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The European Parliament and the Reign of Activists and Experts

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Abstract: The article demonstrates the influence of activist non-governmental organizations (NGOs) at the European Parliament (EP) through the case of a suppressed study on universal criminal jurisdiction. It recounts how a report commissioned, approved, and published by the EP was withdrawn after pressure from an NGO with ties to EU grantmaking and policy-making circles. Through an institutional and political analysis, the study reveals how expert discourse, funding mechanisms, and ideological alliances promote international criminal justice. The article challenges the assumed neutrality of academic expertise in supranational institutions and raises broader concerns about transparency and symbolic use of law.

1. Introduction

The article recounts how a well-connected non-governmental organization (NGO) intervened to suppress a study on universal jurisdiction commissioned and published by the Parliament of the European Union (hereinafter European Parliament or 'EP' and 'EU'), and have it replaced with a report of its liking. The backdrop of the story are the billions in EU subsidies

Disclosure: I submitted an earlier version of this article in 2017 to the Journal of International Criminal Justice (JICJ), the leading journal in the field, not knowing that one of the authors of the EP report that replaced mine served on its editorial board. When I did not hear back from JICJ, I decided to wait until the end of my career and try a journal outside the field.

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distributed to NGOs every year.[1] The article offers insight into the role of activists and experts in steering the EU's agenda and grantmaking, and in shaping international law. It raises questions about transparency and symbolic use of law, and argues that EU-NGO initiatives promoting universal jurisdiction over gross human rights violations are best understood as "branding" and "marketing" exercises. By sheer coincidence, the article was under review when the European Court of Auditors (ECA) published a high-profile report about transparency (or the lack thereof) of EU disbursements to NGOs.[2] The ECA report says nothing, though, about the use of self-serving expert studies to justify such funding, which is the focus of this article.

2. European Union and Parliament

The European Union (EU) combines traditional elements of an intergovernmental international organization with supranational features typical of federal states.[3] Its essence lies in the operation of multiple layers of continuous negotiation and decision-making, as well as the multiplicity of actors involved in making and implementing decisions.[4] As a rule, it is the European institutions and bodies – such as the Parliament, the Council, and the European Commission – that adopt the majority of various types of norms, which are then implemented by the Member States.[5] What stands out is the

1 €17.5 billion from 2020 to 2022 according to Roderick Ackermann et al., "Transparency and Accountability of EU Funding for NGOs Active in EU Policy Areas within EU Territory," Policy Department for Budgetary Affairs of the European Parliament, September 28, 2023.

2 European Court of Auditors, "Special Report 11/2025: Transparency of EU Funding Granted to NGOs – Despite Progress, the Overview Is Still Not Reliable," Publications Office of the European Union, April 7, 2025.

3 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 7th ed. (Oxford: Oxford University Press, 2020), 3–8; Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law: Cases and Materials*, 3rd ed. (Cambridge: Cambridge University Press, 2014), 106–10.

4 Renaud Dehousse, "The European Court of Justice: The Politics of Judicial Integration," *Journal of European Public Policy* 2, no. 1 (1995): 1–19.

5 According to Article 13 of the Treaty on European Union, the institutions of the Union are: the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. See Treaty on European Union (consolidated version), (OJ C202, 7 June 2016), 19–46; Treaty on the Functioning of the European Union (TFEU),

multi-level nature of this system, which includes non-state and informal actors operating outside the official decision-making circuit. "EU institutions interact with a wide range of groups and organizations representing specific interests and undertaking lobbying activities. This is a legitimate and necessary part of the decision-making process to make sure that EU policies reflect people's real needs."[6]

As one of the key institutions within the so-called institutional triangle,[7] the European Parliament is designed to ensure the EU's democratic legitimacy.[8] The EP currently has some twenty standing committees corresponding to their principal areas of activity.[9] The Subcommittee on Human Rights (a subcommittee of the Committee on Foreign Affairs) is responsible for issues of human rights and democracy, including preparing own-initiative reports on specific human rights instruments, ensuring their implementation in European Union policy, and providing a platform for permanent dialog with representatives of civil society (I return to this issue later).[10] Committees often rely on expert input and appoint specialists to provide substantive advice on particular matters. This is where I enter the picture.

3. Report Commissioning and Publication

In 2015, the EP Subcommittee on Human Rights commissioned me to write "in clear and simple language" a study that would "feed into the debate on the application of the principle of universal jurisdiction and help the

(OJ C326/47, 26 October 2012). Liesbet Hooghe and Gary Marks, *Multi-Level Governance and European Integration* (Lanham: Rowman & Littlefield, 2001), 1–4.

6 "Lobby Groups and Transparency," European Parliament, accessed March 20, 2025, https://www.europarl.europa.eu/at-your-service/en/transparency/lobby-groups.

7 Neill Nugent, *The Government and Politics of the European Union*, 8th ed. (London: Palgrave Macmillan, 2017), 298.

8 Michelle Cini and Nieves Pérez-Solórzano Borragán, *European Union Politics*, 6th ed. (Oxford: Oxford University Press, 2019), 203.

9 See: Krzysztof Orzeszyna, Michał Skwarzyński, and Robert Tabaszewski, *International Human Rights Law* (Warsaw: C.H. Beck, 2023), 202.

10 "Subcommittee on Human Rights (DROI)," EU Monitor, accessed March 20, 2025, https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7ykbaar7yv; Justin Greenwood, *Interest Representation in the European Union*, 3rd ed. (Basingstoke: Palgrave Macmillan, 2011), 75–92.

European Parliament form an opinion and make decisions in this respect." The terms of reference provided, *inter alia*, that the study should

> explore how domestic judicial systems contribute/may contribute to fighting impunity for the most serious crimes under the principle of universal jurisdiction and the main challenges these face/might face; assess the efforts of the EU and its Member States to address core international crimes committed in third countries; provide practical recommendations to the EU to improve the application of the principle in the EU Member States and third countries; identify the role of the European Parliament in the process.[11]

I assume the EP found me because of my earlier publications on the subject.[12] After expressing reservations about the activist tone of the terms of reference ("fighting impunity"), I was assured that "there is no desired opinion the EP asks you to adhere to." In February 2016, I submitted a draft; a week later the EP responded: "As required by the terms of reference, the study discusses the definition of universal jurisdiction, offers an overview of relevant laws and practices and provides recommendations for the EU. The arguments presented by the author are interesting." Then followed list of queries and suggestions.[13] I revised my report accordingly and resubmitted it. Shortly after, the EP issued an acceptance letter, and published my report online and in print on April 27, 2016, under the title "The application of universal jurisdiction in the fight against impunity."[14] A disclaimer added by the EP states that "The content of this document is

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11 Terms of reference (on file with author).

12 Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003); Luc Reydams, "Niyonteze v. Public Prosecutor," *American Journal of International Law* 96, no. 1 (2002): 231; Luc Reydams, "Belgium's First Application of Universal Jurisdiction: The Butare Four Case," *Journal of International Criminal Justice* 1, no. 2 (2003): 428; Luc Reydams, "Belgium Reneges on Universality: The August 5, 2003, Act on Grave Breaches of International Humanitarian Law," *Journal of International Criminal Justice* 1, no. 3 (2003): 679; Luc Reydams, "The Rise and Fall of Universal Jurisdiction," in *Routledge Handbook of International Criminal Law*, eds. William A. Schabas and Nadia Bernaz (London: Routledge, 2010), 131–43.

13 EP comments on draft report (on file with author).

14 European Parliament, "The Application of Universal Jurisdiction in the Fight Against Impunity," EP/EXPO/B/DROI/FWC/2013-08/LOT8/06, accessed March 20, 2025, https://www.statewatch.org/media/documents/news/2016/apr/ep-study-universal-jurisdiction-fight-against-impunity-4-16.pdf.

the sole responsibility of the author and any opinions expressed therein do not necessarily represent the official position of the European Parliament."

Given its audience and purpose, my report is mostly factual and practical, from a bird's-eye view, and, as demanded, in plain language. Paraphrasing Professor Bruno Simma, I wrote that "like a flower grown in a hothouse," universal jurisdiction has not survived "the much rougher climate of actual state practice," and concluded:

> The EU has generously sponsored NGOs campaigning for universal ratification of the ICC [International Criminal Court] Statute and the exercise of universal jurisdiction by states. This study has suggested that the political economy of universal jurisdiction provides strong incentives for NGOs to file criminal complaints against high-profile individuals. However, all such complaints were ultimately dismissed or dropped, often after prolonged and costly litigation. In the less than two dozen cases that have gone to trial (cases involving refugees and migrants), NGOs played a minor role or no role at all. It can be asked, therefore, whether or not the EU's financial support of NGOs has had any significant impact on the 'fight against impunity' through universal jurisdiction. It should be noted in this regard that EU law already obliges Member States to investigate and, when justified, prosecute refugees and migrants suspected of having committed international crimes. What more the EU can do in the field of international criminal justice is unclear.
>
> When projects fail to deliver the hoped-for results, funders have three options: redouble efforts and spend more in the hope that things will eventually improve; accept the *status quo*; or cut losses and redirect energy and funds to other projects. Increasing spending would be justified if there were real prospects for improvement. However, it seems unrealistic to expect that what did not work in the best of geopolitical circumstances (1990s and 2000s) will work in a time of resurgent nationalism and Cold War, Chinese expansion and EU crisis. Accepting the *status quo* is the most common response because it threatens no interests; cutting losses and redirecting funds is the most difficult, for the opposite reason. The EU after 20 years has an important 'international criminal justice constituency'. Whether sustaining that constituency is in the EU's best interest is for the EU to decide.[15]

[15] Ibid., 21–2.

4. Protest and Report Retraction

What happened next would prove my point. The day after my report appeared online, the EP received an indignant letter from the Secretary General of Parliamentarians for Global Action (PGA) in New York.[16] PGA, my study notes, is a longtime and major beneficiary of EU funds for projects aiming at supporting international criminal justice. The letter suggested that my report should not have been published and stopped short of accusing me of heresy:

> The publication of Mr. Reydams' report as it is, with the European Parliament's apparent 'seal of approval', would not only be problematic in academic circles due the inaccuracy, inappropriateness and inadequacy of the Study, but also a blow to the advancement of human rights protection and justice.

My concerns about the significant cost to taxpayers of universal jurisdiction investigations and trials,[17] the author opined, were misplaced: "Monetary considerations (...) should not prevail in the administration of justice." And as if that weren't enough, "It is simply legally and morally unacceptable that mass-atrocity crimes go unpunished when individuals on a given territory are accountable for any such crime [sic]." The Secretary General said it. The document also contained a strange, bracketed section and I am not sure what to make of it: "[To honour the rights of victims, the Study that we are commenting [sic; recommending?] should have had a completely different content and tone]."

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16 "Comments on the Reydams' Report on Universal Jurisdiction," letter dated April 28, 2016, from the Secretary General of Parliamentarians for Global Action to the European Parliament (on file with author).

17 For example, US$ 11.4 million for the trial of Hissène Habré in Senegal (mostly paid for by western donors, including the EU); CHF 3.6 million for that of Ousman Sonko in Switzerland; and CA$ 1.4 million for the trial of Désiré Munyaneza in Canada. Reed Brody, "Bringing a Dictator to Justice: The Case of Hissène Habré," *Journal of International Criminal Justice* 13, no. 2 (2015): 212, https://doi.org/10.1093/jicj/mqv005; Askanwi Gambia, "Fact Sheet: Ousman Sonko's Swiss Justice Cost Over D268.8 Million," accessed March 20, 2025, https://www.askanwi.com/feature-publications/factsheet-ousman-sonkos-swiss-justice-cost-over-d2688-million; "Rwandan War Crimes Trial Tab Hits $1.4M and Counting," The Canadian Press, December 14, 2007, accessed March 20, 2025, https://www.cbc.ca/news/canada/montreal/rwandan-war-crimes-trial-tab-hits-1-4m-and-counting-1.662818.

The EP requested that I respond in writing, which I did reluctantly because I failed to see why a letter from an unhappy activist/lobbyist in New York deserved consideration.[18] When I did not hear back, I trusted that the matter had been put to rest. Sometime later, however, the link to my report on the EP website became inactive. A quick search of the bios of the Subcommittee's members revealed that its German vice-chair wore at least three NGO hats: an active member of Parliamentarians for Global Action (Convenor of its International Law and Human Rights Program); board member of the European Center for Constitutional and Human Rights (ECCHR) (see below); and, last but not least, former Secretary General of the powerful German section of Amnesty International. The link with Amnesty is not unimportant because my report is critical of its survey of universal jurisdiction legislation around the world.[19]

More than a month after its removal from the EP website I was notified that my paper was undergoing an external review. As said already, the EP had deemed in April that "As required by the terms of reference, the [Reydams] study discusses the definition of universal jurisdiction, offers an overview of relevant laws and practices and provides recommendations for the EU." The anonymous reviewer disagreed:

> The aim of the study specifies that it is an instrument to help the European Parliament form an opinion and make decisions in this respect. The present report does not meet that standard. (...) The main methodological issue is that whilst the author is correct in stating that the definition of universal jurisdiction is in dispute, s/he does not state clearly what the exact dispute is and whether it is an academic debate only or whether it has consequences in the practice of states applying their version of universal jurisdiction under national criminal law. It is most regrettable that the author did not state his/her definition of universal jurisdiction explicitly.' (...) The report concludes that 'many of the questions that the author was asked to address have become moot'. I do not think that this is the case. This conclusion is based on an implicit definition of the principle assessed in light of an implicit effectiveness criterion only. (...) It is stated that not 'rogue prosecutors but NGOs acting as pseudo-prosecutors are primarily

[18] "Reply to the Secretary General of Parliamentarians for Global Action," letter dated July 21, 2016, from the author to the European Parliament (on file with author).

[19] Amnesty International, *A Preliminary Survey of Legislation Around the World – 2012 Update*, IOR 53/019/2012.

> responsible for the politicisation of universal jurisdiction.' From an academic point of view, it is difficult to interpret exactly what the author means as there is no commonly accepted definition of 'rogue prosecutor' or the 'politicisation of universal jurisdiction'.[20]

My report stated that universal jurisdiction is "a hollow concept which defies definition." Today I would say that it is foremost an article of faith.[21] Consider the sterile discussions on the topic (since 2009!) in the Sixth Committee of the UN General Assembly: everybody "believes" in it, but nobody can agree on its scope and application.[22] Quibbling about definitions and meanings serves a purpose nonetheless, as it obscures the bigger questions and effectively monopolizes the conversation among experts. David Kennedy in a critique of the "reign of experts" writes that "expertise has become embroiled in struggle and come unhitched from the promise of decisive clarity, the usefulness of its indeterminacy more appreciated than its analytic rigor. In our world, *indeterminate language and uncertain knowledge distribute wealth and power*" (emphasis added).[23] The EP's subsequent doubling-down, discussed in the section below, illustrates his point.

5. Expert Workshop and New Report

Once published, the EP could have chosen to debate (and possibly adopt) my report, or to simply ignore it. Instead, the EP quietly retracted it and

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20 "Evaluation form" dated September 23, 2016, but forwarded to me a month later (on file with author).

21 Most literature on the subject repeats and recycles, as if AI-generated. For critical perspectives, see: Matthew Garrod, "Unravelling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and 'Universal Jurisdiction' in the Light of the Habré Case," *Harvard International Law Journal* 59, no. 1 (2018): 125–96; Matthew Garrod, "The Emergence of 'Universal Jurisdiction' in Response to Somali Piracy: An Empirically Informed Critique of International Law's 'Paradigmatic' Universal Jurisdiction Crime," *Chinese International Law Journal* 18, no. 3 (2019): 551–643, https://doi.org/10.1093/chinesejil/jmz025; Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" (Law & Economics Research Paper No. 03–10, School of Law, George Mason University, 2003); Eugene Kontorovich, "The Parochial Uses of Universal Jurisdiction," *Notre Dame Law Review* 94, no. 3 (2019): 1417.

22 UN General Assembly, Resolution 72/120, The Scope and Application of the Principle of Universal Jurisdiction, A/RES/72/120 (December 18, 2017).

23 David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016), 2.

convened an expert workshop of two academics, two practitioners, and representatives from the European Center for Constitutional and Human Rights (ECCHR) in Berlin, REDRESS UK, and the Global Justice Center in New York. The deck appeared to be slightly stacked: one of the academics served on the board of ECCHR; REDRESS UK, like PGA (see above), is a longtime beneficiary of EU grants; both REDRESS UK and ECCHR engage in strategic litigation to "fight impunity";[24] and the ECCHR representative, the Subcommittee's vice-chair, and the academic ECCHR board member all hail from Germany, the country that prides itself on having the most progressive universal jurisdiction statute on the books. Furthermore, the co-chairs of the workshop were both Members of the European Parliament for the Greens, and one of the co-authors of the workshop's final report (not mentioned hitherto) currently is Managing Director of the Green party's office in a major German city. Noticeably absent though were Amnesty International and PGA, perhaps because the conflict of interest would be too obvious. That said, it is beyond me why a democratically elected parliament invites activists/lobbyists from big-budget NGOs in Berlin, London, and New York to hear the views of civil society. To be clear, I blame the workshop organizers, not the participants.

As for the actual proceedings, the vice-chair of the Subcommittee (herself an ECCHR board member and prominent Amnesty member) affirmed the Parliament's commitment to universal jurisdiction; the REDRESS representative recalled that his organization had for years worked in close collaboration with EU institutions and other NGOs to promote its application in Europe;[25] echoing Amnesty International,[26] the German academic professed that "it is firmly settled that universal jurisdiction is part of customary international law"; and so on and so forth.

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[24] For example, REDRESS was involved in the British case against former Chilean President Augusto Pinochet; ECCHR once filed criminal complaints in Germany against former US Secretary of Defense Donald Rumsfeld and former CIA Director George Tenet, among others.

[25] "Victim Participation in Universal Jurisdiction Cases and the Role of the EU: Remarks to a European Parliament Workshop," REDRESS, July 4, 2018, accessed March 20, 2025, https://redress.org/news/victim-participation-in-universal-jurisdiction-cases-and-the-role-of-the-eu-remarks-to-workshop/.

[26] Amnesty International, supra n 16, 7: "[Universal jurisdiction] is now part of customary international law."

The concluding report[27] agrees "that universal jurisdiction can play a role as part of a wider accountability strategy" and, moving forward, recommends more law (another treaty), more training for people in the field, more consideration for victims of sexual and gender-based crimes and, not to forget, continued "support of civil society organisations active in the field." A different content and tone indeed, and, as was to be expected, recommendations within the purview of the workshop participants.[28] An EP expert study published in 2020 (another one!) reaffirms for the umptieth time the core tenets of international criminal justice, including universal jurisdiction.[29] If the whole project has fallen short of expectations, it is not for lack of conviction – or funding.

6. "Branding" and "Marketing" Universal Jurisdiction

I have no desire to litigate here who is right, but Christine Schwöbel's conception of international criminal law (ICL) as "branding"[30] is helpful in understanding the rejection of my report and the framing of the new one. "The branding of ICL is one of a discipline fighting impunity, a beacon of global justice, and the heroic few internationalists who dare to fight big power-players" (Schwöbel). Merely questioning this laudable mission is considered a blow to humanity (cf. the PGA protest letter). "Branding places undue emphasis on image at the expense of content, symbolism at the expense of substance (...). ICL (...) not only employs branding as a way of disseminating information, but has branding at its very core, its logic" (Schwöbel). Since there can never be enough accountability, there will always be a need for

27 Julia Krebs, Cedric Ryngaert, and Florian Jeßberger, "Universal Jurisdiction and International Crimes: Constraints and Best Practices," Think Tank. European Union, September 17, 2018.

28 "The Next Generation of Human Rights Defenders," ECCHR, accessed March 20, 2025, https://www.ecchr.eu/en/ecchr/the-next-generation-of-human-rights-defenders; "Gender and Mass Atrocities," Global Justice Center, accessed March 20, 2025, https://www.globaljustice-center.net/issue/gender-and-mass-atrocities; "Reparations for Survivors of Conflict-Related Sexual Violence," REDRESS, accessed March 21, 2025, https://redress.org/reparations-for-survivors-of-conflict-related-sexual-violence/.

29 Olympia Bekou, "State of Play of Existing Instruments for Combating Impunity for International Crimes," Think Tank. European Parliament, August 14, 2020.

30 Christine Schwöbel, "The Market and Marketing Culture of International Criminal Law," in *Critical Approaches to International Criminal Law*, ed. Christine Schwöbel (London: Routledge, 2014), 264.

more this and that. Clarity of purpose and an inexhaustible problem go far in explaining the resonance of universal jurisdiction with activists and "enchanted international lawyers."[31]

A recent EU initiative vividly illustrates Schwöbel's and my own critique. As my report states, sponsors have three options when projects fail to deliver: redouble efforts and spend more in the hope that things will eventually improve; accept the *status quo*; or cut losses and redirect energy and funds to other projects. A 2021 EP report[32] notes that impunity for perpetrators of gross human rights violations is on the *rise*. (How exactly does one measure this? And if impunity is indeed on the rise, what does it say about the international criminal justice project? Paradoxically, ECCHR, REDRESS, and other players[33] have for years been touting their *successes* in fighting impunity). "Tackling impunity globally," the report concludes, "is therefore an urgent task."

Acknowledging reversals to set the stage for more resources is a well-known strategy. The EU launched a €21 million project entitled "Global initiative to fight against impunity for international crimes: make justice work!".[34] Ostensibly an attempt to counter the field's Eurocentric/neo-colonial image, the initiative inadvertently risks reinforcing it. NGOs responded with products that fit right into the "marketing culture" (Schwöbel) of international criminal justice: the *Universal Jurisdiction in Practice Series* (which includes a "how to bring a complaint" video);[35] the *Universal*

31 Ian Hurd, "Enchanted and Disenchanted International Law," *Global Policy* 7, no. 1 (2015): 1–7.

32 "The State of Impunity in the World: Summary of the 2021 Report on Global Rights by Fight Impunity," European Parliamentary Research Service, accessed March 20, 2025, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733696.

33 Prominently among them Amnesty International, FIDH, Human Rights Watch, and TRIAL International.

34 "Day of International Criminal Justice: Statement by the High Representative on Behalf of the European Union," Council of the European Union, July 16, 2024, accessed March 20, 2025, https://www.consilium.europa.eu/en/press/press-releases/2024/07/16/day-of-international-criminal-justice-statement-by-the-high-representative-on-behalf-of-the-european-union/.

35 "Universal Jurisdiction in Practice," ECCHR, accessed March 20, 2025, https://www.ecchr.eu/en/case/universal-jurisdiction-in-practice/. The videos demonstrate how universal jurisdiction works in practice, the strategic decisions it entails, and how to bring a complaint.

Jurisdiction Annual Review Series;[36] and a *Universal Jurisdiction Interactive Map*[37] purporting to show that, in a revolution of sorts, universal jurisdiction is spreading outside the West.

Twenty-five years after the EU began promoting international criminal justice, its partnership with NGOs seems stronger than ever. I have misgivings about the close relationship, but, in the end, both are free to pursue their interests as they see fit. It may be asked, though, whom the fight against impunity has benefited most.

7. Conclusion

Burying a study after an NGO expressed disagreement undermines the EP's credibility. Terms of reference for consultant services are framed to nod consultants in the desired direction, and unwelcome findings may have serious repercussions (a retraction in academia is no small matter). Deep ties between EP members and NGOs, and NGOs and academics raise concerns about transparency and conflicts of interest. Imagine the EP commissioning and publishing a scientific report about the health dangers of a pesticide, only to retract it after the manufacturer vents unhappiness; or taking down a study on gender equality following démarches from the Vatican. Would NGOs not cry foul and denounce the EP for surrendering to big business or the Pope?

The case also illustrates the outsize role of experts and NGOs in shaping international law.[38] Had my report endorsed the policy it was asked to interrogate, it probably would have been cited as more evidence that universal jurisdiction is settled law. It did not, and to prevent "a blow to the advancement of human rights protection and justice," it had to be suppressed. To my fellow academics I say, do not become part of a crusade, especially one that wants to save humanity.

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36 REDRESS, *Universal Jurisdiction Annual Review 2024*, accessed March 20, 2025, https://redress.org/publication/universal-jurisdiction-annual-review-2024/.

37 "Universal Jurisdiction Interactive Map," TRIAL International, accessed March 20, 2025, https://trialinternational.org/universal-jurisdiction-tools/universal-jurisdiction-interactive-map/.

38 For a most interesting case study, see: Clifford Bob, *The Global Right Wing and the Clash of World Politics* (New York: Cambridge University Press, 2012), 53–7.

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The (Un)Likely Emergence of a "Right to Die" under the European Convention on Human Rights

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Abstract: This article discusses the question of whether the right to die is likely to emerge under the European Convention on Human Rights. In recent decades, several member states of the Council of Europe have changed their legal frameworks by decriminalizing the offences of physician-assisted suicide and euthanasia. This development is particularly significant for individuals with terminal illnesses who, in these jurisdictions, are granted the possibility to choose when and how to die with dignity. For this reason, this article focuses on the implications of these trends for the European Convention. Following an analysis of provisions of the Convention and its case law, this article concludes that a right to die cannot emerge under Articles 2 and 8 of the Convention.

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1. Introduction

> Death has dominion because it is not only the start of nothing but the end of everything, and how we think and talk about dying – [dying with 'dignity'] – shows how important it is that life ends appropriately, that death keeps faith in the way we have to have lived.[1]

More than three decades later, Ronald Dworkin's work continues to exert a significant influence on end-of-life issues. His theoretical framework[2] lends support to the recognition of a right to euthanasia[3] and physician-assisted suicide,[4] or, put simply, a right to die.[5] The path to legalization offers individuals who are suffering from an irreversible medical condition a choice of how and when to end their life.[6] There is growing acceptance that these individuals should be able to choose "how they wish to live or cease to live"[7] as it is an aspect that interferes with the enjoyment of their private life. However, these developments raise significant legal and moral issues because legalization creates conflicting interests with the obligation to protect the right to life.[8] Additionally, this entails the tightening of legislation, which may not

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1 Ronald Dworkin, *Life's Dominion: An Argument About Abortion and Euthanasia* (London: Harper Collins, 1993), 199.

2 John A. Robertson, "A Review of Autonomy's Dominion: Dworkin on Abortion and Euthanasia, by Ronald Dworkin," *Law & Social Inquiry* 19, no. 2 (1994): 481, http://www.jstor.org/stable/828630.

3 "The intentional and active termination of a person's life, at that person's explicit request, which is performed by a doctor." See: The Netherlands, The State Commission on Euthanasia, *Rapport van de Staatscommisic Euthanasie*, vol. 1 (The Hague: Staatsuitgeverij, 1985), 26.

4 "A form of support in which a doctor advises the patient about ways in which they can end their life and provides the necessary medication to enable the patient to administer the drug themselves." See: Miriam Cohen and Jasper Hortensius, "A Human Rights Approach to End of Life? Recent Developments at the European Court of Human Rights," accessed July 15, 2025, https://www.echr.coe.int/documents/d/echr/COHEN-2018-A_human_rights_approach_to_end_of_life.

5 Note that palliative sedation may also be included under the scope of the right to die, but due to its different character it will remain outside the scope of this article.

6 See: Dworkin, *Life's Dominion*.

7 Supreme Court of Canada, Judgment of 6 February 2015, Carter v. Canada (Attorney General) [2015] SCC 5.

8 John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge: Cambridge University Press, 2002), 35–89.

effectively protect the individual,[9] opening a "slippery slope" for abuse that targets vulnerable individuals.[10] With the legalization of these two procedures in several member states of the Council of Europe,[11] there is considerable interest in investigating how these developments could influence the emergence of a right to die under the European Convention on Human Rights.[12] Against this background, the main question this article aims to answer is the following: considering recent legislative developments in member states of the Council of Europe, how likely is it that a right to die may emerge under Articles 2 and 8 of the European Convention on Human Rights?

To answer this question, this article employs a positive approach in the analysis of European human rights law. It analyzed provisions from the European Convention on Human Rights (ECHR or the Convention), case law from the European Court of Human Rights (ECtHR or the Court), and scholarly articles. The first section provides a framework for understanding the logic of the ECHR system, explaining the rationale of the relevant provisions and the methods utilized by the Court for interpreting its jurisprudence. The second section presents the jurisprudence of the ECtHR concerning end-of-life issues under Articles 2 and 8. The final section investigates the likelihood of a right to die to emerge under the Convention, employing the Court's interpretative methods. The conclusion asserts that it is unlikely for a right to die to be recognized under Articles 2 and 8 of the Convention.

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9 Ibid., 67–89.

10 Ibid.

11 See: Act of May 28, 2002, The Belgium Act on Euthanasia; Act of April 1, 2002, The Netherlands Termination of Life on Request and Assisted Suicide (Review Procedures); Act of February 20, 2008, Luxembourg's Bill on the Right to Die with Dignity; Act of June 25, 2021, Spain's Organic Law for the Regulation of Euthanasia; Act of May 25, 2023, Portugal's Euthanasia Law. Moreover, the French and British Parliaments recently voted in favor of the creation of bills to legalize assisted dying, see: Le Monde, AP, and AFP, "French Lawmakers Approve Assisted Dying Bill," May 27, 2025, accessed August 18, 2025, https://www.lemonde.fr/en/france/article/2025/05/27/french-lawmakers-approve-assisted-dying-bill_6741744_7.html; Federica Marsi, "UK Parliament Approves Assisted Dying Bill: How Would It Work?," Al Jazeera, June 21, 2025, accessed August 18, 2025, https://www.aljazeera.com/news/2025/6/21/uk-parliament-approves-assisted-dying-bill-how-would-it-work.

12 See: Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177 (hereafter: ECHR).

2. Understanding the ECHR

2.1. Articles 2 and 8 of the Convention

It is argued that a right to die under the European Convention could fall under the scope of, *inter alia*,[13] the right to life and the right to a private life. Article 2, the right to life, is the most fundamental right of all, as without it, all rights become "redundant."[14] Under this provision, the state has positive obligations to: provide a regulatory framework to protect the lives of people within its jurisdiction, and to carry out an effective investigation into alleged breaches of this substantive right.[15] Although it may not be derogated from in times of war or emergencies which threaten the life of the nation,[16] Article 2 provides an exhaustive set of circumstances in which deprivation of life is justified. These include self-defense from unlawful violence, lawful arrest or prevention of the escape of a person lawfully detained, or putting an end to a riot or insurrection.[17] When these exceptions are engaged, the Court applies a "stricter and more compelling test than normal" to protect human life.[18] Consequently, the restrictive framework of Article 2 does not reveal how a right to die may be construed under this provision.

A right to die may be more easily construed under Article 8 due to its broader scope. Article 8 prescribes that everyone has the right to respect for their private life, which may include the right to decide the manner of one's death.[19] However, Article 8 is not absolute; Article 8(2) enshrines

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13 It could potentially fall under the scope of Article 3 of the European Convention too, but this article limits itself to analyzing it under Articles 2 and 8.

14 Juliet Chevalier-Watts, "A Rock and a Hard Place: Has the European Court of Human Rights Permitted Discrepancies to Evolve in Their Scrutiny of Right to Life Cases?," *International Journal of Human Rights* 14, no. 2 (2010): 301, https://doi.org/10.1080/13642980802538405; See also: Gregor Puppinck and Claire de La Hougue, "The Right to Assisted Suicide in the Case Law of the European Court of Human Rights," *International Journal of Human Rights* 18, no. 7–8 (2014): 739, https://doi.org/10.1080/13642987.2014.926891.

15 ECtHR Judgment of 17 July 2014, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], application no. 47848/08, para. 130.

16 ECHR, Article 15.

17 ECHR, Article 2(2).

18 ECtHR Judgment of 27 September 1995, McCann and Others v. the United Kingdom, application no. 18984/91, paras 146–147.

19 ECtHR Judgment of 29 April 2002, Pretty v. the United Kingdom, application no. 2346/02, para. 67 (hereafter: Pretty v. the United Kingdom); European Court of Human Rights, "Guide on Article 8 of the European Convention on Human Rights: Right to Respect for

that public authorities may interfere with this right in accordance with the law and for reasons necessary in a democratic society. This right can be restricted "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[20] Following a comparison of the two provisions, it is *prima facie* easier to construct a right to die under Article 8 of the Convention. The next subsection will outline the interpretative methods of the Court, which play a significant part in how such a right may emerge.

2.2. Methods of Interpretation of Jurisprudence

In various areas of case law, including end-of-life issues, the Court relies on interpretative mechanisms to support its analysis. Among these are the living instrument, European consensus and the margin of appreciation doctrines. Since the Convention is a living instrument, it must be interpreted according to present-day conditions and attitudes prevailing in the democratic states of the Council of Europe.[21] Consequently, the ECtHR noted that such attitudes are changing concerning the decriminalization of euthanasia and assisted suicide,[22] with the effect that it had to examine whether a European consensus emerged on the applicable standards.

The Court noted on various occasions that there is a lack of European consensus on end-of-life issues. Although it has left the concept of European consensus undefined,[23] in practice, the Court conducts an inquiry into the existence or non-existence of an accepted standard in the member states, which is determined through a comparative survey of their laws and

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Private and Family Life, Home and Correspondence," accessed 17 August 2025, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng; ECtHR Judgment of 20 January 2011, Haas v. Switzerland, application no. 31322/07, para. 51 (hereafter: Haas v. Switzerland).

20 ECHR, Article 8(2).

21 ECtHR Judgment of 25 April 1978, Tyrer v. the United Kingdom, application no. 5856/72, para. 31.

22 ECtHR Judgment of 13 June 2024, Dániel Karsai v. Hungary, application no. 32312/23, para. 143 (hereafter: Dániel Karsai v. Hungary).

23 See: Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015). On different occasions, it utilises variations of the expression as such: 'common European standard', 'general trend', and so forth.

practices.[24] This comparative survey leads to three results: (1) the finding of European consensus, (2) the lack of European consensus, or a third situation, (3) where neither can be established.[25] The Court establishes a European consensus where a trend or similarity is identified in a majority of member states.[26] A lack of consensus is established if there is a discrepancy in the legal regulations.[27] Lastly, the Court can neither establish a European consensus nor a lack of consensus where only a very limited number of states enacted laws regulating an issue.[28] Thereafter, on the issue of euthanasia and assisted suicide, the Court decided that there is a lack of European consensus, which influences how the Court applies its mechanism of margin of appreciation.

The margin of appreciation doctrine gives European states the flexibility to enact their legal framework based on their cultural and legal traditions.[29] Since it is rooted in the Court's subsidiarity principle, it enables the Court to fulfill its obligations with minimal intervention, without substituting its assessment for the assessment of national authorities.[30] Where a European consensus exists on a legal issue, the margin of appreciation presumably given to the state is narrow and the state's standards will be analyzed against the standards of the member states of the Council of Europe.[31] That said, where there is no European consensus, the margin of appreciation afforded

24 See: Alexander Morawa, "The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I. v. the United Kingdom," *German Law Journal* 3, no. 8 (2002): E4, https://doi.org/10.1017/S2071832200015248.

25 See: Dzehtsiarou, *European Consensus*.

26 See: Dzehtsiarou, *European Consensus*. Note that it is not clear what constitutes a majority of member states.

27 Ibid.

28 Ibid.

29 See: Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague: Kluwer Academic Publishers, 1996); ECHR, Protocol No. 15, Article 1.

30 Ibid. The Court's machinery of protection is subsidiary to that of the national authorities as they are in principle better placed to assess their own national laws.

31 ECtHR Judgment of July 8, 2004, Vo v. France [GC], application no. 53924/00, para. 82; ECtHR Judgment of April 10, 2007, Evans v. the United Kingdom [GC], application no. 6339/05, para. 77; Dzehtsiarou, *European Consensus*, 34.

to the state will be wide, however, not unlimited.[32] Lastly, where no such consensus or lack of consensus can be established, the Court will not consider the margin of appreciation in its analysis. Consequently, states are given a wide margin of appreciation concerning euthanasia and assisted suicide. Having explained the rationale of Articles 2 and 8 of the ECHR, and the Convention's interpretative mechanisms, this article will now analyze the Court's jurisprudence on medically assisted death.

3. Jurisprudence on Medically Assisted Death

The Court has consistently decided that a right to die cannot emerge under Article 2 of the Convention. In *Pretty v. the United Kingdom*, it determined that the state did not violate the applicant's rights under Article 2 by refusing to allow assisted suicide.[33] The Court, echoing Lord Hoffman's view in *Airedale NHS Trust v. Bland*,[34] held that "no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2."[35] Further, it asserted that Article 2 does not create a diametrically opposite right, nor does it create a "right to self-determination to choose death rather than life."[36] Therefore, the Court rejected the possibility of a right to die emerging under Article 2 of the Convention.

Despite all of this, the Court held that being denied a right to die could interfere with the quality of one's life under Article 8.[37] In *Haas v. Switzerland*, it was asserted that individuals have the right to decide how and when their life should end, provided they are capable of making such a decision.[38] Therein, the Court considered it appropriate to frame the measure to permit a dignified suicide as a positive obligation.[39] The Chamber justified this finding by setting out a harmonizing approach which takes into account the obligations under Articles 2 and 8 as the "Convention must be read

32 ECtHR Judgment of December 16, 2010, A, B and C v. Ireland [GC], application no. 25579/05, para. 238.
33 Pretty v. the United Kingdom, paras 35–42.
34 House of Lords of the United Kingdom, Airedale National Health Service Trust v. Bland [1993] AC 789 (Hoffman LJ).
35 Pretty v. the United Kingdom, para. 40.
36 Ibid., para. 39.
37 Ibid., paras 65–67.
38 Haas v. Switzerland, para. 51.
39 Ibid., para. 53.

as a whole."[40] In practice, however, this harmonizing approach creates two conflicting obligations for the state: whether to provide assisted suicide or to protect life, and the question remains how to balance these interests.[41]

This dilemma crystallized in *Gross v. Switzerland*, where the Chamber found a violation under the procedural limb of Article 8. The Court held that Swiss law was not sufficiently clear regarding the extent of an individual's right to obtain a lethal substance.[42] Since the state did not grant the applicant the license to obtain the lethal dose, it was found to be in breach of its obligations. However, as argued by the three dissenting judges in the case,[43] Swiss law was foreseeable in that it provided that assisted suicide could not be granted outside the limited exceptions, namely, suffering from a terminal illness.[44] The European Centre for Law and Justice argued that the effect of the Court's harmonizing approach is the reversal of the hierarchical structure of the provisions of the Convention, with Article 8 at the top and Article 2 at the bottom.[45] Consequently, it appears that the Court "solved" this dilemma by balancing interests in favor of the protection of the autonomy of the person.

In *Mortier v. Belgium*, the ECtHR held that Article 2 does not prohibit the conditional decriminalization of euthanasia.[46] As such, states' duties under Article 8 will be consistent with Article 2 when the following safeguards are met:

(1) Where a legislative framework for pre-euthanasia procedures exists and meets the requirements of Article 2 of the Convention.

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40 Ibid., para. 54.

41 See: Olivier Bachelet, "Droit Au Suicide: Un Nouveau Jalon Posé Par La Cour Européenne," Européenne Dalloz Actualité, February 3, 2011, accessed July 15, 2025, https://www.dalloz-actualite.fr/essentiel/droit-au-suicide-un-nouveau-jalon-pose-par-cour-europeenne; Puppinck and de La Hougue, "The Right to Assisted Suicide," 739.

42 ECtHR Judgment of May 14, 2013, Gross v. Switzerland, application no. 67810/10; ECtHR Judgment of September 30, 2014, Gross v. Switzerland [GC], application no. 67810/10, para. 67 (hereafter: Gross v. Switzerland [GC]).

43 The Court found a violation 4–3.

44 Gross v. Switzerland [GC], Joint Dissenting Opinion of Judges Raimondi, Jočienė, and Karakaş.

45 Gross v. Switzerland [GC], The European Centre for Law and Justice third party submission, para. 55

46 ECtHR Judgment of October 4, 2022, Mortier v. Belgium, application no. 78017/17, paras 138–139 (hereafter: Mortier v. Belgium).

(2) Where the legislative framework is complied with.
(3) Where the post-euthanasia review affords all the safeguards required by Article 2.[47]

Even though the Chamber created a *de facto* legal framework enabling euthanasia and physician-assisted suicide, it did not recognize a right to die with dignity under Article 8. It has been argued that this was a missed opportunity,[48] although the framework undoubtedly serves as a useful basis for future jurisprudence. Regrettably, the implications of this framework suggest the need to carve out a new exception under Article 2, which is contrary to the Convention in its current form. In his dissenting opinion, Judge Serghides convincingly argued that the exceptions under Article 2(2) are exhaustive and therefore do not permit the emergence of a new one.[49] Additionally, since there have been no proposals for an additional protocol to govern these practices, there is no legal basis nor consent from member states for such a right to die to emerge. As a second point, the emergence of this framework is a product of the improper balancing exercise done by the Court of Articles 2 and 8.[50] Judge Serghides asserted that undertaking the balancing exercise would lead to the finding that obligations under Article 2 must always prevail. This is because the enjoyment of the rights of the Convention is dependent on the protection of the life of the person.[51] Hence, the right to a private life cannot be protected if there is no life. For this reason, the "yardstick" for comparison should have favored Article 2 obligations.[52]

In *Dániel Karsai v. Hungary*,[53] the Court held that the placing of a blanket ban by Hungary on medically assisted death was not disproportionate

47 Ibid., para. 141.
48 Sarthak Gupta, "Right to Self-Determined Death, European Court, and European Convention on Human Rights," Health and Human Rights Journal, July 3, 2024, accessed August 18, 2025, https://www.hhrjournal.org/2024/07/03/right-to-self-determined-death-european-court-and-european-convention-on-human-rights/.
49 Mortier v. Belgium, Partly Dissenting Opinion of Judge Serghides, para. 5 (hereafter: Judge Serghides).
50 Ibid.
51 Ibid.
52 Ibid.
53 Dániel Karsai v. Hungary, Partly Concurring, Partly Dissenting Opinion of Judge Wojtyczek, paras 3–4 (hereafter: Judge Wojtyczek).

nor contrary to state obligations under the Convention. Despite the previous judgments, the ECtHR returned to its position in *Pretty v. the United Kingdom*, which prioritized taking preventive measures to protect life. The ECtHR relied on its margin of appreciation and living instrument doctrine to come to these findings; however, not without its drawbacks. Two dissenting opinions were attached to the judgment by Judges Wojtyczek and Felici, illustrating the two conflicting positions on the interpretation of these obligations, using either a restrictive (Wojtyczek) or a progressive (Felici) interpretation.[54] Judge Wojtyczek echoed Judge Serghides' dissenting opinion in *Mortier v. Belgium*, highlighting the dangers of progressive interpretation.[55] This interpretation would reverse the primacy of Article 2 obligations and lead to a change of paradigm as to how life is conceptualized on a legal and moral basis. Contrastingly, the view put forward by Judge Felici is anchored in Ronald Dworkin's scholarship,[56] taking into account the changing laws and attitudes in member states towards prioritizing an individual's autonomy over his or her own body. Although this article takes the view of the restrictive interpretation, the Court's approach in *Dániel Karsai v. Hungary* appears to be *prima facie* incoherent with its earlier case law. Considering recent developments in the Court's jurisprudence, which do not demonstrate a coherent approach towards the emergence of a right to die, this article will consider whether it is possible for a right to die to emerge in the future.

4. The Unlikely Emergence of a Right to Die under the ECHR

From recent jurisprudence, a trend of cases emerged which would point towards a potential emergence of a right to die. While a framework regulating euthanasia and physician-assisted suicide was created in *Mortier v. Belgium*, the Court has not recognized a right to die with dignity under Article 8 as such. Even if it is believed that a right to die may emerge, at present, there is a stark inconsistency in the case law. On the one hand, in *Haas v. Switzerland*, *Gross v. Switzerland*, and *Mortier v. Belgium*, the Court prioritized

54 Gabriela García Escobar, "Palliative Care and Assisted Suicide at the ECtHR: Dániel Karsai v. Hungary," EJIL:Talk!, July 12, 2024, accessed August 18, 2025, https://www.ejiltalk.org/palliative-care-and-assisted-suicide-at-the-ecthr-daniel-karsai-v-hungary/.

55 Judge Wojtyczek.

56 Dániel Karsai v. Hungary, Dissenting Opinion of Judge Felici.

the right to a private life and autonomy; on the other hand, in *Pretty v. the United Kingdom* and *Karsai v. Hungary*, it prioritized the right to life. It is believed that these cases evolved as such due to the wide margin of appreciation given to the states based on a lack of European consensus.[57] This ultimately reveals that there is no accepted standard in the member states of the Council of Europe about the right to die. Moreover, the emergence of a right under the Convention is dependent on whether the right is universal and seen as such by a majority of member states.[58] Consequently, the practice of member states does not point towards the emergence of a right to die.

To the contrary, most states prohibit euthanasia and physician-assisted suicide, illustrating a European consensus against legalization. The Court conducted a comparative survey covering forty-two member states of the forty-six total in *Dániel Karsai v. Hungary*,[59] concluding that only twelve member states have laws permitting these procedures. Since thirty member states still criminalize these procedures, it can be inferred that a European consensus exists based on the practice of the majority of member states. European consensus on the prohibition of euthanasia and assisted suicide has also been highlighted in resolutions from the Parliamentary Assembly of the Council of Europe: Recommendation 779 (1976),[60] Recommendation 1418 (1999),[61] and Resolution 1859 (2012).[62] For example, paragraph five of the last Resolution notes that "euthanasia (…) must always be prohibited." Lastly, the respondents[63] also argued in their submissions that

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57 Haas v. Switzerland, para. 55; Gross v. Switzerland [GC], paras 7–8; Mortier v. Belgium, para. 123.

58 See: Adam McCann, "Assisted Dying in Europe: A Comparative Law and Governance Analysis of Four National and Supranational Systems" (PhD Diss., University of Groningen, 2016), 1–317.

59 Dániel Karsai v. Hungary, paras 58–60.

60 See: Council of Europe, Parliamentary Assembly Recommendation 779 of 27 January 1976 (23rd sitting), Rights of the sick and dying (1976), https://pace.coe.int/en/files/14813/html.

61 See: Council of Europe, Parliamentary Assembly Recommendation 1418 of 25 June 1999 (24th Sitting), Protection of the human rights and dignity of the terminally ill and the dying (1999), paras 9.3.1–9.3.3, https://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=16722&lang=en.

62 See: Council of Europe, Parliamentary Assembly Resolution 1859 of January 25, 2012 (6th Sitting), Protecting human rights and dignity by taking in account expressed wishes of patients (2012), para. 5, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18064&lang=en.

63 The United Kingdom and Hungary.

consensus exists against a right to die. In any event, even though the practice of thirty member states may not necessarily amount to European consensus, it should be recognized that a majority of states do not permit such procedures, to the effect that the Court should be careful to avoid double judicial standards in its case law.[64] In the future, however, standards could evolve so that a right to die could emerge.

With the gradual wave of decriminalization in the member states of the Council of Europe, this could happen sooner rather than later. Irrespective of that, as argued by Judges Serghides and Wojtyczek, the European Convention does not permit a right to die to emerge without further amendments being made to Article 2. It is difficult to believe that such amendments could be made today, since they would require unanimous ratification and acceptance from member states that the historical and fundamental value of life has changed. This belief is rooted in religious influence,[65] for example, the Judaist,[66] Christian,[67] and Islamic[68] religions, which consider life to be sanctimonious since life is a gift from God and we were made in His image.[69] Additionally, even in a secular society, life is seen as a necessary condition for a human being to conduct a moral life, thus acquiring intrinsic value.[70] Consequently, no proposals for amendments have been made to Article 2.

To deal with such procedural drawbacks, one might question whether a right to die may arise under Article 8 through the doctrine of the living instrument instead. Since society is becoming increasingly secular, and more countries around the world are starting to legalize the procedures, there is an argument that the Convention should adapt to benefit the living rather than the dead. While this argument is persuasive, the doctrine of the living instrument cannot be employed to negate a fundamental right such

64 Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards," *Journal of International Law and Politics* 31 (1999): 844.

65 Michael Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998), 12.

66 Talmud, Avodah Zarah, 18a.

67 Bible 1, Corinthians, 6:19–20.

68 Quran, 2:195.

69 Cohen and Hortensius, "A Human Rights Approach to End of Life?," 195.

70 See generally: Immanuel Kant, *Lectures on Ethics*, eds. Peter Heath and J.B. Schneewind (Cambridge: Cambridge University Press, 1997), 27:371.

as the right to life.[71] When considering the Convention as a whole, it is necessary to interpret the right to life as a corollary of the enjoyment of other rights. As much as the ECtHR's harmonizing approach tries to reconcile the two paradigms, recognizing autonomy and protecting life, in practice, it can be observed that it has already created conflicting obligations for states. In conducting the balancing exercise, the ECtHR has prioritized the obligation to protect autonomy, finding it lawful for a patient with depression to end their life.[72] On the other side, it has also prioritized life, finding it lawful that a terminally ill patient was precluded from having access to such procedures due to a blanket ban.[73] An appropriate balancing approach would give more weight to Article 2, since the threshold to respect and protect life is much higher than the one to respect and protect private life. One of the reasons is that Article 2 cannot be derogated from under Article 15 while Article 8 can be, hence Article 2 must be respected and protected in all instances with the exception of the instances prescribed in Article 2(2). Another reason, and as noted by the Judges of the Court in their separate opinions, is the fundamental character of life itself. In the absence of the protection and fulfillment of the right to life, none of the rights and freedoms in the Convention can be respected, protected, and fulfilled. Thus, the primacy of obligations under the right to life must prevail. Therefore, a right to die cannot arise under Article 8 by virtue of the living instrument, as this would negate the primacy of state obligations under Article 2. For this reason, a right to die cannot emerge under Articles 2 and 8 without contravening the European Convention.

5. Conclusion

This article aimed to analyze the right to die in the jurisprudence of the ECHR. It concluded that a right to die is not likely to emerge under Articles 2 and 8 without contravening the Convention due to the primacy of obligations under Article 2 to protect life. Current developments in case law which depart from this view are a consequence of the Court's balancing approach and use of the margin of appreciation that, at times, creates

71 Judge Serghides, para. 9.
72 Mortier v. Switzerland.
73 Dániel Karsai v. Hungary.

double judicial standards. In this sense, the ECtHR should revise its current approach to appropriately balance obligations under Articles 2 and 8. Consequently, this article concludes that a right to die is unlikely to emerge under the Convention.

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The Ombudsman's Role in Protecting the Rights of Refugees and Irregular Migrants – Poland's Experience in Comparison to Sweden and Greece Law and Practice

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fundamental rights

Abstract: The article analyzes actions taken by the Polish, Swedish and Greek Ombudsmen to protect fundamental rights of persons seeking international protection and irregular migrants, which is of particular importance in the context of the ongoing migration crisis and the war in Ukraine. Research theses presented here state that the Ombudsman is an institution that fills the lacunae in legal protection exercised by courts and administrative bodies of the Member States and that the existing procedural standards of protection of migrants' rights are not effective in practice and require strengthening. The article proposes a 4-pillar model of the Ombudsman's conduct, which involves dealing with individual complaints (1st), systemic actions to combat maladministration (2nd), activities for the "domestication" of international law (3rd), as well as advocacy and soft competences supporting the civil society (4th). The methodology used includes investigation of the law in force, legal comparison and, to some extent, the statistical method and the analysis of non-legal sources.

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1. Introduction

Europe has continued to experience migration crises for several decades, which have essentially evolved into a high-wave influx of third-country nationals (TCN) into the European Union (EU). Recently, the war in Ukraine, which began on February 24, 2022, has had a particular impact on migration flows.

The research problem addressed in this article concerns standards of effective protection of rights of irregular migrants and migrants seeking international protection in EU Member States. The aim of the research project, the result of which is this article, is, among others, to create a legal model to be followed by national Ombudsmen, whose actions for TCNs remain particularly important in Member States that experience an increased influx of migrants. Poland has been such a country for several years now; it has turned from a transit country to partially a destination country for refugees fleeing Ukraine.

According to the first research thesis, the Ombudsman, as a body acting at the national level, is an institution that fills the lacunae in legal protection exercised by administrative courts and administrative bodies of the Member States and the EU. By means of their *ad hoc* activity, flexible mechanisms and the capacity for quick interventions, they contribute to the implementation of the principle of solidarity of protection of human rights.

Second of all, the existing procedural standards of protection of migrants' rights are not effective in practice and require strengthening. Thus, there is a need to create a universal model of the Ombudsman's activity in migrants' cases, the implementation of which at the level of Member States will contribute to a fuller and more effective protection of this group.

The article presents the results of research on the powers and real actions undertaken by the Polish Ombudsman – the Commissioner for Human Rights (CHR) – in comparison with the actions of Greek and Swedish Ombudsmen for third country nationals – refugees and irregular migrants. Due to the limits for presenting the research, the main focus will be given to the activities of the Polish Commissioner. The methodology employs investigation of the law in force, legal comparison and, to a certain extent, the statistical method and the analysis of non-legal sources. Due to the extensive research material and the dynamic situation

after February 24, 2022, the paper examines the activities of the Ombudsmen in 2022–2024.

2. The Diverse Migration Situation of Poland, Sweden and Greece as Justification for Undertaking a Comparative Study

The choice of the research material is justified by the diverse experience of receiving migrants – while Sweden has been the destination country for TCNs for years, Greece was initially only a sending country; however, over time, due to its location at the external borders, it has become both a transfer country and a destination country, experiencing administrative overload due to the number of incoming foreigners.[1] Poland has been a sending and transit country for decades, but as a result of the crisis on the Polish-Belarusian border (caused by the irregular influx of migrants from third countries to Belarus controlled by the Lukashenko regime in order to cross the border of the European Union), and above all the war in Ukraine, it has also become a receiving country and is facing the challenge of providing administrative services to migrants. European law on refugees and irregular migrants falls within the Area of Freedom, Security and Justice, which under the Treaty rules is a shared competence, and thus involves a certain harmonization of rules, and, consequently, of standards for the protection of TCNs' fundamental rights.[2]

Since 2020, Poland has recorded a sharp increase in requests for international protection – the number of applications submitted in 2023 was 9,750 compared to 2,785 in 2020.[3] In the last three years, the number of applications for temporary protection has been particularly high – 677,110 such requests were submitted in March 2022 alone,[4] and, at the end of March 2024, more than 955,000 people benefited from protection in Poland. The number of applications for international protection in Greece

1 See: Marek Okólski, "Transition from Emigration to Immigration. Is It the Destiny of Modern European Countries?," in *European Immigration. Trends, Structures and Policy Implications*, ed. Marek Okólski (Amsterdam: Amsterdam University Press, 2012), 32.

2 See: Article 4(2) of the Treaty on European Union, consolidated version (OJ C202, 7 June 2016), 47.

3 "EMN Country Factsheet: Poland," European Commission, 7, accessed March 3, 2025, https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-publications/country-factsheets_en.

4 Ibid., 10.

is several times higher compared to Poland and also increased in 2023 (over 64,000),[5] while temporary protection in Greece is exercised for only around 27,000 persons.[6] In Sweden, the number of applications submitted in 2023 was lower than in 2022[7] and amounted to 17,000, and just over 36,000 people benefited from temporary protection.[8]

In the area of irregular migration on the territory of the Republic of Poland, in 2023 irregular residence of more than 16,000 people was confirmed and over 10,000 return decisions were issued.[9] In Greece at the same time there were more than 72,000 irregular migrants, and almost 30,000 return decisions were issued.[10] In Sweden, in 2023, illegal residence was found against just over 2,500 people and return decisions were issued for fewer than 7,700 people.[11]

The data presented shows the different experiences of the three countries in managing migration as well as the different administrative burden in this regard.

3. The Ombudsman as an Agent of Migrants' Rights

The institution of the Ombudsman has its roots in Sweden and can be defined as "a self-reliant, independent state body, usually created by constitutional regulation, established to exercise control over the proper functioning of public administration or the observance of human rights."[12] The Ombudsman is called the Agent of Rights, Justice and

5 "EMN Country Factsheet: Greece," 7.

6 Ibid., 10. See also: Konstantinos Tsitselikis, "Refugees in Greece: Facing a Multifaceted Labyrinth," *International Migration* 57, no. 2 (2019): 158–75, https://doi.org/10.1111/imig.12473; Theodoros Fouskas, "Migrants, Asylum Seekers and Refugees in Greece in the Midst of the COVID-19 Pandemic," *Comparative Cultural Studies: European and Latin American Perspectives* 5, no. 10 (2020): 39–58, https://doi.org/10.13128/ccselap-12297.

7 "EMN Country Factsheet: Sweden," 7.

8 Ibid., 10.

9 "EMN Country Factsheet: Poland," 18.

10 "EMN Country Factsheet: Greece," 18.

11 "EMN Country Factsheet: Sweden," 17.

12 Agnieszka Gajda, "Ewolucja modelu ombudsmana w ujęciu teoretycznoprawnym," in *Instytucje ombudsmana w państwach anglosaskich. Studium porównawcze*, ed. Piotr Mikuli (Warsaw: Wydawnictwo Sejmowe. Kancelaria Sejmu, 2017), 11.

Democracy in the literature and commentary,[13] which aptly reflects the nature of his mandate.

The catalogue of migrants' rights, which are guaranteed and require national authorities' protection, is broad and results not only from constitutional guarantees but also from guarantees enshrined in the EU Charter of Fundamental Rights and EU acts of secondary law implemented in national law, as well as international agreements, such as the Geneva Convention.[14] Among the most important fundamental rights are the right of entry, residence rights, prohibition of arbitrary and collective expulsion, rights of stateless persons, rights of refugees (including the right to international protection) and observance of the principle of non-refoulement.[15] Most of these rights are exercised in the form of an administrative procedure culminating in a decision.

The institution of the Ombudsman in Poland was established in 1987. Currently, the basis for the activities of the Ombudsman is stipulated in Article 80 of the Constitution of the Republic of Poland[16] and the Act on the Commissioner for Human Rights (hereinafter the CHR Act).[17] The Polish model of the institution of the Ombudsman is described as hybrid, typical for countries that have undergone a political transformation.[18] The term "human rights model" is also used in the literature to refer to the Polish CHR due to his broad competences that go beyond the handling of citizens' complaints.[19] The Ombudsman's mandate to support foreigners is grounded in Article 37 of the Constitution, when read together with the general

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13 Ann Abraham, "The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy," *Parliamentary Affairs* 61, no. 4 (2008): 681–93, https://doi.org/10.1093/pa/gsn031.

14 Convention relating to the Status of Refugees, done at Geneva on July 28, 1951 (United Nations, Treaty Series, vol. 189, p. 137).

15 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2019), 523–50.

16 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws of 1997, No. 78, item 483, as amended).

17 Act of July 15, 1987, on the Commissioner for Human Rights (consolidated text: Journal of Laws of 2024, item 1264).

18 Gajda, "Ewolucja modelu ombudsmana," 27.

19 Gabriele Kucsko-Stadlmayer, "Classification by 'Models'," in *European Ombudsman-Institutions. A Comparative Legal Analysis Regarding the Multifactored Realisation of an Idea*, ed. Gabriele Kucsko-Stadlmayer (Vienna: Springer, 2008), 64.

powers of the office. Importantly, the Commissioner's competence to act for foreigners has been explicitly expressed in Article 18 of the CHR Act. It reads that

> The provisions of the law concerning the protection of the rights and freedoms of man and citizen shall also apply mutatis mutandis to: 1) persons who are not Polish citizens, who are under the authority of the Republic of Poland – within the scope of their rights and freedoms; (…).[20]

The institution of the Greek Ombudsman (*Synigoros*) was not established until 1997, and the taking-up of the office took place in 1998. The appointment of the National Ombudsman in Greece was largely influenced by the establishment of the office of the European Ombudsman in the Maastricht Treaty.[21] The mandate of the Ombudsman is based on Articles 101a and 103(9) of the Constitution of Greece and the Act of 22 May 2003.[22] The Ombudsman's mandate also covers issues of discrimination, including that based on origin. Under Law No. 4443/2016, the Greek Ombudsman handles complaints concerning discrimination not only in the public but also in the private sector.[23] The Greek Ombudsman, like the Polish one, is a one-man body. Complaints may be lodged by persons under the jurisdiction of the Greek State.

Since the institution of the Ombudsman originated in Sweden (founded in 1809),[24] the Ombudsman's model currently functioning in Sweden is

20 See: Stanisław Trociuk, *Ustawa o Rzeczniku Praw Obywatelskich. Komentarz*, 2nd ed., LEX/el. 2020.

21 Stella Ladi, "Policy Change and Soft Europeanization: The Transfer of the Ombudsman Institution to Greece, Cyprus And Malta," *Public Administration* 89, no. 4 (2011): 1643–63, https://doi.org/10.1111/j.1467-9299.2011.01929.x.

22 Brigitte Kofler, "The Different Jurisdictions. Greece," in *European Ombudsman-Institutions. A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea*, ed. Gabriele Kucsko-Stadlmayer (Vienna: Springer, 2008), 216. See "Legislation", The Greek Ombudsman, accessed March 1, 2025, https://old.synigoros.gr/?i=stp.en.legislationo.

23 See: Equinet, accessed March 1, 2025, https://equineteurope.org/.

24 Piotr Mikuli, "Ombudsman Institutions and the Judiciary in Sweden and Finland," *Przegląd Prawa Konstytucyjnego* 40, no. 6 (2017): 38, https://doi.org/10.15804/ppk.2017.06.02.

referred to as classic[25] or as a "Rule of Law Model."[26] The basis of the Ombudsman's action (Justitieombudsman) is Regeringsformen – the so-called Swedish Instrument of Government, revised in 1974.[27] The Ombudsman in Sweden is a collegial body (it has been four people since 1986), equipped with the capacity to deal with individual complaints only since 1974.

Taking into account the general statistical data from 2023 available at the time of preparation of this study, it should be emphasized that the office of the Polish CHR received almost 80,000 complaints (which was, incidentally, a record number since 1988),[28] while the Greek *Synigoros* received just over 13,500 complaints[29] and the Swedish Ombudsman received 10,500 such applications.[30]

According to the data provided by the Office of the Commissioner for Human Rights, in 2022 there were 567 cases concerning foreigners, in 2023 they handled 1,246 such cases, and in 2024 1,295 (only until October 30, 2024).[31] The data obtained from the office of the Greek Ombudsman is not so transparent. The only official information received back from Greece said that in 2023 there were 33 complaints regarding entry and stay; however, some migration cases are included in OPCAT statistics[32]

25 Gajda, "Ewolucja modelu ombudsmana," 26.

26 Kucsko-Stadlmayer, "Classification by 'Models,'" 64. See also: Alfred Bexelius, "The Ombudsman's Office and Other Means for Protecting Citizens' Rights in Sweden," *International Social Science Journal* 18, no. 2 (1966): 247–51.

27 Joachim Stern, "Sweden," in *European Ombudsman-Institutions. A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea*, ed. Gabriele Kucsko-Stadlmayer (Vienna: Springer, 2008), 409.

28 Informacja o działalności Rzecznika Praw Obywatelskich w roku 2023, Biuletyn Rzecznika Praw Obywatelskich 2024, no. 2, Źródła, ed. St. Trociuk, Warsaw 2024, p. 654.

29 "Ενημερωτικό Σημείωμα Ετήσια Έκθεση του Συνηγόρου του Πολίτη για το 2023," The Greek Ombudsman, accessed March 1, 2025, www.synigoros.gr.

30 "Annual Report 2023," Summary in English, Riksdagens ombudsmän, 6, accessed February 1, 2025, https://www.jo.se.

31 The system of collecting statistical information in the Office of the Commissioner does not allow for the collection of data on the citizenship of applicants, thus it was not possible to determine how many complaints from third-country nationals were received by the CHR in the years 2022–2024. Data received on November 19, 2024 from the CHR Equal Treatment Team through a freedom of information request.

32 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on December 18, 2002 (United Nations, Treaty Series, vol. 1465, p. 85).

(in 2023 there were 42 such cases).[33] When it comes to Sweden, despite the working contact established in 2023, we could not get an answer to our inquiry. Annual reports show that there were 762 migration complaints in the 2021/22 period and a decrease was recorded[34] in 2023.

Taking into account Polish statistics, there is no doubt that the role of the Ombudsman in the protection of migrants' rights is significant and the analysis of cases handled by them may be used to develop a model for the Ombudsman's office to follow in the realm of migrants' rights.

4. Actions Taken by Ombudsmen to Protect the Rights of Refugees and Irregular Migrants

In order to verify the research theses, the types of competences and activities undertaken by the Commissioner's office in the area of protection of migrants' rights were investigated. The model adopted is based on a four-pillar structure.[35] The first pillar includes actions considered to be the Ombudsman's classic competence, i.e. the handling complaints from individuals; the second pillar includes actions taken under the national level mandate, which aim to comprehensively combat maladministration in the area of protection of migrants' rights; the third pillar involves actions for the so-called "domestication" of international law standards, while the last pillar (4th) includes soft actions: advocacy, networking and the building of civil society awareness.

As the competences under the first pillar do not raise any major doubts, a discussion on them has been minimized. The Polish Commissioner accepts individual complaints from third-country nationals under Article 80 of the Constitution of the Republic of Poland and the CHR Act (Article 10). After reading the complaint, he may take the actions listed in the Act (Articles 11–15 of the CHR Act). However, the address of the Polish Commissioner to the Government Plenipotentiary for Ukraine may be mentioned as an example of an action associated with the large number of complaints

[33] The Office of The Greek Ombudsman, e-mail correspondence with author; November 11, 2024.

[34] "Annual Report 2021/2022," Riksdagens ombudsmän, 58; "Annual Report 2023", Riksdagens ombudsmän, 31, accessed February 1, 2025, www.jo.se.

[35] See other models: Gabriele Kucsko-Stadlmayer, "Powers," in *European Ombudsman-Institutions. A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea*, ed. Gabriele Kucsko-Stadlmayer (Vienna: Springer, 2008), 39–58.

filed at the same time by Ukrainian citizens. The accumulation of complaints concerned repeated situations where Ukrainian refugees left Poland for less than 30 days and lost their UKR status, contrary to the regulations (a designation awarded to Ukrainian citizens who came to Poland as a result of the war in their homeland).[36] Thus, even individual complaints may lead to a diagnosis of a systemic problem and intervention in this area (the legal basis was Article 13(1)(2) of the CHR Act). In turn, in 2023, the Greek Ombudsman received a number of complaints regarding the conditions at the Samos detention center[37] or delays in the extension of residence permits for asylum seekers.[38] Complaints regarding migration issues in Sweden are published in the Ombudsman's annual reports and have in recent years concerned, among others, the activities of the Swedish Migration Agency and conditions in detention centers.[39]

Within the second pillar of the proposed model, the Commissioner takes actions to combat maladministration at the national level. It includes the following activities:

(1) **Delivering addresses to state administration bodies competent for migration matters** – In the years 2022–2024 the Commissioner repeatedly addressed administrative bodies, e.g. the Prime Minister (June 20, 2022), in connection with the need to eliminate the so-called "push-backs"[40] and the need to clarify the migration policy drafted by the government.[41] Other statements concerning vulnerable groups were of particular importance, such as the address to the Government

[36] "Address to Paweł Szefernaker, Government Plenipotentiary for War Refugees from Ukraine, 8.03.2023, XI.541.139.2022.KM," Rzecznik Praw Obywatelskich, accessed March 1, 2025, https://bip.brpo.gov.pl/pl. All documents cited in the article concerning the activities of the Polish Ombudsman are available on this website.

[37] "ΕΤΗΣΙΑ ΕΚΘΕΣΗ 2023 (Annual Report 2023)," The Greek Ombudsman, 60, accessed March 1, 2025, www.synigoros.gr.

[38] Ibid., 62.

[39] "Annual Report 2021/2022," Riksdagens ombudsmän, 35 ff.; "Annual Report 2023", Riksdagens ombudsmän, 31.

[40] "Address to Prime Minister Mateusz Morawiecki of June 20, 2022, XI.543.238.2022.AS/," Rzecznik Praw Obywatelskich.

[41] "Address to the Prime Minister of 22.10.2024, XI.540.413.2024.AM," Rzecznik Praw Obywatelskich. "Take back control. Ensure security" – comprehensive and responsible migration strategy of Poland for the years 2025–2030, resolution of the Council of Ministers of October 15, 2024, No. 120, Annex.

Plenipotentiary for Ukraine on the protection of vulnerable groups[42] (April 8, 2022, repeated, addressed to Prime Minister Donald Tusk on July 11, 2024).[43] Migrants themselves are a vulnerable group, hence the Commissioner's efforts to protect the so-called "double vulnerability" of people are of such great importance, an example of which are speeches in cases of migrants with disabilities regarding accommodation organized for them[44] or deaf persons from Ukraine.[45] The CHR's address to the Head of the Office for Foreigners regarding the eligibility for protection of stateless persons from Ukraine was also significant, as the Law on assistance to citizens of Ukraine in connection with armed conflict on the territory of that country regulates this issue to a limited extent.[46] This speech is an example of a diagnosis of legal deficits in the protection of certain groups, especially since Poland has not ratified the Convention relating to the protection of Stateless Persons.[47]
In Greece, an interesting example of intervention was the sending of a letter of opinion on standards in health treatment of asylum seekers in the Policastro Camp on May 25, 2020. The case of one asylum seeker with HIV was finally brought before the European Court of Human Rights (ECHR) and the Court, in justifying violation of Article 3 of the Convention, took into account the Commissioner's position.[48]
An interesting example of the Ombudsman's actions involves interventions in urgent cases (and such is often the nature of migration

[42] "Address to the Government Plenipotentiary for War Refugees from Ukraine, 8.04.2022, XI.518.9.2022.MK," Rzecznik Praw Obywatelskich.

[43] "Address to the Prime Minister of July 11, 2024, XI.543.445.2024.JK," Rzecznik Praw Obywatelskich.

[44] "Address to the Mazovian Governor of 18 April 2024, XI.543.52.2024.KM," Rzecznik Praw Obywatelskich.

[45] "Address to the Deputy President of the Management Board for Program of the State Fund for Rehabilitation of Disabled Persons of April 18, 2024, XI.815.9.2024.DB," Rzecznik Praw Obywatelskich.

[46] Law of March 12, 2022, on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that country (consolidated text: Journal of Laws of 2024, item 167).

[47] "Address to the Head of the Office for Foreigners of August 28, 2023, XI.540.136.2023.KM," Rzecznik Praw Obywatelskich. Convention relating to the Status of Stateless persons adopted on August 28, 1954, by a Conference of Plenipotentiaries convened by the Economic and Social Council Resolution 526a (XVII) of April 26, 1954 (United Nations, Treaty Series, vol. 360, p. 117).

[48] ECtHR Judgment of 5 October 2023, E.F. v Greece, application no. 16127/20, hudoc.int.

cases, e.g. detention or expulsion) based on information obtained by the Commissioner, not only from complainants, but also from independent sources. Such interventions have been repeated many times, including those concerning deportations[49] and detention of migrants.[50]

(2) **Signaling the need for legal changes –** The introduced model of the Commissioner's activities is technical, but it should be remembered that during the handling of cases, the Commissioner acts in a multifaceted way and the acquired insight allows him to take actions to signal the need for changes in the law in order to better protect the rights of irregular migrants and refugees. Examples of such actions include an address to the Minister of the Interior and Administration[51] of July 17, 2023. In his speech, the CHR presented comments on the need to amend the border regulation[52] and eliminate those provisions that are contrary to the guarantees of the rights of individuals, including those provided for in European Union law. Acting under his mandate (Article 14(6) of the CHR Act), the Commissioner also challenged the Order Regulation of the Governor of the Podlaskie Voivodship No. 1/2023 of February 16, 2023, on the rules of order in force in the border zone adjacent to the external state border in the Podlaskie Voivodeship. The CHR concluded that "the objectives of the Regulation are achievable based on the provisions of generally binding law contained in EU laws or acts."[53] This regulation limited the possibility of providing humanitarian aid to migrants on the Polish-Belarusian

49 "Interwencja RPO w sprawie deportacji cudzoziemca," Rzecznik Praw Obywatelskich, accessed March 1, 2025, https://bip.brpo.gov.pl/pl/content/rpo-interwencja-deportacja.

50 "Interwencja ZRPO Wojciecha Brzozowskiego w sprawie trzech Afgańczyków zatrzymanych przy granicy przez SG," Rzecznik Praw Obywatelskich, accessed March 1, 2025, https://bip.brpo.gov.pl/pl/content/zrpo-straz-graniczna-uchodzcy-granica-interwencja.

51 "Address to the Minister of the Interior and Administration of July 17, 2023, XI.543.10.2022. KM," Rzecznik Praw Obywatelskich. The basis for the action taken by the CHR was Article 16(1) of the CHR Act.

52 Regulation of the Minister of the Interior and Administration of March 13, 2020, on temporary suspension or restriction of border traffic at certain border crossing points (Journal of Laws 2023.1403, consolidated text of July 24, 2024).

53 "Complaint of the Commissioner for Human Rights to the Voivodship Administrative Court in Białystok of April 26, 2023, V.543.1.2023.ŁK/ST," Rzecznik Praw Obywatelskich.

border. The Voivodship Administrative Court in Białystok, by its judgment of July 13, 2023, declared invalidity of the contested regulation.[54]

(3) **Presentation of comments on draft legal acts –** Within their mandate, the CHR may submit their comments on draft legal acts (Article 16(2)(1) of the CHR Act). These actions are important since the national migration law has been recently subject to dynamic changes due to the crisis on the Polish-Belarusian border, the war in Ukraine and the implementation of the so-called EU Migration Pact. Examples of such actions include: comments addressed to the Marshal of the Senate concerning the Act amending the Law on assistance to citizens of Ukraine,[55] comments presented to the Marshal of the Senate on February 15, 2023, regarding the Act amending the Act on Foreigners.[56] Similar activities were carried out by the Greek Ombudsman – they submitted their comments on the draft law "Immigration Code" to the Standing Committee on Public Administration, Public Order and Justice, which were submitted to Parliament on March 20, 2023, after the completion of the public consultation process.[57]

(4) **Actions to change the line of decisions to one that is compatible with the fundamental rights of migrants** – An interesting example of the Commissioner's actions, certainly worth cementing in the practice of the office, involved sending comments to the President of the Regional Court in Krosno on the conditions in detention centers for foreigners (the office collected the data while monitoring the National Preventive Mechanism), information on the ECtHR case-law in detention cases and general conclusions on the need to limit detention whenever possible, in particular with regard to minors.[58] Under the law, detention of a foreigner is ruled by a court, hence the Commissioner addressed

54 Voivodship Administrative Court in Białystok, Judgment of 13 July 2023, Ref. No. I SA/Bk 365/23.

55 "Comments addressed to the Marshal of the Senate Tomasz Grodzki on April 12, 2022, XI.543.104.2022," Rzecznik Praw Obywatelskich. Article 16(1) of the CHR Act provided the legal basis for the comments.

56 "Comments addressed to the Marshal of the Senate Tomasz Grodzki on February 15, 2023, XI.540.55.2021.JK," Rzecznik Praw Obywatelskich.

57 The Greek Ombudsman, accessed March 1, 2025, www.synigoros.gr.

58 Letter to Judge Janusz Kmiecik, President of the Regional Court in Krosno of February 25, 2022, KMP.572.1.2021.PK.

their comments to the court adjudicating in foreigners' matters. Such actions have educational qualities on the one hand, and typical advocacy qualities on the other, indicating the grounds for formulating the line of jurisprudence consistent with international standards of human rights protection.

(5) **Participation in court proceedings –** Under the CHR Act and procedural regulations, the CHR may join civil and administrative proceedings and lodge cassation appeals in criminal cases if they believe that there has been a violation of human rights (these are the so-called CHR's strategic proceedings).[59] An example of an important migrant rights case involving the Commissioner was the case of a minor Syrian (O.A.) who was detained in 2022 and returned to Belarus with a person who was not their legal guardian. The minor entered Poland again and was then placed in foster care. The CHR filed a complaint with the Voivodship Administrative Court against the decision to return the minor, alleging numerous violations of the return procedure (e.g. lack of access to an interpreter, lack of medical examinations, lack of activities aimed at clarifying the case). The Voivodship Administrative Court in Białystok, in its judgment of October 27, 2022, repealed the contested order and remanded the case back.[60]

The so-called action as an agent of international law (third pillar within the proposed model) is extremely important in the context of protecting the rights of refugees and irregular migrants, whose rights are guaranteed in international agreements ratified by the states. As Richard Carver notes, the national ombudsman "domesticates (…) international human rights law and ensures its standards to be applied directly."[61] This is done through direct reference to acts of international law, monitoring the

[59] Article 14(4–8) of the CHR Act. See also the Law on proceedings before Administrative Courts (consolidated text: Journal of Laws of 2023, item 259); Article 8 concerning the participation of the Commissioner in the proceedings.

[60] Voivodship Administrative Court in Białystok, Judgment of 27 October 2022, Ref. No. I SA/Bk 588/22. Since the judgment was not satisfactory for the CHR, they filed a cassation appeal, which was dismissed by the Supreme Administrative Court ruling of January 9, 2024, Ref. No. II OSK 165/23.

[61] Richard Carver, "National Human Rights Institutions in Central and Eastern Europe. The Ombudsman as Agent of International Law," in *Human Rights, State Compliance, and*

implementation of treaty obligations by States, or direct action in the area of implementation of treaties, such as the Additional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[62] Under the Protocol, a National Preventive Mechanism (NPM) was established in the States Parties to the Convention, which monitors places of limitation of liberty, including detention centers for foreigners. In Poland,[63] Greece[64] and Sweden[65] the functions of the NPM were entrusted to the offices of the Ombudsmen. The Polish Commissioner carries out unannounced inspections of detention centers and centers for foreigners (e.g. in 2022 – in Przemyśl and in Lesznowola; in 2023 – in Kętrzyn).

The Commissioner's action for the protection of human rights also includes the right to submit the so-called *amicus curiae* in proceedings pending before the European Court of Human Rights,[66] which are of particular importance for the detection of systemic human rights violations. The Polish Commissioner declared his participation in the R.A. and others v. Poland case (complaint No. 42120/21), which concerned a group of foreigners residing in the border area near Belarus. The complaint alleged that Poland violated the prohibition of inhuman treatment and collective expulsion. The case was transferred to the Grand Chamber of the Court in June 2024.[67]

As an example of action for the "domestication" of international law, one should mention actions for the implementation by Poland of "interim

Social Change. Assessing National Human Rights Institutions, eds. Ryan Goodman and Thomas Pegram (Cambridge: Cambridge University Press, 2012), 190.

62 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on December 18, 2002 (United Nations, Treaty Series, vol. 1465, p. 85).

63 Polish NPM reports are available at: www.bip.brpo.gov.pl, accessed March 1, 2025.

64 "ΕΤΗΣΙΑ ΕΚΘΕΣΗ 2022 (Annual Report 2022)," The Greek Ombudsman, 118, accessed March 1, 2025, www.synigoros.gr.

65 For the Swedish Migration Agency, which is responsible for the operation of detention centers, see the "2023 National Preventive Mechanism Report on the Activities," Riksdagens ombudsmän, 54, accessed March 1, 2025, www.jo.se.

66 See: "Rules of the Court, 28.03.2024 edition," European Court of Human Rights, accessed March 1, 2025, www.echr.coe.int.

67 "Skarga migrantów zawróconych do linii granicy. Opinia Rzecznika dla ETPC. Sprawę zbada Wielka Izba Trybunału," Rzecznik Praw Obywatelskich, accessed March 1, 2025, https://bip.brpo.gov.pl/pl/content/rpo-opinia-migranci-pushbacki-etpc-wielka-izba.

measures" issued by the ECtHR. Their purpose is to prevent the possible violation of the rights of individuals by the State accused of systemic violations. This is particularly important in migration cases, where arbitrary or collective expulsions may occur. The Polish CHR addressed the Headquarters of the Border Guard in the case of a citizen of Tajikistan, against whom the ECtHR issued an "interim measure," and who was nevertheless to be expelled, asking for clarification of the non-application of the standard of international law in the Polish order.[68]

In Greece, in turn, the Ombudsman has the power to monitor TCN return operations, both domestic and joint return operations organized by Frontex.[69]

The fourth pillar of the CHR's activities involves advocacy, networking and building civil society awareness. These include monitoring observance of the rights of specific groups or specific rights and preparing reports in this area that inform about the shortcoming in the human rights protection and thus reveal them to the public.[70] The Commissioner carries out specific system checks and acts as a kind of watchdog. These actions consequently uphold the moral authority of the Commissioner, who forms public opinion in civil society through views and judgments – in the context of refugee issues, this is important given the recurring anti-migration sentiment. In parallel to these activities, the Commissioner conducts a direct dialog with the civil society, e.g. through meetings and consultations with key third sector organizations (e.g. the cooperation of the Greek Ombudsman with

68 "Interwencja ZRPO Wojciecha Brzozowskiego w sprawie deportacji tadżyckiego opozycjonisty," Rzecznik Praw Obywatelskich, accessed March 1, 2025, https://bip.brpo.gov.pl/pl/content/interwencja-zrpo-deportacja-tadzyckiego-opozycjonisty.

69 See: "ΕΤΗΣΙΑ ΕΚΘΕΣΗ 2022 (Annual Report 2022)," The Greek Ombudsman, 116, accessed March 1, 2025, www.synigoros.gr.

70 The report of the Greek Ombudsman "The challenge of migration flows and refugee protection – reception conditions and procedures" serves as an example here. Information available at: "Συνήγορος του Πολίτη," The Greek Ombudsman, accessed March 1, 2025, https://www.synigoros.gr/el/category/allodapoi-ithageneia-astiki-katastasi/post/ek8esh-or.

the International Red Cross)[71] and through networking with other national ombudsmen, e.g. within the European Network of Ombudsmen.[72]

5. Conclusions

Summing up the analysis, it should be stated that the first research thesis put forward is true – the Ombudsman is an institution that completes the gap in legal protection of refugees and irregular migrants at the national level. This is indicated by the proposed and presented model of activities under his mandate, which is framed in a four-pillar model. The added value of the operation of the Ombudsman's office involves the adaptability and flexibility of their actions and their authority,[73] which allows for effective interventions, despite the lack of formal power for sanctions.[74] By transforming the views of legal scholars and commentators, one can recognize that the Ombudsman is a kind of a "surrogate" institution for migrants and, through the activities undertaken, creates conditions for their adoption and adaptation in the receiving country.[75]

As a result of the comparative investigation, the second thesis, according to which the rights of migrants are not fully guaranteed in the actions of the state administration, should also be considered true and thus the proposal of a four-pillar model for the Ombudsman's operation was justified. This model allows for a comprehensive cataloguing of the Ombudsman's possible actions and assumes the functioning of the office in a specific algorithm – from the detail (i.e. handling individual complaints, pillar one) to the general, i.e. diagnosing and eliminating maladministration in actions undertaken by the state. Only the parallel and continuous functioning of

71 "ΕΤΗΣΙΑ ΕΚΘΕΣΗ 2022 (Annual Report 2022)," The Greek Ombudsman, 114–5, accessed March 1, 2025, www.synigoros.gr.

72 "O Europejskiej Sieci Rzeczników," Europejski Rzecznik Praw Obywatelskich, accessed March 1, 2025, https://www.ombudsman.europa.eu/pl/european-network-of-ombudsmen/about/pl.

73 Roy Gregory, "An Office for all Seasons? The Origins and Development of the Ombudsman Institution in the United Kingdom," in *Law and the Spirit of Inquiry. Essays in Honour of Sir Louis Blom-Cooper*, eds. Charles Blake and Gavin Drewry (The Hague: Brill, 1999), 107.

74 Ludvig Beckman and Fredrik Uggla, "An Ombudsman for Future Generations: Legitimate and Effective," in *Institutions for Future Generations*, eds. Inigo González-Ricoy and Axel Gosseries (Oxford: Oxford University Press, 2016), 118.

75 Manos Moschopoulos, "A 'Surrogate State' for Refugees in Greece," *Refugee Survey Quarterly* 42, no. 2 (2023): 123–57, https://doi.org/10.1093/rsq/hdad002.

these four pillars can ensure effective protection of migrants as a vulnerable group.

The legal norms currently in force in the Polish national order in the area of the Ombudsman's mandate should be considered as broadly consistent and enabling specific actions to be taken, resulting in enhanced protection of TCNs. Thus, both the legal bases shaping the mandate of the Ombudsman in Poland, as well as the actual actions taken, indicate that the Polish solution may be considered a model. In recent years, Poland has faced a sudden influx of a significant number of TCNs, becoming a receiving country (unlike Greece and Sweden, which have been receiving countries for decades) – the analysis indicates the effectiveness of the envisaged legal mechanisms in the area of the Commissioner's activities. On the other hand, this success was also down to the high dynamics of the activities undertaken by the Commissioner's office team, the transparency of these activities and the provision of extensive feedback on the activity of the office to civil society. This is not the case for the Greek and Swedish Ombudsmen, whose activity in the area of migration matters is either less (Greece) or more limited in terms of the range of activities undertaken (Sweden). Thus, the Commissioner's office in Poland may be considered an office for all seasons,[76] providing effective *ad hoc* protection to doubly vulnerable groups.

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Customs Administrations in the EU Countries and Ukraine: Comparative Legal and Functional Analysis

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Abstract: This article examines the contrasting legal status and functional roles of customs officers in the European Union and Ukraine. It highlights how the absence of law enforcement powers and procedural independence in the Ukrainian system limits the effectiveness of its customs personnel. Drawing on judicial practice and comparative models from EU member states, the study proposes concrete institutional reforms, including empowering specialized customs units with enforcement authority. These steps, it argues, are critical for aligning Ukraine's customs administration with EU standards and strengthening its capacity to address illicit trade. In several EU member states, such as Poland and Hungary, customs authorities have an enforcement mandate, and their employees are granted a special status, which includes carrying weapons, having official titles, the right to independently investigate customs crimes, and procedural autonomy. In contrast, in Ukraine, customs officers are civil servants without law enforcement status, which limits their effectiveness in combating smuggling and customs violations. Although Ukrainian customs officials hold special ranks, this becomes an additional obstacle when it comes to pension allocation, as the Ukrainian Pension Fund does not recognize customs officers as public servants, arguing that there is no rank assigned to their public service position. The methodological framework of the study is based on comparative, formal-legal, and systemic

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methods. Based on the analysis of legislation, public institutions, and judicial practices, the author concludes that Ukrainian customs authorities possess low procedural autonomy and face a high level of legal uncertainty, particularly in the area of service under contract. Examples of judicial decisions provided confirm the common practice of dismissing customs officers without proper legal justification. In conclusion, the study suggests revisiting the regulatory approaches to the status of customs officers in Ukraine, taking into account European experience, particularly regarding granting law enforcement powers to specific customs units. Such a shift would strengthen the institutional capacity of the customs service and lay the groundwork for a more resilient and responsive system of financial and border security, better suited to the challenges of European integration.

1. Introduction

Customs authorities play a key role in financial security, tax enforcement, and combating illicit trade. Ukraine's integration with the EU requires aligning customs legislation with EU standards – driven not only by treaties but also by practical needs like fighting smuggling, corruption, and outdated institutions.

In most EU member states, customs services often combine administrative and law enforcement roles. Customs officers are granted procedural autonomy, the right to carry weapons, hold official ranks, and, in some jurisdictions, even conduct independent criminal proceedings. This enhanced mandate directly shapes service conditions, motivation systems, and disciplinary mechanisms – critical aspects of effective institutional functioning.

Globalization has expanded customs' roles beyond revenue to include security and crime prevention. As Gordhan notes, growing trade and new threats have pushed reforms across both old and new EU members.[1] In this context, it is interesting to compare the approaches of various

[1] Pravin Gordhan, "Customs in the 21st Century," *World Customs Journal* 1, no. 1 (2007): 49–54, https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/key-issues/customs-in-the-21st-century/customs_in_the_21st_century.pdf.

countries – both old EU members and new or candidate countries – to the reform of their customs services in response to these challenges. These challenges underscore the need for reform of the legal status of customs authorities, especially in countries undergoing EU integration or adapting their administrative structures to European norms.

Despite OECD participation, Poland's public service still faces challenges like those in Ukraine – making its experience a useful reference.[2] While some research exists, the legal status of customs officers – especially regarding law enforcement roles – needs deeper analysis. Specifically, it is important to explore the influence of different models of institutional subordination and normative regulation on the functional content of customs officers' status in both EU countries and states harmonizing their legislation with European standards. Customs services operate in a legal environment where general labor law (*lex generalis*) relates to special civil service regulations (lex specialis) and specific provisions of customs law (*lex specialissimus*).[3]

Meanwhile, in Ukraine, customs officers are civil servants without law enforcement status, and the State Customs Service is not a law enforcement agency. This significantly limits its functional capacity in preventing customs offenses and investigating smuggling. This context raises interest in the comparative analysis of the legal status models of customs officers in Europe, both in academic literature and among policy developers.

This study highlights key differences between Ukraine and the EU in customs powers, structure, and autonomy – and considers EU practices adaptable to Ukraine. The study addresses four key questions:

(a) What are the key characteristics of the legal status of customs service officials in EU countries, and how does this status distinguish them from civil servants?

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2 Lech Marcinkowski, "Kluczowe wyzwania dla służby publicznej w Polsce – standardy OECD i Unii Europejskiej [Key Challenges for the Public Service in Poland – OECD and EU Standards]," *Kontrola i Audyt*, no. 1 (2025): 80–91, https://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.ojs-doi-10_53122_ISSN_0452-5027_2025_1_07.

3 Ljiljana Dapčević-Marković, "Radno pravni status carinskih službenika [Labor-Legal Status of Customs Officers]," *Pravne teme* 6 (2015): 196, https://www.ceeol.com/search/article-detail?id=542458.

(b) How do national legal systems in EU countries provide normative frameworks for granting law enforcement powers to customs officers (carrying weapons, conducting procedural actions, independent investigations)?
(c) How does institutional subordination and the special status of customs services affect their ability to perform functions in public security and customs justice?
(d) Which aspects of European customs service regulation models could be adapted in Ukraine, considering current legal restrictions and judicial practice?

The methodology of the study is based on the combination of comparative legal methods (for analyzing EU legislation and that of individual member states), formal-legal methods (for interpreting the normative constructions of the status of customs officials), and a systemic approach (for examining customs services as part of the administrative and law enforcement sub-systems of the state apparatus). The analysis focuses on legal acts of both Ukraine and the EU, including the Customs Code of Ukraine, the Union Customs Code (UCC), as well as special laws regulating the status of customs officers in EU countries.

2. Legal Status of Customs Officers in EU Member States

In EU member states, the legal status of customs officers varies, but most enjoy extended powers resembling those of law enforcement. These powers include military-style attributes such as official ranks, uniforms, the right to carry weapons, and independent operational powers in criminal investigations.

Within the framework of the European Union's legal order, customs law has developed as an autonomous branch of law with its own regulatory objects, legal methods, terminology, and institutional-normative architecture. As Polish researcher Adam Drozdzek aptly notes, the autonomy of customs law lies not only in its separation from tax or administrative law but also in the presence of its own legal instruments, procedures, and mechanisms aimed at regulating international trade relations: customs law is considered an autonomous legal field due to its distinct subject matter

and specific operational procedures.[4] This autonomy of EU customs law allows for the unified application of standards across all member states, including the definition of customs debt, the customs debtor, and the legal status of the customs administration as an authorized subject of public authority.

In recent decades, the volume of EU external trade has increased significantly, necessitating the provision of security for the movement of goods not only at external borders but across the entire customs territory of the Union. Customs authorities now manage entire trade flows and contribute directly to national competitiveness and enterprises, and playing a leading role in ensuring security within global supply chains.[5] In response to these transformations, the European Union has gradually developed a comprehensive institutional architecture for customs administration. It is designed to meet both economic integration requirements and modern security needs.

Today, the EU customs system is a complex structure. It includes interlinked institutions, legal frameworks, and operational mechanisms that jointly address globalization, technological change, and transnational crime. At the same time, it supports trade facilitation and competitiveness. As noted by Jowita Świerczyńska, the EU customs system is not only a legal construct based on the Union Customs Code and the common customs tariff but also a coordinated array of bodies, including the customs administrations of member states, including DG TAXUD, OLAF, Europol, Frontex, and Eurojust.[6] Despite national differences, EU customs administrations operate as an integrated mechanism ensuring fiscal, regulatory, and security functions. In several countries, customs officers may conduct pretrial investigations, oversee cargo and passenger flows, and exercise broad

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4 Adam Drozdek, "The Autonomy of the European Union Customs Law (Selected Issues)," *Acta Universitatis Carolinae Iuridica* 1 (2017): 91–102, https://www.ceeol.com/search/article-detail?id=518077.

5 Monika Grottel, "Poprawa funkcjonowania unii celnej UE w kontekście postanowień Unijnego Kodeksu Celnego [Improvement of the Functioning of the EU Customs Union in the Context of the Provisions of the Union Customs Code]," *International Business and Global Economy* 36 (2017): 79–82, https://doi.org/10.4467/23539496IB.17.005.7453.

6 Jowita Świerczyńska, "The Contemporary Face of the Customs System in the European Union," *Przedsiębiorczość i Zarządzanie* 18, no. 9.2 (2017): 321–32, https://www.ceeol.com/search/article-detail?id=718576.

enforcement powers. The implementation of these institutional approaches at the national level, despite the unified requirements of the EU Customs Code, takes place in various organizational models. In some member states, the customs service has transformed into a militarized or police structure with investigative functions and law enforcement powers.

In most EU countries, customs officers have a special status similar to law enforcement officers. For example, in the Czech Republic, customs officers are subject to the Police Service Act and have a "police" status in criminal proceedings. In the Czech Republic, customs officers hold police-equivalent status and operate under the Police Service Act.[7] In Poland, the National Revenue Administration (Krajowa Administracja Skarbowa, KAS) combines tax and customs enforcement. Its officers carry weapons, hold military-style ranks, and are authorized to investigate customs crimes.[8]

The Polish Customs Service, as a uniformed formation created to protect the customs territory of the European Union, is one of the key subjects ensuring the security of the EU's external borders, particularly in the fight against smuggling and financial crimes.[9] This led to the creation of Krajowa Administracja Skarbowa (KAS), a unified organization that combined administrative functions with ensuring the fiscal security of the state. Reforming and consolidating customs, tax, and control functions under KAS significantly improved enforcement capacity.[10]

Customs authorities, with powers to oversee and control all goods crossing customs borders, have become the true guardians of security in cross-border freight movement.[11] For example, KAS officers can detain

7 Zákon č. 17/2012 Sb., "Zákon o Celní správě České republiky," accessed May 11, 2025, https://www.zakonyprolidi.cz/cs/2012-17?text=o+Celní+správě+České+republiky.

8 Ustawa z dnia 16 listopada 2016 r. o Krajowej Administracji Skarbowej, accessed May 11, 2025, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20160001947/U/D20161947Lj.pdf.

9 Waldemar Zubrzycki, "Polish Contribution to the European Union Borders Protection," *Security, Economy & Law* 13, no. 4 (2016): 90, https://www.ceeol.com/search/article-detail?id=562510.

10 Jowita Świerczyńska, "W kierunku nowoczesnej organizacji – reforma instytucjonalna administracji celnej w Polsce [Towards a Modern Organization – Institutional Reform of the Customs Administration in Poland]," *Krakowskie Studia Międzynarodowe*, no. 2 (2019): 249–69, https://doi.org/10.34697/2451-0610-ksm-2019-2-013.

11 Jowita Świerczyńska, "The Polish Customs Service as a Guardian of Security and Safety of the Cross-Border Freight Traffic," *Krakowskie Studia Międzynarodowe* 3 (2016): 39–52, https://www.ceeol.com/search/article-detail?id=584459.

vehicles, inspect goods, conduct searches, and verify documents – powers enshrined in special legislation. This is explicitly enshrined in the provisions of the special law on KAS.[12]

An analysis of individual national models demonstrates that the status of customs officers as law enforcement officers is realized through various institutional and regulatory mechanisms, but in most cases, it provides them with significant procedural autonomy, weaponry, and investigative functions. The shift toward law enforcement roles reflects a broader EU trend of enhancing security functions in customs services.

In Hungary, NAV operates under the Ministry of Finance and carries out armed enforcement tasks through its Criminal Directorate.[13] Slovakia's Financial Administration, formed by merging customs and tax bodies, also includes a dedicated Criminal Office for such investigations.[14] In Poland, Hungary, and the Czech Republic, officers in special units may carry firearms and perform independent investigations akin to police duties.

Latvia's State Revenue Service (VID) includes a Tax and Customs Police unit, authorized to investigate serious customs offenses, while regular customs staff remain civil servants.[15] In Ukraine, however, the customs service does not have such a status. According to scientific analysis, the absence of a law enforcement status in the State Customs Service of Ukraine significantly limits its ability to combat customs violations and conduct operational-search activities.[16]

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12 Ustawa o Krajowej Administracji Skarbowej (Journal of Laws 2016, item 1947).

13 2010. évi CXXII. törvény a Nemzeti Adó- és Vámhivatalról [Act CXXII of 2010 on the National Tax and Customs Administration], accessed May 11, 2025, https://njt.hu/jogszabaly/2010-122-00-00. 485/2015. (XII. 29.) Korm. rendelet a Nemzeti Adó- és Vámhivatal szerveinek hatásköréről és illetékességéről [Government Decree on the Scope of Powers and Jurisdiction of the Organs of the National Tax and Customs Administration], accessed May 11, 2025, https://njt.hu/jogszabaly/2015-485-20-22.

14 Zákon z 5. decembra 2018 o finančnej správe a o zmene a doplnení niektorých zákonov [Act of December 5, 2018 on Financial Administration], Národná rada Slovenskej republiky, accessed May 11, 2025, https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2019/35/20230101.html.

15 Valsts ieņēmumu dienesta likums [Law on the State Revenue Service], Saeima, adopted October 31, 2024, accessed May 11, 2025, https://likumi.lv/doc.php?id=59902#p13.

16 E.A. Polianska, "Pravoohoronnij status Derzhavnoï mytnoyi sluzhby Ukrayiny [Law Enforcement Status of the State Customs Service of Ukraine]," *Науковий вісник*

In most countries, customs authorities operate independently of police forces and are subordinated to finance ministries (e.g., Hungary, Lithuania, Slovakia, Poland). In the Czech Republic, they report to the Ministry of Internal Affairs. For instance, Lithuania's customs authority includes a Criminal Customs Service for investigating smuggling.[17] Estonia's Tax and Customs Board currently performs customs tasks, though possible police integration is under review.[18] In Romania, customs investigators operate under the fiscal authority but lack independent enforcement status.[19]

Career advancement and compensation systems usually differ from those of standard civil servants. For example, in Poland, customs officers hold military ranks and corresponding pay multipliers.[20] In most of these countries, special allowances are provided for length of service, risk, etc.

In Ukraine, the customs service is a central executive body whose activities are coordinated by the Ministry of Finance, and customs officers are civil servants. After the State Fiscal Service was dissolved in 2019, the State Customs Service of Ukraine was established on March 6. Since then, customs officers have been paid under the general civil service pay scale, without law enforcement-style benefits. Their salary includes a base rate

Ужгородського національного університету. Серія: Право 85, no. 3 (2024): 66–71, https://doi.org/10.24144/2307-3322.2024.85.3.10.

17 Lietuvos Respublikos vidaus tarnybos statuto pakeitimo įstatymas, No. XIV-2404, adopted December 19, 2023, accessed May 11, 2025, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/07a8f3509ff911ee8172b53a675305ab?jfwid=1t1okd23m.

18 Maksu- ja Tolliameti põhimäärus [Statute of the Estonian Tax and Customs Board], adopted October 6, 2008, No. 29, RTL 2008, 84, 1168, effective December 1, 2008, amended by subsequent acts, accessed May 11, 2025, https://www.riigiteataja.ee/akt/126012018003?leiaKehtiv.

19 HOTĂRÂRE nr. 237 din 16 februarie 2022 privind organizarea și funcționarea Autorității Vamale Române [Decision No. 237 of February 16, 2022, on the Organization and Functioning of the Romanian Customs Authority], Guvernul României, published in *Monitorul Oficial* no. 167 on February 18, 2022, accessed May 11, 2025, https://legislatie.just.ro/Public/DetaliiDocumentAfis/251770.

20 Rozporządzenie Ministra Rozwoju i Finansów z dnia 24 lutego 2017 r. w sprawie dodatków do uposażenia zasadniczego funkcjonariuszy Służby Celno-Skarbowej [Regulation of the Minister of Development and Finance on Allowances to the Basic Salary of Customs and Tax Officers] (Journal of Laws 2017, item 414), accessed May 11, 2025, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20170000414/O/D20170414.pdf.

plus various allowances – such as for seniority, rank, qualifications, performance, and bonuses provided by law.[21]

However, this pay model is unstable: around 70% of income comes from bonuses and allowances, which management can revoke. This undermines motivation and overall effectiveness. Customs administration bodies are part of the non-integrated government administration, which is included in the structure of public administration. Non-integrated administration is a specialized administration that includes territorial government bodies that are not subordinate to local general government bodies but are subordinate to the respective ministers.[22]

In modern conditions, the effectiveness of the customs service is determined not only by its institutional structure but also by its ability to undergo technological transformation and implement client-oriented solutions. This is particularly relevant for administrations operating within the non-integrated model, which requires a high level of coordination, transparency, and flexibility.

Poland's experience in modernizing the customs service through digital technology aimed at business can be a relevant model for Ukraine. As M. Grottel notes, systematic digitalization (electronic declaration, automated cargo placement, the i-Cło program) has significantly reduced customs clearance time, decreased the number of checks without losing efficiency, and also ensured better communication with business.[23] This approach aligns with the provisions of the Ukraine-EU Association Agreement and the strategies of the National Agency of Public Service and the State

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21 Mytnyi kodeks Ukrainy (Customs Code of Ukraine), Zakon Ukrainy vid 13 bereznya 2012 roku № 4495-VI [Law of Ukraine of March 13, 2012 No. 4495-VI], accessed May 11, 2025, https://zakon.rada.gov.ua/laws/show/4495-17#Text.

22 Viktoriya Herasymenko, "Administracja celna jako element struktury administracji publicznej po przystąpieniu Polski do Unii Europejskiej [Customs Administration as an Element of the Structure of Public Administration after Poland's Accession to the European Union]," *Rocznik Administracji Publicznej* 2 (2016): 291–312, https://www.ceeol.com/search/article-detail?id=601110.

23 Monika Grottel, "Polska służba celna w procesie podwyższania jakości usług biznesowych [The Polish Customs Service in the Process of Improving the Quality of Business Services]," *International Business and Global Economy* 33 (2014): 712–22, https://doi.org/10.4467/23539496IB.13.053.2438.

Customs Service of Ukraine regarding the adaptation of customs administration to European standards.

OLAF, Europol, Frontex, and Eurojust provide informational and coordination support to customs administrations in member states within the framework of customs violations investigations, particularly in areas such as smuggling, fraud, and the illegal circulation of excise goods.[24]

Customs crimes require tailored legal and operational measures due to their distinct nature.[25]

Serbian customs officers have the right to conduct searches of vehicles and premises, verify documents, temporarily restrict freedom of movement, apply technical means, and under certain conditions, carry weapons.[26]

The development of the European Union's customs legislation is accompanied not only by the deepening of fiscal control but also by the enshrinement of the customs service's role as a full-fledged tool for protecting the security of the internal market. As stated in the scientific study, the new Union Customs Code introduces a fundamentally different control model – from physical checks at the borders to post-clearance audit based on risk-oriented digital procedures: "From checks at the borders to audit-based control, from paper-based systems to electronic processes, the UCC is introducing a new paradigm for cross-border transactions."[27] This approach to the organization of customs services in the EU ensures the appropriate efficiency of control, including in the areas of security and combating customs violations. However, an important aspect is the difference in the legal status of customs officers, which determines their level of powers and the ability to exercise law enforcement functions. Given the differences in

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24 Jowita Świerczyńska, "Współpraca celna w obszarze bezpieczeństwa i ochrony unijnego rynku [Customs Cooperation in the Area of Security and Protection of the EU Market]," *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu* 407 (2015): 51–63, https://www.ceeol.com/search/article-detail?id=304435.

25 Oksana Viktorivna Korotiuk et al., "Rethinking the Concept of 'Crime Prevention in the Customs Sphere'," *Lex Humana* 14, no. 1 (2022): 337–47, https://doi.org/10.16925/2357-5891.2023.01.04.

26 Dapčević-Marković, "Radno pravni status carinskih službenika."

27 Catherine Truel, Emmanuel Maganaris, and Dan-Razvan Grigorescu, "The Development of EU Customs Law: From the Community Customs Code to the Union Customs Code," *Journal of Legal Studies "Vasile Goldiș"* 30 (2015): 83–106, https://www.ceeol.com/search/article-detail?id=468957.

the organization of customs services and the legal status of customs officers in different EU countries, it is important to consider how these changes affect the efficiency of customs control and law enforcement. This analysis allows for formulating recommendations for further improvement of the customs service in Ukraine, particularly regarding enhancing its operational efficiency and alignment with European standards.

The next section will discuss the legal status of customs officers in Ukraine, where customs officers do not have law enforcement powers, which significantly limits their ability to combat customs violations.

3. Legal Status of Customs Officers in Ukraine

Unlike in most EU countries, Ukrainian customs officers operate solely within the general public administration framework and lack law enforcement powers. This limitation weakens their capacity to combat smuggling and undermines enforcement effectiveness – an issue noted by both national and international experts.

The legal status of customs authorities and their officers is closely tied to how service within these bodies is structured. Ukraine's Customs Code (Chapter 79) contains detailed provisions on service in customs bodies, defining customs officials as civil servants. In contrast, most EU countries regulate customs service through separate laws rather than within customs codes.[28] This grants customs officers in Ukraine a defined legal status enshrined in national legislation. In contrast, the situation across European Union countries is different: most have separate national laws governing their customs services rather than incorporating service-related provisions into their customs codes. EU legislation itself does not include specific chapters regulating customs service careers. Instead, the status of customs authorities and officers is determined by various national legal acts, often through civil service regulations, but without establishing a unified standard across all EU member states.

This model lets each EU country organize its customs service based on national needs, leading to diverse approaches. In contrast, Ukraine applies a centralized model with clearly codified officer status. Yet, despite performing quasi-enforcement roles, Ukrainian customs officers remain

[28] Mytnyi kodeks Ukrainy.

regular civil servants with no special rights or protections. Their legal status reflects general public service rules, without added guarantees.

As E.A. Polyanska emphasizes, the absence of law enforcement status significantly constrains the operational capabilities of Ukraine's customs service.[29] Ukrainian customs officers serve under the Law "On Civil Service," but lack the privileges and safeguards typical of law enforcement personnel.[30] The State Customs Service of Ukraine reports to the Ministry of Finance and does not hold the status of a law enforcement agency.[31]

Lacking law enforcement status, the Customs Service cannot investigate offenses independently, which weakens its response to smuggling. The inability to carry out operational activities limits its overall effectiveness in detecting and addressing violations that require special powers.

Although customs officials perform important functions – such as contributing to state revenue and drawing up reports on customs offenses – their legal status is comparable to civil servants in non-enforcement sectors like education or healthcare. All are classified as civil servants, working under the same general conditions, without any of the legal guarantees or powers typically granted to law enforcement agencies.

This creates serious practical challenges, especially when it comes to fulfilling their duties. Customs officers follow a fixed 9 a.m. to 6 p.m. schedule, even at border checkpoints. However, border operations run 24/7. This creates a legal mismatch between institutional rules and real operational needs. Due to limited authority outside working hours and the lack of investigative tools, officers face serious constraints in fulfilling their duties. Acting Head of the State Customs Service, Serhii Zviahintsev, has

29 Polianska, "Pravoohoronnij status Derzhavnoï mytnoyi sluzhby."

30 Zakon Ukrainy "Pro derzhavnu sluzhbu" [Law of Ukraine "On Civil Service"], *Vedomosti Verkhovnoï Rady Ukrainy* (VVR), 2016, no. 4, art. 43, accessed May 11, 2025, https://zakon.rada.gov.ua/laws/show/889-19#Text.

31 Kabinet Ministriv Ukrainy, Postanova vid 6 bereznya 2019 r. № 227 "Pro zatverdzhennya polozhen′ pro Derzhavnu podatkovu sluzhbu Ukraïny ta Derzhavnu mytnu sluzhbu Ukraïny" [Resolution No. 227 of March 6, 2019, "On Approval of the Regulations on the State Tax Service of Ukraine and the State Customs Service of Ukraine"], accessed May 11, 2025, https://zakon.rada.gov.ua/laws/show/227-2019-%D0%BF#Text.

emphasized the urgent need to grant customs officers operational and investigative powers to fulfill EU obligations and counter smuggling.[32]

The National Revenue Strategy, adopted in late 2023, proposes giving customs authorities powers for operational intelligence and pre-trial investigations in smuggling cases – aimed at strengthening their security role and transforming the service into a law enforcement agency.[33] This direction is reinforced by the 2028 Financial Investigations Strategy, which also supports granting such powers, aligning them with FATF standards and EU Directive 2024/1260 on criminal asset tracing.[34]

Customs officers cannot independently conduct searches or interrogations, relying instead on prosecutorial approval – even when duties overlap with law enforcement. O.A. Pustovit argues that the complexity of specialized services like customs cannot be captured by general administrative codes, requiring tailored legislation. This makes it necessary to rely on specialized legislation rather than a single regulatory act, as is typical for general administrative service. Moreover, the current model of legal regulation is largely based on procedural subordinate acts, which has a significant impact on the legal status of customs officials.[35]

Without procedural autonomy, Ukrainian customs must coordinate any investigative actions with prosecutors or police, reducing responsiveness and operational efficiency. As a result, Ukrainian customs officers currently have limited capacity to investigate crimes and must rely on the police or the Security Service of Ukraine, rather than on their own investigative units.

Interestingly, Ukrainian customs legislation – at least on paper – does grant customs officers the right to carry firearms, which contrasts with many European standards. Ukraine's Customs Code formally authorizes

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32 Serhii Zviahintsev, "Navishcho mytnytsi funktsii operatyvno-rozshukovoi diialnosti i slidstva?," *Ekonomichna pravda*, February 21, 2024, accessed May 11, 2025, https://epravda.com.ua/columns/2024/02/21/710230/.

33 Yefrem Lashchuk, "Komu potribne peretvorennia mytnykiv na pravookhorontsiv?," *Ekonomichna pravda*, June 19, 2024, accessed May 11, 2025, https://epravda.com.ua/columns/2024/06/19/715368/.

34 Strategy of Financial Investigations in Counteracting Criminal Offenses Related to Income Generation until 2028. Draft Resolution of the Cabinet of Ministers of Ukraine, 2025.

35 Oksana A. Pustovit, "Mechanism of Legal Regulation of Civil Service in Ukraine" (PhD diss., Odesa National Law Academy, 2025), 17–19.

officers to use special means – such as handcuffs, rubber batons, tear gas, tools for stopping vehicles, and entry equipment – for tasks like detaining offenders, repelling attacks, or accessing places where smuggled goods may be hidden.[36] The detailed procedures, including lists of allowed equipment and rules for their use, are set by the Cabinet of Ministers in Resolution No. 1953 of December 25, 2002.[37]

In practice, these provisions are declarative: officers are not equipped with firearms or special tools. At joint EU checkpoints, they must often rely on foreign counterparts for enforcement support. These powers remain a formal declaration, unsupported by material resources. In fact, at joint border checkpoints with the EU, Ukrainian customs officers are sometimes forced to ask their Polish counterparts for assistance in situations involving threats to public order or the need for physical intervention.

This exposes a clear gap between the powers granted on paper and the actual capacity of Ukraine's customs service to ensure its own security and respond effectively to risks. The situation calls for either a revision of the legal provisions to bring them in line with available resources, or for equipping customs personnel in accordance with the existing legal framework.

A key argument in favor of reassessing the status of the State Customs Service of Ukraine is the position of EU experts, who emphasize the urgent need to grant customs authorities the right to carry out operational and investigative activities. Vitianis Ališauskas specifically notes that without granting law enforcement status to Ukraine's customs authorities, it is impossible to effectively combat smuggling, as the customs service lacks both the necessary powers and access to operational information from European partners.[38]

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36 Mytnyi kodeks Ukrainy.

37 Kabinet Ministriv Ukrainy, Postanova vid 25 hrudnia 2002 r. № 1953 "Deyaki pytannya zastosuvannya spetsial'nykh zasobiv ta vohnepaly'noyi zbroyi posadovymy osobamy mytnoyi sluzhby" [Resolution No. 1953 of December 25, 2002, "Certain Issues of the Use of Special Means and Firearms by Customs Officials"], accessed May 11, 2025, https://zakon.rada.gov.ua/laws/show/1953-2002-%D0%BF#Text.

38 Vytianis Ališauskas, "How to Criminalize Smuggling Without Harming Business?," *EU Public Finance Management Support Programme for Ukraine*, August 9, 2023, accessed May 11, 2025, https://www.dsnews.ua/ukr/economics/kak-kriminalizirovat-kontrabandu-ne-ushchemlyaya-interesov-biznesa-01092021-435579.

From the perspective of administrative law, the legal status of a customs official is viewed not merely as a set of formally defined rights and duties, but as a complex and evolving structure that encompasses competence, authority, functional limitations, and safeguards related to official duties. This approach offers a deeper understanding of the legal nature of the customs service within the broader context of public administration.

Building on the analysis of the legal status of customs officers in Ukraine and its comparison with European practices, it is worth exploring in more detail the specific areas of reform that could help align Ukraine's customs authorities with modern security demands and enforcement needs. The following section offers a comparative analysis of the legal frameworks governing customs services in Ukraine and the EU, with the aim of identifying potential pathways for improving the national customs system.

4. Comparative Analysis: Similarities and Differences

Ukraine's civilian-based customs model sharply contrasts with the law enforcement-oriented systems of most EU member states. A comparative analysis helps identify reform paths by examining functional mandates, institutional subordination, and service models. Such an analysis helps to identify both the points of divergence and the potential reference models for adapting European approaches to the Ukrainian context.

Across Europe, customs services have evolved into law enforcement agencies tasked with protecting supply chains and combating financial crime. This shift in paradigm has been well described by P. Gordan, who emphasized that in the 21st century, customs authorities are no longer just "tax collectors," but have become key actors in security and trade management.[39]

Compared to EU countries, where customs officers are often granted special law enforcement status, Ukrainian customs officials remain civil servants. In most EU member states, customs services have law enforcement powers – their officers are armed and authorized to carry out investigative and intelligence operations.[40] In Poland,[41] Hungary, and the Czech

39 Gordhan, "Customs in the 21st Century."
40 2010. évi CXXII. törvény.
41 Ustawa o Krajowej Administracji Skarbowej.

Republic, customs officers are armed, uniformed, and granted investigative authority comparable to police powers.

Table. Comparison of Customs Services in the EU and Ukraine

Criterion	EU Customs Services	Customs Service of Ukraine
Legal status and institutional subordination	Structured, armed services under the Ministry of Finance or Interior (Czech Republic, Hungary); police status (Poland).	Civil servants without formally recognized law enforcement status.
Powers	Authorized to carry firearms, conduct inspections, and investigate customs crimes (Poland, Hungary, Czech Republic).	Administrative customs powers; investigative functions handled by police or prosecutors.
Procedural autonomy	Independent criminal units (e.g., Tax and Customs Police in Latvia); ability to initiate proceedings under national law.	No separate investigative units; dependent on the prosecutor's office and cannot initiate criminal cases independently.
Career development	Service ranks, position-based multipliers, and special bonuses.	Standard civil service pay scale; basic bonuses as for regular government employees.

Source: compiled and systematized by the author based on open legal and institutional sources

In contrast, the absence of law enforcement status in Ukraine significantly hampers the effectiveness of customs control and the investigation of offenses. These disparities reflect divergent post-Soviet reform trajectories, where some countries retained or developed customs enforcement units, while Ukraine followed a civil service model. The table above summarizes the institutional, functional, and legal differences between EU customs models and Ukraine's current system.

In different EU countries, identical customs violations can lead to very different outcomes – ranging from a simple warning with no fine to goods being confiscated or even criminal prosecution.[42] In most modern customs

[42] Małgorzata Czermińska and Jowita Świerczyńska, *Administracja celna w Unii Europejskiej – wspólna czy 28 różnych?* [*Customs Administration in the European Union – Common or 28*

administrations, customs investigations fall into two main categories: administrative customs investigations, which deal with violations of customs procedures, and criminal customs investigations conducted in accordance with the Criminal Procedure Code.[43]

Beyond formal legal differences – such as status, structure of authority, and institutional subordination – key factors in the effectiveness of a customs service also include service conditions and the underlying motivation model. Across European countries, increasing attention is being paid not only to material incentives, but also to non-material ones: interpersonal communication, fairness in evaluation, involvement in decision-making, and opportunities for career growth. International experience shows that high job satisfaction is strongly correlated with institutional effectiveness and lower staff turnover.

Empirical studies confirm that recognition, participation in decision-making, and transparent evaluation significantly influence staff satisfaction and performance. For instance, a study of 679 Greek customs officers identified interpersonal trust and fair assessments as key drivers of job satisfaction.[44] More broadly, international experience shows that customs effectiveness depends not only on formal powers but also on internal support mechanisms – particularly clear evaluation systems and career prospects. This makes the design of HR models, especially contract-based service, central to institutional performance. In Ukraine, however, analysis of how employment contracts function in the customs sector reveals persistent systemic issues.

It is important to recognize that, in the context of European integration, the modern doctrine of public service emphasizes not only the presence of authority, but also a clear distinction between "competence" (as the general legal capacity within the scope of the institution's mandate) and "powers" (as specific legal actions). Harmonizing these concepts is a crucial

Different?] (Kraków: Krakowska Akademia im. Andrzeja Frycza Modrzewskiego, 2017), 111–3.

43 Vencislav Haladjov, "Mytničeskoto razsledvane – sŭstoyanie, problemy i perspektivi [Customs Investigation – Status, Problems, and Perspectives]," *Godišen Almanah "Naučni izsledvaniya na doktornanti"*, no. 11 (2016): 417–32.

44 Elen I. Barda, "Evaluation of Job Satisfaction in the Public Sector: The Case of Customs Officers" (MA diss., University of Thessaly, 2016).

step toward aligning the legal status of Ukrainian customs officers with the European model.

A civil service contract in the customs sphere is not merely a formal record of appointment – it is a distinct legal act that gives rise to public service relations. As O. Stets emphasizes, a contract is an individual, consequential, and fixed-term legal act that governs a specific area of public activity – namely, service within a state institution. Its content includes not only the employee's obligation to meet certain performance targets but also the duty of the public service manager to provide appropriate working conditions and ensure access to the resources needed for proper fulfillment of the assigned functions.[45] Such issues expose not only legal gaps in contracts but also serious challenges in their practical application, as shown by court decisions. A notable trend is the dismissal of customs officers for allegedly failing key performance indicators (KPIs) without proper legal assessment. In case No. 380/15503/22, the Eighth Administrative Court of Appeal found that Lviv Customs fired an officer without measuring KPIs, despite wartime conditions that made targets unachievable. [46]

A broader review confirms that contract-based dismissals often lack legal grounds. For example, in case No. 380/15752/22, the Supreme Court upheld reinstatement of a department head dismissed without documented performance failures,[47] while in case No. 440/3992/22, the dismissal of Odesa Customs' head was annulled due to insufficient evidence, vague accusations, and failure to account for martial law conditions.[48]

Other examples include case No. 260/4780/23, where Zakarpattia Customs unlawfully dismissed an official due to staff reduction without offering

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45 Oleg Stets, "Public Service Contract as a Basis for Emergence of Public Service Relations," *Knowledge, Education, Law, Management* 3, no. 2 (2020): 195–6, https://doi.org/10.51647/kelm.2020.3.2.35.

46 Eighth Administrative Court of Appeal, Decision in Case No. 380/15503/22, March 21, 2023, regarding unlawful dismissal based on unverified performance indicators, https://reyestr.court.gov.ua/Review/109723502.

47 Supreme Court of Ukraine, Administrative Cassation Court, Decision in Case No. 380/15752/22, May 31, 2024, regarding unlawful dismissal of a customs officer, https://reyestr.court.gov.ua/Review/119503469.

48 Supreme Court of Ukraine, Administrative Cassation Court, Decision in Case No. 440/3992/22, November 12, 2024, regarding unlawful dismissal of the head of Odesa Customs, https://reyestr.court.gov.ua/Review/123060084.

alternative positions,[49] and case No. 640/2964/22, in which the Supreme Court ruled against a dismissal carried out during COVID-19 quarantine, emphasizing automatic contract extension and lack of ministerial approval.[50] In both cases, the civil servants were reinstated.

These rulings expose systemic flaws in applying fixed-term contracts, especially under emergency conditions like COVID-19 or martial law. The lack of a unified legal approach to fixed-term contracts in Ukraine's customs service during emergencies – especially the pandemic – supports the findings of Izha and Melnyk. They noted poor regulation and unclear procedures in civil service hiring during 2020–2021, particularly the absence of a clear plan and legal certainty for those appointed under such contracts, which aligns with numerous court rulings on unlawful dismissals.[51]

During Poland's public administration reform, the customs and tax services were reorganized into the Krajowa Administracja Skarbowa (KAS), which had major legal consequences for staff. Employment was terminated for those who refused new terms or were not offered a position. As E. Ura notes, former customs officers were divided into three groups: those who accepted the new terms; those who declined; and those whose contracts ended automatically under the law (*ex lege*) on a date set by legislation.[52]

Although Serbia has sectoral customs laws, it still lacks a dedicated act on the customs service. This hampers consistent regulation of officers' status and delays the adoption of EU Customs Blueprints standards.[53] Unlike Ukraine, where contract-based service has at least been analyzed

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49 Zakarpattia District Administrative Court, Decision No. 260/4780/23, October 13, 2023, concerning reinstatement of a customs officer dismissed due to restructuring, https://reyestr.court.gov.ua/Review/114395086.

50 Supreme Court of Ukraine, Administrative Cassation Court, Decision in Case No. 640/2964/22, October 1, 2024, regarding automatic extension of public service contracts during quarantine, https://reyestr.court.gov.ua/Review/122134796.

51 Mykola Izha and Volodymyr Melnyk, "Osoblyvosti upravlinnya lyudskymy resursamy derzhavnoï sluzhby v umovakh kryzy [Peculiarities of Human Resource Management in Public Service during Crisis Conditions]," *Aktual'ni problemy derzhavnoho upravlinnya* 1, no. 2(83) (2021): 118–25, http://uran.oridu.odessa.ua/article/view/237282.

52 Elżbieta Ura, "Zatrudnienie funkcjonariuszy w administracji celno-skarbowej po reformie [Employment of Officers in the Customs and Tax Administration after the Reform]," *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, no. 4 (2021): 243–67, https://ruj.uj.edu.pl/entities/publication/fefb143d-b139-472d-b992-8e53f55f0562.

53 Dapčević-Marković, "Radno pravni status carinskih službenika."

despite its flaws, Serbia faces similar challenges without even a specific legal framework.

These issues, stemming from legal uncertainty and the lack of effective regulation of the customs service in Ukraine, call for comprehensive reform – particularly the establishment of a clear legal framework and the adoption of modern operational standards. The following section outlines a series of recommendations for Ukraine aimed at optimizing and aligning its customs legislation with European standards.

5. Conclusions

European integration requires Ukraine's public service to adopt principles of flexibility, professionalism, and institutional efficiency. This requires improvements in legal mechanisms, the digitalization of administrative procedures, and the development of a strong talent pool.

The IMF emphasizes that successful reform hinges on stable leadership, structured change management, and active stakeholder involvement. Experts noted that past institutional uncertainty – including the prolonged leadership vacuum with only an acting head in place – had a negative impact on staff motivation and overall management effectiveness.

According to Serhii Zviahintsev, Acting Head of the State Customs Service of Ukraine, human resource reform and the expansion of customs authority – particularly the inclusion of pre-trial investigative functions – indicate the government's readiness for systemic modernization.[54]

To enhance the effectiveness of Ukraine's customs authorities, several key steps must be taken:

(a) Grant customs law enforcement status to enable procedural autonomy, investigative powers, and use of force where necessary. Empowering customs officers with the necessary legal tools would significantly improve the effectiveness of customs control and enforcement.
(b) Introduce a modern, flexible contract model with performance-based incentives and stable evaluation practices.
(c) Accelerate digitalization (e-declarations, risk analysis systems, AI cargo control) to enhance efficiency and reduce corruption.

[54] Serhii Zviahintsev, "Zakon pro kadrove reformuvannia mytnytsi stane lakmusovym papirtsiem hotovnosti vlady do zmin," *Ukrinform*, July 21, 2023, accessed May 11, 2025, https://www.ukrinform.ua/rubric-economy/3738623-sergij-zvagincev-vo-golovi-derzmitsluzbi.html.

(d) Codify fair dismissal rules, performance reviews, and appeals processes to strengthen legal certainty.
(e) Adapt proven models (e.g., Poland's KAS) to Ukraine's context with adequate legal and operational safeguards. This includes strengthening internal control systems and ensuring adequate legal and material support for customs authorities.

To meet the demands of European integration, Ukraine must transform its customs service. This includes legal reform, modernization of personnel policy, technological innovation, and more effective management. As customs reform is central to Ukraine's alignment with EU standards, it is essential to identify strategic priorities and articulate a roadmap for institutional development.

Law enforcement status directly impacts the ability of customs services to detect and combat offenses effectively. In countries where customs services have police powers, they are able to detect and investigate crimes more quickly—thanks to access to firearms and their own investigative units. In Ukraine, by contrast, customs officers have limited powers and primarily perform control functions, while investigations are carried out by other agencies. These disparities result from diverging institutional paths and reform models across countries: in some European countries (such as Poland, Hungary, and the Czech Republic), customs services developed their own enforcement branches, whereas in Ukraine, frequent reorganizations of the customs service have often led to a narrowing of its role.[55]

In many EU member states, such as Poland, Hungary, and the Czech Republic, customs agencies serve both fiscal and preventive roles, functioning as key security actors, evolving into specialized law enforcement bodies capable of anticipating risks and combating transnational crime.[56]

An effective legal status should clearly define duties, rights, and safeguards tailored to enforcement needs. This approach not only helps to systematize the legal position of customs personnel, but also reinforces their functional role within public administration. In turn, this would grant

55 Polianska, "Pravoohoronnij status Derzhavnoï mytnoyi sluzhby."
56 Świerczyńska, "Współpraca celna w obszarze bezpieczeństwa."

greater autonomy to the customs service, allowing it to focus more effectively on tackling emerging security threats and financial crimes.

Empowering customs officers with investigative and enforcement powers is essential to align Ukraine with EU standards and improve institutional effectiveness. These changes would contribute to a more stable and predictable system, drawing on national models such as Poland's KAS and supporting Ukraine's integration objectives.

Reforming the status of customs officers and granting them law enforcement powers could have far-reaching implications for economic security and international cooperation. Reforming the legal status of Ukraine's customs officers will enhance national security, increase revenue, and improve cooperation with EU partners.

At the same time, such reform would strengthen the legal standing of customs bodies, enhance their capacity to protect national interests, and ensure more stable and constructive relations with international partners.

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Ensuring a Fair Development? The Role of Cohesion Policy and Just Transition Mechanism in the EU Green Initiative

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Abstract: The dual imperatives of environmental sustainability and equitable development occupy a central position in the EU's strategic vision, yet their concurrent pursuit engenders inherent tensions. The EU has noted that some regions and people are more vulnerable in the process of realizing green ambitions and that the Just Transition Mechanism (JTM) and Cohesion Policy (CP) are two of the most crucial concepts and tools for the EU to mitigate this friction in order to mediate between socio-economic equity and the realization of green ambitions. This article examines how the EU's CP and JTM reconcile environmental climate goals with social fairness, especially the potential challenges and interactions in this process. Combining legal analysis of EU treaties and funding regulations with policy evaluations of subsidy implementation, it identifies a divergence in primary objectives between the CP's regional balanced development goals and the JTM's mandate to mitigate the social impact of urgent decarbonization. The study argues that achieving a fair green transition requires a wider interpretation of "Just Transition" under EU climate law. It proposes harmonizing the CP and JTM, and sets the functionalism as the core to determine the integrative relationship between the CP and JTM. Furthermore, enforceable and convenient procedural rights for affected populations is a feasible way to improve the supporting effect of related structural funds. By addressing normative gaps in participatory equity, this analysis advances institutional pathways to align environmental urgency with just development in supranational policymaking and implementation.

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1. Introduction

Since the adoption of the European Green Deal (EGD) in 2019,[1] the European Union (EU) has promoted its pace of legislation on environmental protection and climate change mitigation in order to achieve its green objectives.[2] The EGD covers multiple sectors of the EU economy which shows the EU's ambitions to transform itself into a modern and resource-efficient society.

Obviously, it is very difficult and complex to accomplish an overall structural change in this giant union. The EU is establishing a legal system for green transition through harmonized legislation to ensure the consistency of member states' environmental policies; however, there are wide disparities in the level of economic development of individual member states and regions of the European Union, and for some low-income regions that rely on traditional industries, green transition is a tough process. From its inception, the EU has been attentive to internal inequalities and has consistently intervened to bridge the gap between different regions. Article 174 of the Treaty on the Functioning of the European Union (TFEU) provides that the EU's goals include: "strengthening of its economic, social and territorial cohesion" and "reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions."[3]

It is the Treaty foundation of the cohesion policy (CP). This policy is a main investment policy[4] to divert multiple EU fund resources to reduce

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1 This document accommodates environmental challenges in various areas and sets out a systematic path for economic sustainability development in the EU. See "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions the European Green Deal," European Commission, December 12, 2019, accessed April 6, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019DC0640.

2 These are selected environmental legislative actions, not all the related legislation enacted after the publication of the European Green Deal.

3 Consolidated version of the Treaty on the Functioning of the European Union - Part Three: Union Policies and Internal Actions – Title XVIII: Economic, Social and Territorial Cohesion – Article 174 (ex Article 158 TEC) (OJ C115, 9 May 2000), accessed March 10, 2025, https://eur-lex.europa.eu/eli/treaty/tfeu_2008/art_174/oj/eng.

4 The EU's definition of investment policy from the perspective of policy implementation, however, as a provision set out in the TFEU and reflective of the EU's holistic approach and endeavors, is a principle that must be followed and taken into account in the implementation of all EU policies.

the disparity of EU inequality.[5] Although the green transition is a main focus of the CP, it is a policy strategy which has to take comprehensive factors that contribute to the EU internal inequality. Thus, some disputes and ambiguities would arise which would hinder the process of the EU green transition. It is evident that the reason for the dispute is the discrepancy in policy goals, and the measures of reconciliation is worth delving into.

The JTM is a critical tool to support the fairness of EU green transition which would help to mobilize approximately EUR 55 billion from 2021 to 2027.[6] At first blush, these two policy instruments may cooperate and ensure the equity in the EU green transition process. The fact, however, is that there are still a large number of regions that can barely afford the industrial change and replacement under the green initiative.

The implementation and application of the EU's CP and JTM is not a simple overlay, they are different policies pursing different targets with a certain degree of functional overlap. In addition, the concepts of the just transition (JT) and CP, their internal structures and legal implications are not clear. In this context, even their respective roles cannot be fully defined, let alone the linkages and synergies effect between the two.

Although there are a few scholars that explore the concept and legal implication of the JT[7] – they delve into the question to explore its function and meaning in the EU or international context – it is still limited and not enough. For one thing, due to the different sources and scenarios of application, the concept and legal meaning have to be examined in the specific context of the EU green transition, while assessing their usefulness in the context of concrete examples. For another, the relationship and synergies effect between the JT and CP have not been examined.

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5 "EU Cohesion Policy (2021–27) – Policies," IEA, October 26, 2021, accessed March 10, 2025, https://www.iea.org/policies/14328-eu-cohesion-policy-2021-27.

6 "The Just Transition Mechanism – European Commission," European Commission, accessed February 10, 2025, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en.

7 Vilja Johansson, "Just Transition as an Evolving Concept in International Climate Law," *Journal of Environmental Law* 35, no. 2 (2023): 229–49; Vasiliki (Vicky) Karageorgou, "The EU Just Transition Concept and Its Application in the Case of the Just Transition Mechanism," *Journal for European Environmental & Planning Law* 20, no. 3–4 (2023): 287–320, https://doi.org/10.1163/18760104-20030006.

Against this background, this article would delve into the concept and legal implication of EU's JT and CP, especially the relationship and policy interactions between the two in the context of the EU's pursuit of environmental objectives.

2. Concept and Legal Implication

2.1. Elements, Origins and Purpose

The concept of the JT was first introduced by a worker activist in North America.[8] Its impact and influence has expanded in the decade since it was introduced, but the basic scope of coverage remains in the context of labor rights affected by environmental policies. The noun was adopted by international organizations as well. The UN Framework Convention on Climate Change (UNFCCC) adopted the reference of JT in a meeting in 2010 after years of negotiation.[9] In 2016, the International Trade Union Confederation (ITUC) Centre for the JT released a report stating that the JT is not only about tackling unemployment, it's an initiative investing in programs and efforts to achieve sustainable goals for jobs, sectors, and economies.[10] The factors that incorporated in the JT consideration has been extended and was not limited to the environmental policy impact on labor rights by this interpretation.

In contrast to the JT, the CP is a more macro-level policy that is widely accepted in the EU field, which is usually linked to the EU's territorial space, i.e. "territorial cohesion," and which, as already mentioned, is rooted in Article 174 of the TFEU.[11] Apart from the Treaties, there have been many

8 Anabella Rosemberg, "Building a Just Transition: The Linkages between Climate Change and Employment," *International Journal of Labour Research* 2, no. 2 (2010): 125–61.

9 The document states "Realizes that addressing climate change requires a paradigm shift towards building a low-carbon society […], while ensuring a just transition of the workforce that creates decent work and quality jobs." UNFCCC: Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad-Hoc Working Group on Long-term Cooperative Action under the Convention (March 15, 2011).

10 "Just Transition: A Report for the OECD," JTC, May 2017, accessed March 2, 2025, https://www.oecd.org/environment/cc/g20climate/collapsecontents/Just-Transition-Centre-report-just-transition.pdf.

11 Consolidated version of the Treaty on the Functioning of the European Union – Part Three: Union Policies and Internal Actions – Title XVIII: Economic, Social and Territorial Cohesion – Article 174 (ex Article 158 TEC) (OJ C115, 9 May 2000).

initiatives and agendas that deal with the EU territorial development gap in the last two decades, the territorial perspective of the CP provides the legal foundation and context for these measures.[12] The legislative work of the CP began in the 1990s, with a legislative cycle of six years or so; basically the funds and regulations related to the maintenance of fairness in the EU are all included in the framework of the CP.[13]

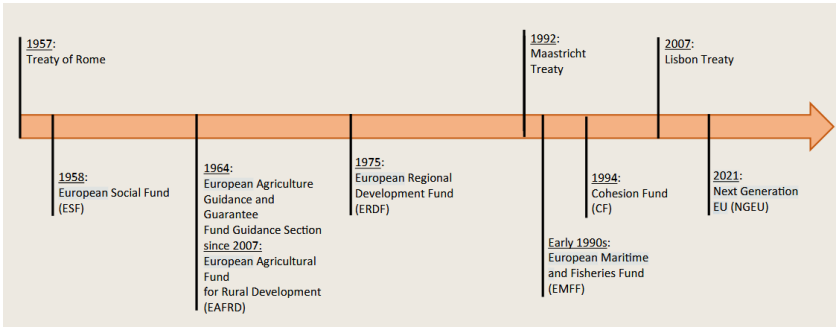

Fig. 1. Key Treaties and funds related to CP. (Victor Forte-Campos and Juan A. Rojas, "Historical Development of the European Structural and Investment Funds" [SSRN Scholarly Paper, Social Science Research Network, Rochester, 2021], https://papers.ssrn.com/abstract=3873939.)

Reducing imbalances and inequalities within the Union is the aim of the CP. This attempt entails economic, social, and geographical coherence that is consistent with article 174 of the TFEU, with special emphasis on rural and other underprivileged areas impacted by industrial transition. Thus, mitigating the impacts of ecological policies to promote a fair transition is only one aspect of the CP, which is fundamentally concerned with the inequalities that arise in all areas of the EU's socio-economy. This provision dates back to 1957, the Treaty establishing the European Economic

12 Vratislav Havlík, "The Power of Ideas: The Territorial Dimension of EU Cohesion Policy and Its Impact on EU Multi-Level Governance," *European Journal of Spatial Development*, October 17, 2023.

13 European Commission, "Cohesion Policy Legislation 2021–2027," accessed February 28, 2025, https://ec.europa.eu/regional_policy/information-sources/legislation-and-guidance/regulations_en.

Community (TEEC).[14] The main tools for the CP implementation are various types of structural funds (see Fig. 1), but it is debatable that some scholar equates the CP with various types of structural funds in their discussions.[15]

2.2. Current Legal Basis and Connection between the Just Transition and Cohesion Policy

2.2.1. The Paris Agreement Sets the Concept Foundation for the Just Transition

As mentioned previously, the concept of the JT did not originate from the EU, it originated in North America. The international organizations play an important role in the development and expansion of its concept and influence. The signing of the Paris Agreement in 2015 was a major milestone in the expansion of JT's influence, with the JT prominently featured in the agreement. The EU formally ratified the adoption of the accession to the Paris Agreement in 2016, whereby the JT has had a significant impact through the international treaties on the equity of the EU's green transition. The relevant formulation of the JT appears in the preamble to the Paris Agreement,[16] but in international law, preambular provisions do not generally create legal obligations.[17] Although EU and some other western countries realized the importance of the JT, they signed a political declaration to uphold the international endeavor for it,[18] it serves only as a sworn statement and has no formal legal effect.

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14 Article 158 of the Treaty establishing the European Economic Community (TEEC), also known as the Treaty of Rome, is now article 174 of the TFEU.

15 Lars P. Feld and Joshua Hassib, "On the Role of EU Cohesion Policy for Climate Policy," (working paper, ZEW Discussion Papers, 2024).

16 The Preamble to the 2015 Paris Agreement refers to the Just Transition by committing to "take into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities." United Nations, Paris Agreement (2015) Preamble.

17 Jan Klabbers, "Treaties and Their Preambles," in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, eds. Dino Kritsiotis and Michael J. Bowman (Cambridge: Cambridge University Press, 2018), 172–200, https://doi.org/10.1017/9781316179031.009.

18 "Supporting the conditions for a just transition internationally" adopted 4 November 2021 at the COP 26 in Glasgow, UK, para. 4, accessed March 14, 2025, https://webarchive.nationalarchives.gov.uk/ukgwa/20230313132211/https://ukcop26.org/supporting-the-conditions-for-a-just-transition-internationally/.

2.2.2. EU Legal Framework for the JT and CP

It is evident that the JT and CP have different policy objectives and also arise in different legislative contexts. Article 174 of the TFEU, as the primary law of the EU, sets a valid foundation for the CP. It can be deemed as the guiding principle for the subsequent CP measures with the aim of decreasing developing disparities in the EU.[19] This policy can also be seen as a comprehensive investment policy as it is implemented to foster equal socio-economic development in the EU through investment.[20] As displayed in Figure 1, the main component is the multiple EU funds constructed for different purposes.[21] The Common Provisions Regulation (CPR)[22] incorporates the stipulation about the priority use of these funds for achieving sustainability, green, fair transition to a net zero carbon and a resilient EU economy.[23] This regulation is a key legal strategy to establish a unified rule for the management, allocation and implementation of the EU's eight structural funds. By harmonizing these funds, this design would maximize the influence of EU funding to support the territorial cohesion and sustainable development. In addition, as a periodic measure, the 2021–2027 rule set a new fund of the JT, which sets a legal link between the JT and CP compared with the 2013–2020 CPR.[24]

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19 Lela Tijanić and Ines Kersan-Škabić, "Tracking the Green Transition in the European Union within the Framework of EU Cohesion Policy: Current Results and Future Paths," *Economies* 13, no. 2 (2025): 37, https://doi.org/10.3390/economies13020037.

20 Ian Bache, "Cohesion Policy: A New Direction for New Times?," in Helen Wallace, *Policy-Making in the European Union*, 7th ed. (Oxford: Oxford University Press, 2014).

21 The funds under the Cohesion policy framework mainly including European Regional Development Fund (ERDF), European Agricultural Fund for Rural Development (EAFRD), European Social Fund (ESF), Cohesion Fund (CF), European Maritime and Fisheries Fund (EMFF).

22 Regulation (EU) 2021/1060 of the European Parliament and of the Council of June 24, 2021 Laying down Common Provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and Financial Rules for Those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (2024), http://data.europa.eu/eli/reg/2021/1060/2024-06-30/eng.

23 "Cohesion Policy of EU," European Circular Economy Stakeholder Platform, February 14, 2025, accessed April 1, 2025, https://circulareconomy.europa.eu/platform/en/financing/cohesion-policy.

24 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of December 17, 2013 Laying down Common Provisions on the European Regional Development

The EU has emphasized the importance of the JT in its climate law,[25] it explicitly stipulates that the climate actions should be taken aligning with a way of "just and fair transition." This stipulation ensures the position of the JT in the EU secondary law. In addition, the EGD and its following multiple initiatives have specified the implementation measures of the JT. The main strategy is constructing a JT mechanism, as a part of the EGD investment plan to mitigate the negative effect of the green transition.[26] There are three pillars to support the operation of the mechanism: Just Transition Fund (JTF), "InvestEU" scheme, and public sector facility.[27] The relevant fund and financial legal documents including the CPR naturally fall into the legal documents of JTM.[28]

2.2.3. The Comparison and Relation between the JT and CP

The JTF has been included in the implementation framework of the CP,[29] which shows that there is functional overlap between the two with a similar main practical way of investment and funding. In addition, the CPR also incorporates both of the JTF and cohesion fund to channel money flow with the other six funds.[30] This regulation would motivate one third of the EU

Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund f˙or Rural Development and the European Maritime and Fisheries Fund and Laying down General Provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and Repealing Council Regulation (EC) No 1083/2006 (OJ L347, 20 December 2013), http://data.europa.eu/eli/reg/2013/1303/oj/eng.

25 EU Climate Law, supra note 12.

26 The European Green Deal, supra note 1.

27 "The Just Transition Mechanism – European Commission," European Commission, accessed February 10, 2025, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en.

28 Although not all the funds included by the Common Provision Regulation regulation to the Just Transition fund, which is one of the core funding tools of Just Transition Mechanism, there is definitely the regulating function produced by the CPR.

29 "Cohesion Policy," European Circular Economy Stakeholder Platform, February 14, 2025, accessed April 1, 2025, https://circulareconomy.europa.eu/platform/en/financing/cohesion-policy.

30 Regulation (EU) 2021/1060 of the European Parliament and of the Council of June 24, 2021 Laying down Common Provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and Financial Rules for Those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ L231, 30 June 2021), http://data.europa.eu/eli/reg/2021/1060/oj/eng.

budget to promote the realization of a comprehensive strategic direction,[31] which links the operation and application of the JT and CP in the funding process. However, this does not mean that there is a common and consistent goal between the two. For one thing, with regards the JT, the EU climate law and the EGD focus on supporting people and places which are influenced by green policy to promote the pursuit of climate and environmental goals. For another, the CP, with its original goal to support the balanced economic development within the EU. It can be seen that although the CP is concerned about the regional development imbalance caused by the EU's environmental policies, its ultimate pursuit is balanced and equitable development within the EU, and the JT aims to maintain the legitimate interests of people affected by green policies to promote the realization of environmental goals, so it can be concluded that the pursuit of the two is not exactly the same.

3. Micro Perspective: The Operational Practice of Just Transition and Cohesion Policy

Various EU Structural Funds and other financial support are the main instruments for the implementation of the JTM and CP. Member states and regions are the main recipients of funds when they are in operation, and it is worth noting that the Just Transition Fund (JTF) is not only one of the pillars of the JTM, but also is included in the toolbox of the CP strategy by the EU.

The JTF requires joint efforts and close coordination between EU and its members in its implementation. First of all, the ultimate pursuit of the JTF is definitely the EU's environmental goals, so, according to the JTF Regulation, Member States that have not committed to reach net zero carbon emissions by 2050 can only approach half of the fund's resources.[32] This provision clarifies that one of the functions of the JTF is to facilitate the EU member states' compliance with the EU's ultimate goal of achieving

[31] There are five strategic directions in detail: (1) Smart and Competitive Europe; (2) Green and Climate-Resilient Europe; (3) Connected Europe; (4) Social and Inclusive Europe; (5) Europe Closer to Citizens.

[32] Regulation (EU) 2021/1056 of the European Parliament and of the Council of June 24, 2021 Establishing the Just Transition Fund (OJ L231, 30 June 2021), https://eur-lex.europa.eu/eli/reg/2021/1056/oj/eng.

carbon neutrality by 2050, accelerating the Union's transformation as a whole. The Commission will give final approval to the regions where the Fund projects will be implemented, and the member states and regional authorities will work together to prepare one or more Territorial Just Transition plans (TJTPs).

As the country received the most EU funding from 2014 to 2020, amounting to EUR 1.5 billion, Poland is a practical example for understanding the interaction and conflict between the JTM and CP.[33] Its plan was approved by the European Commission in 2022, in which five Polish priority regions were listed. However, there were, in fact, seven regions initially proposed by Poland, but two regions, Lublin Voivodeship and Zgorzelec, were rejected by the EU due to lack of clarity in the plan. In addition, the Western Małopolska region was later rejected on the grounds that it did not detail how the JT's funding would affect the region's transformation process.[34]

The EU's rigorous scrutiny of the use of JTF funds is partly reflected in the content requirements for the TJTP. The JTF Regulation require member states to submit plans describing the ways in which they will support jobs and ensure that these measures are in line with the principles of climate neutrality and the EGD.[35] This is the EU's way of guiding and monitoring the effective implementation of the EU's green policies by individual member states, and of using JTF funds for transformational aid in line with green objectives. Some people may think that this strategy may lead to a less efficient use of JTF funds, and that some regions affected by the transition policies may not receive the funding they deserve. This is understandable, as each region has different facilities and human resource bases, as well as different degrees of impact. procedures. However, the JTF Regulation, as well as other relevant fund regulations, provide for detailed and stringent

33 "EU Cohesion Policy: Commission Adopts €76.5 Billion Partnership Agreement with Poland for 2021–2027," European Commission, June 30, 2022, accessed April 9, 2025, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4223; "Cohesion Policy and Poland," Official Website of European Commission, accessed April 3, 2025, https://ec.europa.eu/regional_policy/en/information/publications/factsheets/2014/cohesion-policy-and-poland.

34 Miłosława Stępień, Alina Pogoda, and Michiel Stapper, *Following the Money: Poland – What Is the Just Transition Fund Going to Finance* (CEE Bankwatch Network, 2024).

35 Regulation (EU) 2021/1056 of the European Parliament and of the Council of June 24, 2021 establishing the Just Transition Fund, 2021 (OJ L231, 30 June 2021).

operational procedures, as these institutionalized funds have established objectives. Simplifying the approval process could lead to the funds being used for other purposes or even misused, so it is not acceptable to solely cut off some operational and screening processes, especially when the steps are set to ensure the alignment between policy objectives and funding flows.

The TJTPs submitted by the five Poland regions are significantly different. The Upper Silesia region emphasizes innovation and the substitution of traditional industries by high-tech industrial institutions, while the Western Małopolska region focuses on supporting and investing in enterprises in order to contribute to the stabilization of the employment rate and to prevent people from losing their jobs. In addition, some plans lack key components.[36] For example, the Upper Silesian region does not provide an emissions reduction target for the region, and the region's coal plants will be completely shut down by 2030, which would reduce CO_2 emissions by a significant amount because most of the region's electricity was generated by coal prior to the transition. Anticipated estimates of emission reductions are important for achieving climate neutrality. Article 11(d) of the JTF Regulation requires that the expected contribution to the 2050 climate neutrality goal of the impacts on the environment, economy, and employment of the JTF's support be described in the TJTP.[37] This plan does not strictly comply with this requirement. However, this provision also does not explicitly require the reporting of carbon reduction values by region in the provided TJTP, leaving room for ambiguity in the content of the TJTP.

Compared to the JTM, the CP covers a wider sectors scope. A number of EU funds, including the JTF, and financial instruments are categorized in a policy perspective under the CP. Its multiple mandates dictate its comprehensive objectives in policy practice, as evidenced by the amount of

[36] Selective elements of planned outcomes based on TJTP of Poland, CEE Bankwatch Network based on a methodology formulated by Michiel Stapper and data contained in the Territorial Just Transition Plans for Poland, Emilia Ślimko, Magdalena Bartecka and Alina Pogoda, Territorial Just Transition Plans for Polish Coal Regions (Alliance of Associations Polish Green Network, CEE Bankwatch Network, 2021), accessed May 14, 2025, https://bankwatch.org/wp-content/uploads/2021/10/2021-10-20_TJTP_Poland.pdf.

[37] Regulation (EU) 2021/1056 of the European Parliament and of the Council of June 24, 2021 establishing the Just Transition Fund, 2021 (OJ L231, 30 June 2021).

funds set aside for the CP 2021–2027: EUR 392 billion – which is equivalent to one-third of the EU's total budget.[38] According to the CP 2021–2027 partnership agreement between Poland and the Commission,[39] the CP's efforts are directed in five main directions: firstly, the energy transition and environmental protection; secondly, the digitalization of EU society; thirdly, the protection of the rights of citizens; fourthly, the financing of regional governments to promote the partnership; and fifthly, the support and protection of the fisheries and the marine environment. The first objective is the most green-relevant, the JTF will support several of Poland's most affected regions with nearly EUR 4 billion in financial support, however, according to the agreement,[40] most of the CPF funds will be used for direct green investments rather than supporting the affected areas. The third goal focuses on social inclusion and resilience. The fifth measure focuses on fisheries and the marine environment, which is a direct contribution to the environment, biodiversity and other climatic issues, and does not pay much attention to the inequities caused by the relevant transformation measures. Otherwise, the other two goals are not directly related to a fair green transition.

It can be seen that at the policy level, the EU places the environment, climate and ecological pursuits at the forefront of the CP. However, Article 174 of the TFEU, which is the legal foundation of the CP, does not seem to be set up for the pursuit of environmental objectives, and only a small part of the funds would generate direct effect on reducing regional disparities brought about by green transition measures.

38 Vasilis Margaras and Emmanuel Alvarez, "The Future of Cohesion Policy: Current State of the Debate," European Parliamentary Research Service, 2025, accessed April 29, 2025, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2025)767217.

39 "EU Cohesion Policy: Commission Adopts €76.5 Billion Partnership Agreement with Poland for 2021–2027," European Commission, June 30, 2022, accessed April 9, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_22_4223/IP_22_4223_EN.pdf.

40 Ibid.

4. Assessment of Measures Under the Due Conception and Legal Implications of Just Transition and Cohesion Policy

4.1. Limitation of Implementing Framework

Although the EU currently places the CP and JTM at a crucial position, and has set up European structural funds such as the JTF, CPF, ESF+, ERDF, etc. to provide substantial economic support, these settings may still not be able to fully buffer the industrial and employment impacts of the EU's green policies. The dimension, framework, and intensity of the current JT implementation are not enough. Also, the citation and application practices of the CP policy show a tendency of generalization, which may lead to the impairment of the function of the CP policy and is not conducive to the achievement of equity in the green transition.

The JTF creates an immediate link between the JTM and the CP, which enhances the relevance of the two. However, it just focuses on the most affected region,[41] the interests of other citizens who are affected to varying degrees can easily be ignored. In addition, even though the JTF as a core fund does not fully reflect the concept of equity in the JT, the population focused on in the implementation of the JTF regulation is limited. It mainly helps the employment situation in the most important traditional industrial areas, such as the unemployed in fossil energy extraction companies; however, the fact remains that there are a large number of other citizens who are directly affected by the industrial changes in these areas.[42]

Furthermore, the JTF application requirements are not of a sufficient standard. As mentioned above, member nations are obliged to send in the TJTP to the EC under the JTF Regulation with the required key information attached to its content. However, due to the lack of detail required by the filing criteria, some crucial information in the plan form may not be mentioned. In addition, the official organizations of these regions may be eager to receive economic support from the JTF due to the pressure of shortage of funds, while neglecting to pay attention to the objectives of

41 Ruven Fleming and Romain Mauger, "Green and Just? An Update on the 'European Green Deal'," *Journal For European Environmental & Planning Law* 18, no. 1–2 (2021): 164–80, https://doi.org/10.1163/18760104-18010010.

42 Karageorgou, "The EU Just Transition Concept and Its Application in the Case of the Just Transition Mechanism."

the JTF, in which case the goal of fairness that the JTF is expected to pursue will be jeopardized.[43]

Moreover, the JTM and CP are in conflict to some extent, although the EU appears to have achieved a coupling between them. In terms of its fundamental function, the CP aims to promote economic growth and employment opportunities to downsize the economic differences across the different areas of the EU, which is essentially an economic promotion policy, and some of the projects may be related to traditional industries, which is not in line with the green transition pursued by the JT. There may also be a conflict when dividing EU resources between the climate change adaptation actions and the CP.[44] Whilst the EU has made principles such as sustainable development key to the operation of the CP, including innovation, accessibility, education, business, employment and other factors, all points are to be considered by the CP,[45] so it is bound to be inclusive to a certain extent. The EU has taken note of this issue and it is undeniable that in the last decade it is increasingly strengthening the link between the CP and environmental protection and climate change mitigation endeavors,[46] which is a good tendency, however in terms of the functionality of the legal set-up, it is very difficult to fully reconcile it.

Last but not least, money mobilized by funds and other tools is insufficient. The EU is currently supporting the green transition through funds such as the JTF, ESF+, and other financial support such as Invest EU. What appears to be a systematic approach to aid is, in fact, deeply flawed, with the exception of the JTF, other instruments either do not have the sole purpose of financing areas affected by the green strategy or do not have the capacity to do so directly. The EU structural funds including the JTF, CPF are the mainstay of the defense of a JT, and, according to the common rules of these

43 Another potential negative factor is the current EU JTM focus on the most affected regions and citizens, which promotes competition between different regions to receive funding allocations, which may have led to a lack of analysis of intended programs and impacts. As a result, the JTF's use of funds may be derailed.

44 Feld and Hassib, "On the Role of EU Cohesion Policy for Climate Policy."

45 Ramona Pîrvu et al., "The Impact of the Implementation of Cohesion Policy on the Sustainable Development of EU Countries," *Sustainability* 11, no. 15 (2021), https://doi.org/10.3390/su11154173.

46 Michal Nekvasil and Bedřich Moldan, "Could Cohesion Policy Push EU Climate Efforts?," *Climate Policy* 18, no. 1 (2018): 129–39, https://doi.org/10.1080/14693062.2016.1251878.

funds, the achievement of the climate goals is one of their main objectives, and thirty per cent of the funds will go to this area. However, equity, which is affected by climate measures, is not sufficiently taken into account.[47]

4.2. The Misalignment of CP Policy's Focus on Equity in the Green Transition

According to the primary law of CP legislation, Article 174 of the TFEU, the CP is set up to improve economic, social and territorial cohesion.[48] The generalized provisions of primary law leave a great space for interpretation and manipulation by EU officials. This has led the EU to pile more and more elements into the CP, and while it is understandable to give the CP overarching consideration, the focus on a fair green transition must be reinforced.

For one thing, the EU defines the CP in practice as its primary investment policy,[49] which limit its function of the JT facilitation. As the original purpose of the CP policy was for EU cohesion, it is reasonable for the EU to consider the imbalance caused by the green transition as only one of the aspects.[50] However, defining the CP directly as an investment policy may limit its role and function in promoting EU cohesion and alleviating disparities between regions, as support in other areas such as culture, education, training, etc., in addition to finance, is also important. This limitation may also have a negative impact on the adaptation of the green transition.

For another, climate friendliness and energy transition are gaining importance in the CP program. Three of the eleven objectives of the CP program for 2014–2020 are related to climate change issues.[51] In fact, the CP has never lacked attention to climate change issues in its implementation over the years.[52] Compared to the 2014–2020 phase, the 2021–2027

47 The EU Common Provision regulation, supra note 44.

48 Article 174, TFEU, supra note 7.

49 "Modernising the Cohesion Policy to Meet Today's Challenges," Directorate-General for Communication, April 1, 2025, accessed May 5, 2025, https://commission.europa.eu/news-and-media/news/modernising-cohesion-policy-meet-todays-challenges-2025-04-01_en.

50 The EU has listed related legislation on Cohesion Policy. See "Cohesion Policy Legislation 2021–2027," European Commission, accessed May, 5 2025, https://ec.europa.eu/regional_policy/information-sources/legislation-and-guidance/regulations_en.

51 Dorota Murzyn, "Cohesion Policy and the EU's Response to Climate Change Challenges," *Przegląd Europejski* 2022, no. 4 (2023): 81–94, https://doi.org/10.31338/1641-2478pe.4.22.6.

52 Elisavet Thoidou, "The Climate Challenge and EU Cohesion Policy: Implications for Regional Policies," *International Journal of Innovation and Sustainable Development* 7, no. 3 (2013): 303–20, https://doi.org/10.1504/IJISD.2013.056946.

CP program has gone further in terms of greening, with increased financial support, improved regulation and adjustment measures, and reinforced communication and visibility provisions (see Table). Increased attention and investment in green is a trend in the EU policy area; however, businesses and individuals in regions that have been affected by the transformational shocks caused by green policies have not received more attention. The current CP policy focus on green areas is centered on promoting and supporting the energy transition and water resilience. Rather than directly supporting the adaptation of affected regions to the green transition, the CP policy is moving away from a "balanced" and "cohesive" approach.

Table. Environment and Climate Consideration of two program periods of Cohesion Policy (2014–2020, 2020–2027).

2014–2020	2021–2027
Relevant ex-ante conditionalities.	Enabling conditions.
List of specific actions to take into account environmental protection requirements, resource efficiency, climate change mitigation and adaptation, disaster resilience and risk prevention and management, in the selection of operations.	Climate proofing of investments in infrastructure with an expected lifespan of at least 5 years.
Climate and environmental weighting of intervention fields in implementing act.	Climate and environmental weighting of intervention fields in annex I.
Minimum contribution at Fund level to climate targets.	If 3% climate bonus applied to Recovery and resilience plan, then also to Cohesion Policy funds.
Total indicative amount of support envisaged for climate change objectives to be indicated in the Partnership Agreement and in the programmes.	National climate contributions, for ERDF and Cohesion Fund, to be established in the Partnership Agreement.
	Climate adjustment mechanism: in case monitoring indicates insufficient progress, remediation measures agreed in annual review meeting.
Managing authorities to undertake actions to avoid or reduce environmentally harmful effects of interventions and ensure results in net social, environmental and climate benefit.	"Do no significant harm" principle.

Source: "New Cohesion Policy," European Commission, accessed May 5, 2025, https://ec.europa.eu/regional_policy/2021-2027_en.

The JTM and CP are essential to accelerate the EU's adaptability to green policies. They can help to address the equity issues arising from carbon reduction policies, where the TFEU provides a legal centerpiece of balanced development and cohesion in the EU. But the EU has adopted a restrictive understanding of the JT, while the CP policies have strayed from the conceptual track of valuing balanced development.

5. Definition of "Just Transition" in a More Strengthened Legal Context

5.1. Stabilization and Expansion

Whether internationally or within the EU, the JT is increasingly mentioned and cited, and its theoretical connotations are becoming richer, but there are very few interpretations of its legally binding definition; it remains "underdiscussed and poorly defined in legal literature."[53] In the EGD, the EU closely links the JT to green investments and explains the functions of the JTM:

> The Just Transition Mechanism will focus on the regions and sectors that are most affected by the transition because they depend on fossil fuels or carbon-intensive processes. It will draw on sources of funding from the EU budget as well as the EIB group to leverage the necessary private and public resources.[54]

The EGD categorizes the JTM as part of its sustainable investment program at the implementation level and does not elaborate on the theoretical definition of the JT. Besides, the EU climate law also does not elaborate on the definition of the JT, its Article 4(5) simply states that "the need to ensure a just and socially fair transition for all" needs to be taken into account in the pursuit of climate goals.[55]

JT represents the direction of the EU's attention and efforts to address the equity of the various social roles generated by green measures.[56] There-

[53] Ann Eisenberg, "Just Transitions" (SSRN Scholarly Paper, Social Science Research Network, Rochester, 2018), https://papers.ssrn.com/abstract=3281846.

[54] 2.2.1, European Green Deal, supra note 1.

[55] The EU Climate Law, supra note 12.

[56] Some of the EU's green policies are to some extent the product of political activity and gamesmanship, and there is a degree of opacity in their operation. Anna Kyriazi and Joan Miró, "Towards a Socially Fair Green Transition in the EU? An Analysis of the Just Transition Fund Using the Multiple Streams Framework," *Comparative European Politics* 21, no. 1 (2023): 112–32, https://doi.org/10.1057/s41295-022-00304-6.

fore, it should be set as a binding principle of EU environmental governance. Current frameworks merely acknowledge the JT through fragmented aspirational clauses, lacking substantive obligations to operationalize socio-economic equity in decarbonization.[57] Elevating the JT to a cross-cutting legal principle would mandate systematic ex-ante impact assessments for all climate policies, ensuring proportionality between mitigation targets and distributive justice. Concurrently, legislative revisions must expand the JT's targeting scope beyond the most affected fossil fuel-dependent regions. Amendments to the JTF should cover all significantly adversely affected entities, including workers in carbon-intensive industries, SMEs in green transitions, and communities impacted by biodiversity policies. The JT framework must evolve beyond investment to integrate technical assistance, educational interventions, and judicial safeguards enabling CJEU oversight of national compliance. This holistic approach would transform the JT from political rhetoric into an actionable rights-based framework, aligning with the EU's value of social rights while mitigating regressive impacts of the green transition.

5.2. Enhancing the Compatibility of Cohesion Policy

The balanced development of environmental protection is a vital area of concern for the CP, which is rooted in the importance of environmental protection matters in the EU. Article 191(1) of the TFEU makes the protection and enhancement of the quality of the environment a pursuit of EU policy.[58] The CP's focus on the green development gap reflects a focus on fairness. In this sense, the JTF belongs to the scope of the CP.

In addition, the scope of the CP is quite large and is not limited to regional disparities caused or amplified by green policies,[59] but also focuses on regional economic disparities in the EU caused by a variety of

[57] Jerzy Jendrośka, Moritz Reese, and Lorenzo Squintani, "Towards a New Legal Framework for Sustainability under the European Green Deal," *The Opole Studies in Administration and Law* 19, no. 2 (2021): 87–116, https://doi.org/10.25167/osap.4274.

[58] Article 191(1), TFEU, supra note 7.

[59] The diversified targets can be seen in the CP objectives set out in the partnership agreement between Poland and the commission, which include: educating energy dependence and protecting the environment; digital transformation of the economy and society; building socially inclusive and resilient communities; local partnerships; sustainable fisheries and aquaculture sector; sustainable fisheries and aquaculture; and the development of the local

reasons. Therefore, the promotion of green investment is also its main concern, which creates friction within it, and can also be understood as friction between the CP and the JTF, i.e. the CP promotes the green industry transition through investment,[60] and also supports employment and business development in regions affected by this transition through funding to maintain equity. Although the EU has set an ambitious zero carbon target, this should be based on the premise of overall equity. The EU, as a whole, not a particular EU region, is the subject to seek to realize the goal. As such, the CP should allocate a sufficient amount of funds to promote the development of the economy of the affected region, rather than overly aggressively investing a large portion of the funds in the replacement of traditional industries. This is, in fact, supported by EU law, as Article 191(2) TFEU mentions: "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union."[61]

Regional differences should, therefore, be a necessary consideration for the implementation of green policies. Therefore, the CP should first consider the expected resilience of regions to the impacts of green investments and establish a systematic assessment of socio-economic impacts when developing and implementing green policies, and allocate JTF funds accordingly.

The CP is designed to respond to national and regional differences within the EU.[62] Although the CP is important for investments to reduce gas emissions, and related climate investments are increasingly expanding, these growing green investments are predicated on adequate funding to ensure balanced development and growth across regions.

economy, society; Building socially inclusive and resilient communities; Local partnerships; Sustainable fisheries and aquaculture sector. See the Partnership Agreement, supra note 70.

60 Green policies may be understood in a broad sense to include the promotion of direct green transitions as well as the promotion of green and just transitions that are influenced by the corresponding policies. In this context, a narrower understanding is applied.

61 Article 191(2), TFEU, supra note 7.

62 Maciej Jagódka and Małgorzata Snarska, "Should We Continue EU Cohesion Policy? The Dilemma of Uneven Development of Polish Regions," *Social Indicators Research* 165, no. 3 (2023): 901–17, https://doi.org/10.1007/s11205-022-03048-8.

6. Conclusion

The EGD, as the EU's flagship sustainability strategy, crystallizes its transformative climate ambitions by accelerating decarbonization timelines, thereby amplifying the urgency of addressing transitional inequities. This study systematically examines the interplay between the CP and JTM within this accelerated green transition paradigm. While the CP serves as the EU's longstanding instrument for reducing regional disparities through multidimensional investments in infrastructure, innovation, and social inclusion, the EGD's heightened pace of ecological modernization has intensified tensions between rapid industrial restructuring and equitable outcomes. The analysis positions the CP and JTM as dual yet often misaligned pillars of the EU's sustainability architecture, tasked with reconciling climate neutrality objectives under the Paris Agreement with the socio-economic vulnerabilities of structurally disadvantaged regions.

The CP's multiplicity of objectives and lack of normative definition of the JT creates functional overlaps and tensions with the JTM, which prioritizes compensatory justice for communities affected by decarbonization. While the CP increasingly channels investments into green infrastructure, its limited focus on transitional equity reveals a structural imbalance. In addition, procedural gaps in stakeholder participation — exemplified by contested TJTPs in Central and Eastern Europe — highlight systemic barriers to translating equity norms into enforceable entitlements.

To reconcile these tensions, the study advocates for a binding and clearer legal definition of "Just Transition" within the EU framework, mandating comprehensive socio-economic impact assessments for climate policies. It further proposes integrating the JTM's compensatory measures with the CP's structural reforms to ensure vulnerable communities receive sufficient transitional relief and sustainable development support.

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Judicial Responses to AI-Generated Works: A Comparative Case Law Analysis on Copyright

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Abstract: As artificial intelligence (AI) increasingly contributes to the creation of original content, legal systems are under pressure to determine whether and how such outputs can be protected by copyright. While much of the academic debate focuses on future legislative reforms, courts and existing legal frameworks are already being tested by real disputes. This paper examines how different jurisdictions, namely, the United States, the United Kingdom, the European Union, Australia, and China, approach the copyright protection of AI-generated works, both at the level of underlying legal doctrine and through judicial interpretation. The first part of the paper outlines the key principles of copyright law in each system, including definitions of authorship, standards of originality, and relevant exceptions or limitations that may apply to AI training and output. The second part shifts to case law, examining how courts have applied or challenged these principles when addressing AI-generated work. In doing so, the paper focuses on three core legal issues: whether AI-generated works can meet originality thresholds, how authorship and ownership are assigned, and how the expression–idea dichotomy is interpreted in this context. It is within this judicial context that the present study situates its analysis, using case law as the primary lens to examine how legal systems are grappling with the growing presence of AI in creative processes. By comparing these legal systems and judicial approaches, the paper demonstrates that

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while human authorship remains a consistent requirement, some courts have begun to accommodate more nuanced forms of human–machine collaboration. Ultimately, the study argues that in the absence of clear legislative reform, courts are actively shaping the emerging boundaries of copyright in the age of generative AI. In addition, this paper contributes to the growing literature on AI and copyright by providing a doctrinal analysis grounded in case law, revealing not only how courts are applying traditional concepts to new technologies, but also where doctrinal tensions are beginning to emerge.

1. Introduction

The growing use of artificial intelligence (AI) puts pressure on established copyright principles, particularly those concerning authorship, liability, and the allocation of rights. As AI-generated works[1] become more prevalent across fields such as music, visual arts, and literature, foundational questions arise about whether these outputs qualify as protectable subject matter or exist beyond the realm of human authorship, thereby disrupting established copyright doctrines. At the heart of these debates lies the complex nature of AI systems. The opacity and unpredictability of algorithmic processes, often described as "black box" operations, complicate the identification of authorship, ownership, and accountability. The legal doctrine emphasizes that the difficulty of tracing the decision-making pathways behind AI outputs creates significant challenges for attributing creative credit and establishing liability. This uncertainty raises the critical issue of whether rights should be allocated to AI developers, users, or withheld altogether under current IP frameworks.[2]

Moreover, the training of AI models frequently relies on massive datasets that often include copyrighted material, intensifying legal concerns over fair use, text-and-data mining exceptions, and licensing requirements. The incorporation of protected content into AI training sets exposes developers

[1] For the purposes of this paper, "AI-generated works" refers to outputs produced wholly or partially through the use of artificial intelligence systems that fall within categories protected by copyright law, such as literary, artistic, musical, and photographic works, and which are capable of meeting the legal criteria of originality and authorship under the jurisdictions examined.

[2] Mark A. Geistfeld et al., *Civil Liability for Artificial Intelligence and Software* (Berlin: De Gruyter, 2023), https://doi.org/10.1515/9783110775402.

and users to potential claims of infringement, while existing doctrines of fair use and exceptions are strained by the scale and opacity of machine learning processes.[3]

Recognizing the limitations of traditional copyright frameworks in addressing these challenges, scholars increasingly advocate for alternative models. One standpoint includes proposing hybrid approaches, granting protection only to AI-assisted works where substantial human creative input is evident, while leaving fully autonomous outputs unprotected. Others suggest *sui generis* rights modeled after database protections, providing limited economic incentives without granting full copyright status.[4]

While these theoretical and legislative debates continue to evolve, it is increasingly in the courtroom where the most immediate and consequential decisions about AI and copyright are taking place. As lawmakers hesitate and policymakers deliberate, courts have begun applying existing legal standards to AI-generated works, often with little doctrinal guidance. This emerging case law provides the clearest view of how traditional copyright principles such as originality, authorship, and the distinction between ideas and expression are being interpreted in response to technological change. Rather than proposing new legal models, courts are testing the boundaries of existing frameworks in real-world disputes, producing rulings that both clarify and complicate the future of copyright in the age of AI.

In terms of structure of this paper, the analysis begins with an overview of the foundational copyright principles in the five jurisdictions under review, United States, United Kingdom, European Union, Australia, and China, focusing on definitions of authorship, standards of originality, and relevant exceptions. It then turns to recent case law, examining how courts have applied or adapted these principles in disputes involving AI-generated works. This is followed by a comparative discussion that identifies areas of convergence and divergence in judicial reasoning, and an exploration of the implications for both the protection of AI-generated outputs and the use of copyrighted works in AI training. The study closes by

[3] Jozefien Vanherpe, "AI and IP: A Tale of Two Acronyms," in *Artificial Intelligence and the Law*, eds. Jan De Bruyne and Cedric Vanleenhove (Cambridge: Intersentia, 2021), 213.

[4] Hafiz Gaffar and Saleh Albarashdi, "Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape," *Asian Journal of International Law* 15, no. 1 (2024): 23–46, https://doi.org/10.1017/S2044251323000735.

highlighting key patterns and offering reflections on possible directions for policy and legislative development. In addition, this article's main theoretical contribution is its typology of judicial responses to AI-generated works, distinguishing between human-centric authorship and technology-neutral originality approaches.

Methodologically, this study adopts a doctrinal, case-based approach. Jurisdictions were selected for their representative diversity in copyright traditions (common law, civil law, and mixed systems) and for the availability of reported judicial decisions on AI-generated works. Cases were included if they directly addressed questions of originality, authorship, or the legality of using copyrighted materials in AI training. Both concluded and ongoing cases were considered to capture evolving judicial trends.

2. Authorship and Copyright Protection of AI-Generated Works: A Comparative Legal Analysis

In copyright law, human authorship remains a core requirement that excludes most AI-generated works from protection. Authorship traditionally requires both mental conception and the tangible execution of a work. In this context, AI systems are generally viewed as tools, not authors.

U.S. doctrine, particularly under the 1976 Copyright Act,[5] frames authorship through an "upstream/downstream" lens: it may lie with developers who design generative models or users who shape specific outputs through prompts, depending on who contributes the creative input. Absent a human who directs both conception and execution, AI-generated works risk being deemed authorless.[6] The U.S. Copyright Office's refusal to register AI-authored works reinforces this stance. U.S. law also applies the fair use doctrine, permitting limited use of copyrighted material without authorization when certain conditions are met. Courts assess intent, the nature of the original work, the amount used, and the effect on the market, applying these factors flexibly. If a use falls outside fair use, even temporary reproductions in volatile memory may constitute infringement.[7]

5 Copyright Act of 19 October 1976, United States Code, Title 17, § 101 et seq., as amended.

6 Jane C. Ginsburg and Luke Ali Budiardjo, "Authors and Machines," *Berkeley Technology Law Journal* 34, no. 2 (2019): 343–438, https://doi.org/10.15779/Z38SF2MC24.

7 Giorgio Franceschelli and Mirco Musolesi, "Copyright in Generative Deep Learning," *Data & Policy* 4 (2022): e17, https://doi.org/10.1017/dap.2022.10.

Meanwhile, the U.K. Intellectual Property Office has tentatively proposed that copyright might vest in the person who "makes the arrangements" necessary for the AI's output, suggesting an emerging divergence in national approaches.[8] In the United Kingdom's Copyright, Designs and Patents Act 1988 (CDPA in the following text):[9] "[a] work generated by computer" without a human author is still protected: the statute simply vests authorship in "the person by whom the arrangements necessary for the creation of the work are undertaken." This provision was deliberately drafted to capture what we think of as the "upstream" role of those who design, program, or commission the AI system itself. Section 9(3) of the CDPA provides a distinctive solution by recognizing the person who made the "arrangements necessary for the creation" of a computer-generated work as its author. This approach, while pragmatic, now faces increasing scrutiny as AI systems become more autonomous and sophisticated. A key aspect of the debate centers on the requirement of originality. Although UK law does not demand novelty, it does require that a work must reflect the author's intellectual creation. Recent analysis emphasizes that for AI-generated works, copyright protection should only extend to outputs where the human user's instructions to the AI demonstrate sufficient originality to meet this threshold.[10]

EU copyright law has historically relied on international instruments such as the Berne Convention,[11] which presupposes that a work must be the result of human intellectual creation to qualify for protection. Although the Berne Convention does not explicitly limit authorship to humans, its context and interpretations across EU member states affirm this foundational principle. Within the EU, the concept of "author" varies slightly

8 "Call for Views: AI and Intellectual Property," UK Intellectual Property Office, accessed June 26, 2025, https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-call-for-views.

9 Copyright, Designs and Patents Act of 15 November 1988, United Kingdom Statute Law, 1988, c. 48, as amended.

10 Atilla Söğüt, "Dealing with AI-Generated Works: Lessons from the CDPA Section 9(3)," *Journal of Intellectual Property Law & Practice* 19, no. 1 (2024): 43–6, https://doi.org/10.1093/jiplp/jpad102.

11 World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, Paris Act of 24 July 1971, as amended by the 1979 Amendment, WIPO Collection of Laws for Electronic Access (CLEA).

between national systems but consistently centers on the necessity of human creativity. In continental systems, influenced by the French *droit d'auteur* model, authorship encompasses both moral and economic rights, whereas common law systems, such as those in the United Kingdom and Ireland, emphasize economic rights while allowing moral rights to be waived.[12]

Emphasis on the necessity of human intellectual creation in copyright regimes in EU jurisdictions makes it difficult for autonomously produced AI works to qualify for protection. This strict adherence to human authorship, however, raises concerns regarding the incentives for investment in AI-generated content.[13]

In the EU, copyright law emphasizes the reproduction right under Directive 2001/29/EC,[14] granting authors control over both permanent and temporary copies. Article 5(1), however, introduces a narrow exception for transient reproductions, allowed only when part of a technical process is short-lived and without economic value. Though conceptually similar to U.S. fair use, it imposes stricter requirements, especially regarding the absence of commercial impact. While this may cover some text and data mining (TDM) where data are briefly held in RAM, research practice often requires retention for verification or reuse, which exceeds the scope of "temporary" use. This limitation contributed to the adoption of Directive (EU) 2019/790,[15] which, under Article 3, permits TDM for scientific research by public-interest institutions and allows extended retention. Still, the exception excludes the right to share the data, even for validation, unless recipients have lawful access, significantly limiting collaboration and transparency.[16]

Australian copyright law, as well as the previously mentioned legal systems, does not currently recognize AI-generated works as protectable

12 Gaffar and Albarashdi, "Copyright Protection for AI-Generated Works," 28–9.

13 Vanherpe, "AI and IP," 223–4.

14 Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (OJ L167, 22 June 2001).

15 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC (OJ L130, 17 May 2019).

16 Franceschelli and Musolesi, "Copyright in Generative Deep Learning," e17.

under the existing legal framework. The Copyright Act 1968[17] defines the author of a work as a "person," with various provisions across the Act reinforcing that authorship is limited to human creators. As such, only a natural person can be the author and, by extension, the initial copyright owner.[18]

China, on the other hand, has taken a relatively progressive stance on copyright protection for AI-generated works, though the current legal framework continues to rely heavily on traditional human-centered concepts of authorship. The primary legal instrument governing this area is the Copyright Law of the People's Republic of China,[19] which does not specifically address AI-generated content but has been interpreted by courts to apply to such works under certain conditions. Chinese courts have recognized AI-generated images as creative works entitled to copyright protection when they reflect the creator's intellectual achievements, such as the careful selection of prompts, parameters, and final outputs.[20] China's legal framework also includes provisions for copyright exceptions, including fair use, which allows limited use of protected material for research, teaching, news reporting, and public interest purposes. However, questions remain regarding how these exceptions apply to AI training datasets and automated data processing. Enforcement remains a challenge, as high litigation costs and inconsistent awareness of IP rights hinder practical protection, particularly for works generated by or involving AI.[21]

3. Comparative Case Law Analysis – Introduction to Methodology

As the generative artificial intelligence (AI) tools become increasingly widespread, courts worldwide face new challenges in applying traditional copyright principles to AI-generated works. Key issues include determining

17 Copyright Act of 1 June 1968, Commonwealth of Australia, No. 63, as amended.

18 Jolyn De Roza, "The Impact of Artificial Intelligence on the Culture Industries and Copyright Law," *UNSW Law Journal Student Series*, no. 26 (2020): 1–18.

19 Copyright Law of the People's Republic of China of 11 November 2020, Gazette of the Standing Committee of the National People's Congress 2021, No. 1, as amended.

20 Huma Rubab et al., "Copyright and AI-Generated Content: A Comparative Analysis of Legal Perspectives in China and the United States," *International Journal of Social Science Archives* 7, no. 2 (2024): 387–95.

21 Alesia Zhuk, "Navigating the Legal Landscape of AI Copyright: A Comparative Analysis of EU, US, and Chinese Approaches," *AI and Ethics* 4 (2023): 1299–306, https://doi.org/10.1007/s43681-023-00299-0.

whether such works meet the threshold of originality required for copyright protection, identifying the rightful author or rights holder, and distinguishing protected expressions from unprotected ideas.

Courts are increasingly called upon to grapple with these complexities. In disputes involving AI-generated content, judges must now interpret source code and machine learning processes much like they interpret statutes or contracts, probing the logic of algorithms to determine whether an output infringes existing rights.[22] Although early decisions in Europe and Asia offer glimpses of possible paths forward, the rulings remain inconsistent and fragmented.[23]

This section examines how different jurisdictions, including China, the UK, the United States, selected European Union Member States, and Australia, have approached these challenges in recent case law. Using a doctrinal method, the case law is examined around three focal questions:

(1) What criteria do courts apply to determine whether AI-generated works qualify for copyright protection?
(2) Who is legally recognized as the author and rights holder of AI-generated outputs?
(3) How do courts balance copyright protection with the principle that ideas and concepts remain free for public use?

By analyzing judicial approaches across multiple legal systems, this section aims to identify emerging patterns, highlight divergences, and assess the evolving legal landscape for AI-generated works in the field of copyright law.

3.1. Judicial Treatment of AI-Generated Works: Insights from Chinese Case Law

Chinese courts have consistently emphasized that human intellectual input is central to the copyrightability of AI-generated content. In the "Half-Heart" case,[24] the Changshu People's Court recognized the plaintiff's creative role in crafting prompts for Midjourney and refining the resulting image with

[22] Anna Collins, "Interpreting Code: Judicial Approaches to AI-Generated Works," *Journal of Intellectual Property Law* 28, no. 1 (2023): 45–72.

[23] Qi Liu and Ying Wang, "AI Generated Creativity and Copyright Law in China," *China Legal Review* 12, no. 2 (2024): 89–110.

[24] Changshu People's Court, Judgment of 21 March 2025, "Half-Heart" Case, unreported.

Photoshop. The court found that these human choices and arrangements demonstrated sufficient originality to warrant copyright protection.

Similarly, the Beijing Internet Court ruling on a case involving an image created with Stable Diffusion,[25] held that the plaintiff's detailed prompting, iterative modifications, and aesthetic decisions reflected the necessary intellectual achievement and originality under Chinese copyright law.

In both the Changshu People's Court and the Beijing Internet Court decisions, the courts emphasized that only a natural person, legal entity, or unincorporated organization can be considered an author under Chinese law. The AI tools themselves, or their developers, did not possess authorship or ownership rights because they did not contribute intellectual creativity to the specific outputs.[26]

Conversely, in *Fei Lin v. Baidu*,[27] the courts carefully distinguished between works created through substantial human effort and those automatically generated by databases like Wolters Kluwer. Only after establishing that the plaintiff had added creative analysis beyond the automatic output did the court recognize the work as copyrightable. In this case, the court similarly as in the previous two, confirmed that, provided a party demonstrated original intellectual labor, it could claim rights over AI-assisted content. However, simple use of automated systems without significant human input was insufficient.

Finally, the Hangzhou Internet Court's decision in the Ultraman case,[28] while focused primarily on infringement of existing IP, implicitly

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25 Beijing Internet Court, Judgment of 2025, AI-Generated Image with Stable Diffusion Case, unreported.

26 Edward Chatterton, Joanne Zhang, and Liam Blackford, "Another Chinese Court Finds that AI-Generated Images Can Be Protected by Copyright: The Changshu People's Court and the 'Half Heart' Case," *Technology's Legal Edge*, March 21, 2025, accessed April 20, 2025, https://www.technologyslegaledge.com/2025/03/another-chinese-court-finds-that-ai-generated-images-can-be-protected-by-copyright-the-changshu-peoples-court-and-the-half-heart-case/; Loke-Khoon Tan, James Lau, and Harrods Wong, "China: A Landmark Court Ruling on Copyright Protection for AI-Generated Works," *Global Litigation News*, May 8, 2024, accessed April 15, 2025, https://globallitigationnews.bakermckenzie.com/2024/05/08/china-a-landmark-court-ruling-on-copyright-protection-for-ai-generated-works/.

27 Beijing Internet Court, Second-Instance Judgment of June 18, 2023, Fei Lin v. Baidu, unreported.

28 Hangzhou Internet Court, Judgment of September 25, 2024, Tsuburaya Productions (Shanghai Character License Administrative Co., Ltd. as licensee) v. Small Design AI Platform

acknowledged that significant human manipulation and training of AI models could constitute meaningful creative activity. Across the analyzed cases, Chinese courts firmly rejected the notion that AI systems could hold authorship. Instead, the recognized authors were the human users who exercised meaningful creative control over the AI outputs.

What we can note during the analyses is that Chinese courts are cautious in ensuring that copyright law protects expressions of ideas, not the ideas themselves.

The Changshu People's Court's "Half-Heart" decision separated the protected two-dimensional image from the broader concept of a floating half-heart, which it ruled was an unprotected idea available for general use. Similarly, the Beijing Internet Court stressed that while the specific artistic execution was protectable, general themes or styles derived from prompts remained free. In *Fei Lin v. Baidu*, the court again underscored that raw data, facts, and procedures derived from automated processes were not protectable unless shaped through original human interpretation. Finally, in the Hangzhou Internet Court's Ultraman decision, the infringement finding rested on substantial similarity to a specific pre-existing work, not on the mere borrowing of a general character idea.

3.2. Judicial Treatment of AI-Generated Works: Insights from UK and US Case Law

U.S. courts maintain a strict interpretation of originality, requiring human authorship as a prerequisite for copyright protection. In *Thaler v. Perlmutter*,[29] the U.S. Copyright Office rejected an application for a work generated by an AI system, emphasizing that copyright requires human authorship. The D.C. District Court affirmed that copyright protection is reserved for works that are the product of human creativity, reiterating the Copyright Office's rule that "human authorship is a prerequisite for copyright." This attempt to

(Ultraman LoRA case), unreported; upheld by Hangzhou Intermediate People's Court, Judgment of December 30, 2024; "User-Generated Ultraman Infringing Pictures, AI Platform Responsible? The Analysis of the Judgment of the Hangzhou Internet Court," Hangzou Internet Court, accessed February 10, 2025, https://mp.weixin.qq.com/s?__biz=MzU4NzExNTkyMQ==&mid=2247507667&idx=1&sn=c524cc81dff2bf48a3469f94173fa8b7.

29 District Court for the District of Columbia, Judgment of August 18, 2023, Ref. No. 22-cv-01564, Thaler v. Perlmutter.

register a work attributed solely to an AI program failed because no natural person was involved in its creation. This holding rests primarily on a statutory interpretation of the U.S. Copyright Act, read against the constitutional backdrop of Article I, Section 8 of the U.S. Constitution (the Copyright Clause),[30] which empowers Congress to promote the progress of science and the useful arts by incentivizing human creativity. While current judicial consensus excludes non-human authorship, this is not a fixed constitutional mandate because Congress could amend the statute to extend protection to certain AI-generated works, provided such reform remains consistent with the constitutional purpose.

There is also an ongoing case in front of the U.S. District Courts – *Andersen v. Stability AI et al.*[31] that has not yet resulted in a final ruling, where the plaintiffs' claims challenge the idea that AI-generated outputs trained on copyrighted materials can be considered original or independent creations. The plaintiffs argue that Stable Diffusion and related AI systems replicate substantial elements of their copyrighted artworks, not through independent creation, but through unauthorized training on those works. The complaint asserts that the artists whose works were included in training datasets did not authorize such use and are not credited or compensated. While the plaintiffs do not claim authorship over the AI-generated outputs themselves (the "Fakes"), they argue that these outputs misappropriate their artistic style and identity, particularly when AI tools are prompted using their names.

Another ongoing case: *Getty Images v. Stability AI*[32] in the UK raises questions relevant to the originality standard in the context of AI-generated works. While the court has not yet ruled on the merits, the case concerns the use of a large volume of copyrighted images as training data for the AI model Stable Diffusion. Although originality itself is not the central issue, the proceedings highlight how AI systems may produce content by relying on pre-existing protected works. The core argument is premised on

30 The Constitution of the United States of America, 1787, United States Statutes at Large, Vol. 1, 1 Stat. 1, as amended.

31 District Court for the Northern District of California, Judgment of August 12, 2024, Andersen et al. v. Stability AI Ltd. et al., Ref. No. 3:23-cv-00201-WHO.

32 High Court of Justice, Chancery Division, Intellectual Property List, Getty Images (US), Inc. v. Stability AI, Ltd., Claim No. IL-2023–000005.

unauthorized copying and use of human-created works to train an AI model, implying once again that protected authorship and ownership stem from human-created expressions. Under UK law, originality requires a minimal degree of skill, labor, or judgment by a human author. The challenge in cases like this lies in identifying whether the output of such a system meets that threshold, and if so, who can be identified as the author. Should the court adopt this reasoning, the decision may assist in clarifying whether and how originality can be assessed when the process is largely automated.

In another UK example, the case of *Nova Productions Ltd v. Mazooma Games Ltd & Ors*,[33] the Court of Appeal addressed several key issues pertinent to copyright law as it relates to computer-generated works. The court underscored that copyright protection does not extend to mere ideas but to the expression of those ideas. It emphasized that "an idea consisting of a combination of ideas is still just an idea in a computer program as in any other copyright work." This principle indicates that for AI-generated works, originality hinges on the unique expression rather than the underlying ideas or functionalities. The judgment acknowledged that images displayed during the gameplay, generated by the software but designed by a human, qualify as artistic works protected by copyright. The court noted that "the author of the composite frames was the person who had made the arrangements necessary for the creation of the work." This suggests that in AI-generated works, the individual who orchestrates the creation process holds authorship and associated rights.

When it comes to the question on protection of expression versus ideas, U.S. and U.K. courts distinguish between protectable expression and unprotected ideas as key in evaluating AI-generated content.

In *Thaler v. Perlmutter*, the court reinforced that although AI may generate innovative or aesthetically interesting outputs, only human-originated expressions qualify for legal protection – ideas or outputs without human creativity cannot be monopolized.

The plaintiffs in *Andersen v. Stability AI et al.* highlight that the unauthorized training and generation processes do not merely draw on ideas or styles, but use copyrighted works as data for machine learning. By framing

[33] Court of Appeal (Civil Division), Judgment of March 14, 2007, Nova Productions Ltd v. Mazooma Games Ltd & Others, Ref. No. A3/2006/0205, Reported in 2007 EWCA Civ 219.

their claim around specific reproductions, the case challenges the notion that the use of "style" or artist identity in AI prompts is purely conceptual. The legal tension lies in distinguishing between general artistic influence (which is not protected) and the reproduction or derivation of expressive elements from protected works (which is protected). Plaintiffs allege that AI outputs are unauthorized derivatives generated through data scraping and training on copyrighted works.

In the U.K., the *Getty Images v. Stability AI* litigation directly touches on this point. Getty Images argues that the "expressive elements" of millions of photographs were unlawfully appropriated to train Stability AI's model. If upheld, the court's eventual decision will likely hinge on how much the AI's outputs replicate or transform protected human-created expressions, as opposed to merely using general ideas or styles.

Reiterating the distinction between ideas and their expression, in the case of *Nova Productions Ltd v. Mazooma Games Ltd & Ors*, the court held that "what had been taken was a combination of a limited number of general ideas... but those ideas did not form a substantial part of Nova's computer program itself".[34]

3.3. Judicial Treatment of AI-Generated Works: Insights from Australian Case Law

In Australian case law, judicial interpretation has moved toward a more restrictive standard for originality and authorship. While earlier decisions such as *Desktop Marketing Systems v. Telstra*[35] appeared to accept computer-assisted compilations as sufficiently original, this position was later reversed in *IceTV v. Nine Network*.[36] In *IceTV*, the High Court made it clear that originality requires an "independent intellectual effort" by a human author, and that antecedent human effort alone, such as data gathering or decision-making, is insufficient unless it contributes directly to the material form of the work.[37]

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34 Court of Appeal (Civil Division), Judgment of March 14, 2007, Nova Productions Ltd v. Mazooma Games Ltd & Others, Ref. No. A3/2006/0205, Reported in 2007 EWCA Civ 219.

35 Desktop Marketing Systems Pty Ltd v. Telstra Corporation Limited [2002] FCAFC 112, [407].

36 High Court of Australia, Judgment of April 22, 2009, IceTV Pty Limited v. Nine Network Australia Pty Limited, Ref. No. S308 of 2008, [2009] HCA 14.

37 De Roza, "The Impact of Artificial Intelligence on the Culture Industries and Copyright Law," 1–18.

This principle was reaffirmed in *Telstra v. Phone Directories*[38] and in *Acohs Pty Ltd v. Ucorp Pty Ltd*,[39] where the court rejected copyright protection for AI-generated work. In *Telstra v. Phone Directories*, the applicants failed because they could not demonstrate which individuals made creative contributions to the final directories. The decision emphasizes that for copyright to subsist, the human author must be identifiable, and their contribution must embody independent creativity. This decision marked a clear departure from the earlier "industrious collection" doctrine endorsed in *Desktop Marketing Systems v. Telstra*, under which substantial labor, skill, or expense in compiling factual information could suffice for originality. Following *IceTV v. Nine Network* and reaffirmed in *Telstra v. Phone Directories*, Australian law now requires "independent intellectual effort" or "sufficient creative spark" by a human author. Mere investment of time and resources, without creative input into the final expression, is insufficient. This aligns Australia more closely with the creativity-based originality standards in the UK and EU, with significant implications for AI-generated works that are produced autonomously or with minimal human intervention.[40] The Australian court in *Telstra v. Phone Directories* firmly upheld the classic copyright distinction between protected expression and unprotected ideas or facts. It was noted that while substantial labor was invested in compiling the directories, the mere arrangement or collection of factual data without original expression did not attract copyright protection.

Similarly, in *Acohs Pty Ltd v. Ucorp Pty Ltd*, the court held that no copyright subsisted in HTML source code automatically generated by a computer program. It declined to recognize the programmers as authors of the resulting output, finding it artificial to attribute authorship to those who had not directly shaped the final work.[41] In *Acohs Pty Ltd v. Ucorp Pty Ltd* the court ruled that the output reflected methods rather than expression,

38 Federal Court of Australia, Judgment of February 8, 2010, Telstra Corporation Ltd v. Phone Directories Co Pty Ltd, Ref. No. NSD 534 of 2007, [2010] FCA 44.

39 Federal Court of Australia, Full Court, Judgment of March 2, 2012, Acohs Pty Ltd v. Ucorp Pty Ltd, Ref. No. VID 873 of 2004, [2012] FCAFC 16; 201 FCR 173.

40 Nirogini Thambaiya, Kanchana Kariyawasam, and Chamila Talagala, "Copyright Law in the Age of AI: Analysing the AI-Generated Works and Copyright Challenges in Australia," *International Review of Law, Computers & Technology* 39, no. 2 (2025): 1–26, https://doi.org/10.1080/13600869.2025.2486893.

41 Ibid.

and it fell outside the scope of copyright protection. The key reasoning was that the output was entirely automatic, with no identifiable human intervention in the creation of each individual work. While programmers had created the system that produced the content, they did not exercise any creative control over the final form of documents. Therefore, the court rejected the idea that authorship could be inferred simply because the programmers had enabled the process, and it emphasized that authorship requires a direct and original intellectual contribution to the expression of the specific work. The court reaffirmed the idea–expression distinction as central to copyright law. It found that the HTML code was a purely functional output, generated automatically without creative input. Though the system was technically advanced, it produced standardized factual content, leaving no space for original expression.

3.4. Judicial Treatment of AI-Generated Works: Insights from European Union Case Law and National Laws

As of May 2025, the European Court of Justice (ECJ) has not ruled on the copyright status of AI-generated works. However, it has consistently held that for a work to be protected under EU law, it must be the author's intellectual creation. In *Infopaq International A/S v. Danske Dagblades Forening*,[42] the Court established that originality depends on the author's personal, creative choices, not the work's length or complexity. This principle was further developed in *Cofemel v. G-Star Raw*,[43] where the ECJ ruled that works dictated solely by technical constraints lack originality. In *Eva-Maria Painer v. Standard Verlags GmbH*,[44] the Court clarified that authorship is reserved for natural persons, whose creative decisions reflect their personality. While these cases do not directly address AI, they shape the EU's approach, requiring human intellectual input for protection. Consequently, AI-generated works without significant human creative control fall outside the scope of

[42] CJEU Judgment of 16 July 2009, Infopaq International A/S v. Danske Dagblades Forening, Case C-5/08, ECLI:EU:C:2009:465.

[43] CJEU Judgment of 12 September 2019, Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV, Case C-683/17, ECLI:EU:C:2019:721.

[44] CJEU Judgment of 1 December 2011, Eva-Maria Painer v. Standard Verlags GmbH, Case C-145/10, ECLI:EU:C:2011:798.

copyright protection, reinforcing the distinction between expression and ideas, as highlighted in Infopaq.

However, national courts within the European Union have begun to confront this issue. In a landmark decision, the Municipal Court of Prague ruled that an image created using OpenAI's DALL·E AI tool could not be protected by copyright. This decision is considered to set a precedent in the Czech Republic and may influence similar cases in other EU jurisdictions.[45]

The second case involves a German photographer Robert Kneschke who filed a lawsuit against LAION e.V., a non-profit organization that created the LAION-5B dataset used to train AI models like Stable Diffusion. The case, currently before the Hamburg Regional Court, raises critical questions about the legality of using copyrighted works for AI training and the boundaries of text and data mining under EU law.[46]

The most recent case is from March 2025, when French publishers and authors initiated legal action against Meta Platforms Inc., accusing the company of using their copyrighted works without authorization to train its AI models.[47]

In the Czech DALL·E case,[48] the Municipal Court of Prague applied the fundamental requirement of human authorship under Czech copyright law. The court held that copyright protection can only be granted to works created by a natural person. Since the image in question was autonomously generated by OpenAI's DALL·E, and no evidence of meaningful human creative input was presented, it did not meet the threshold of originality through human intellectual creation. The court did not attempt to stretch

45 Vojtěch Chloupek, "Czech Court Denies Copyright Protection of AI-Generated Work in First Ever Ruling," *Bird & Bird*, May 29, 2024, accessed April 26, 2025, https://www.twobirds.com/en/insights/2024/czech-republic/czech-court-denies-copyright-protection-of-ai-generated-work-in-first-ever-ruling.

46 Ronak Kalhor-Witzel, "Germany: Landmark Court Decision Deals with AI Training and Copyright," Norton Rose Fulbright, August 2024, accessed April 26, 2025, https://www.nortonrosefulbright.com/en/knowledge/publications/218a3079/germany-landmark-court-decision-deals-with-ai-training-and-copyright.

47 Kelvin Chan, "French Authors Sue Meta over Use of Works to Train AI," Associated Press, October 14, 2022, accessed April 26, 2025, https://apnews.com/article/168b32059e70d0509b0a6ac407f37e8a.

48 Municipal Court of Prague, Judgment of January 24, 2024, Case concerning DALL·E-generated image, unpublished.

the law to accommodate machine-generated content, reinforcing the view that under current law, creativity must be attributable to a person.

In the German *Kneschke v. LAION* case,[49] which is ongoing, the court is not directly tasked with evaluating the originality of AI outputs, but rather the legality of using copyrighted works as training data. However, the case indirectly engages with the question of what constitutes a "creative act" when millions of copyrighted images are scraped for AI training. The fact that the court has accepted the case suggests recognition that training AI systems with unlicensed copyrighted material may blur the line between analysis and reproduction, which could impact how originality is later interpreted in the outputs.

The French case against Meta[50] focuses on the systemic use of copyrighted works in training datasets. While the question of originality is not at the center, the plaintiffs argue that the use of their works in training without consent creates outputs that potentially exploit and reconfigure protected content. Here, too, the concern is not whether the outputs are original, but whether the process leading to their creation unlawfully depends on protected expressions and if it can affect the originality and legality of the outputs.

When it comes to recognition of authorship and right ownership we can note that across these cases, the Czech court confirmed that AI systems cannot be authors, denying protection where no human creative contribution is identified; while the German and French disputes focus instead on the unauthorized use of protected works in AI training datasets, highlighting potential rights claims by original creators over such inputs rather than the AI outputs themselves.

The third criterion of this research is the protection of expression versus ideas. In that manner, the Czech court, by rejecting protection for an AI-generated image, effectively reinforced the idea–expression dichotomy: while the output may involve certain thematic or stylistic ideas, without human-authored expression, those ideas cannot be monopolized through

[49] Hamburg Regional Court, Judgment of 28 February 2024, Robert Kneschke v. LAION e.V., unpublished.

[50] Paris Judicial Court, Filing of 8 March 2025, French Publishers and Authors v. Meta Platforms Inc., pending.

copyright. The decision supports the principle that expressive protection is contingent on human creativity, and anything outside of that domain remains part of the public domain.

In the German case, the court is implicitly asked to weigh whether text and data mining (TDM) for AI training can be seen as lawful use of publicly accessible content, especially under EU copyright exceptions. The distinction between extracting ideas and reproducing expression is critical: if the training process merely extracts unprotectable patterns or structures, it may be permissible; if it reconstructs expressive elements, it may infringe – a question that strikes at the heart of how European copyright law interprets originality, use, and technological neutrality in the context of machine learning. This issue is particularly relevant under Article 4 of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive),[51] which allows TDM for research purposes but leaves commercial uses to national discretion. Germany, in its national implementation (§ 44b UrhG),[52] has taken a more expansive view, allowing TDM for any purpose unless expressly reserved by rightsholders, a position now tested in light of generative AI models that rely on large-scale scraping of online content.

The French case similarly raises questions about how far the principle of public use of ideas can be stretched. The lawsuit points to a lack of transparency and consent in how training datasets are assembled. If outputs draw heavily on stylistic signatures or recognizable features of the input works, even if only conceptually, the courts may be asked to determine whether such use improperly appropriates protected expression under the guise of "training."

4. Summary Tables: Key Legal Challenges and Jurisdictional Trends

To synthesize the findings from the analyzed case law and highlight the dual legal challenges courts are currently grappling with, the following two tables offer a structured overview: Table 1 distinguishes between the legal

[51] Directive (EU) 2019/790 of the European Parliament and of the Council of April 17, 2019, on copyright and related rights in the Digital Single Market (OJ L130, 17 May 2019), 92–125.

[52] German Copyright Act (Urheberrechtsgesetz, UrhG), § 44b, introduced through the Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes (2021).

treatment of AI-generated outputs and the use of copyrighted materials for training, while Table 2 provides a comparative summary of judicial approaches across key jurisdictions.

Table 1. Two-layer legal challenges in AI and copyright

Legal Layer	Key Question	Examples of Case Law	Legal Focus
1. AI-generated outputs	Can the output be copyrighted? Who is the author?	*Thaler v. Perlmutter*, *Half-Heart case (China)*, *DALL·E Case (CZ)*	Originality, human authorship, expression vs. idea
2. Copyrighted inputs	Can copyrighted works be used to train AI, and to what extent?	*Getty v. Stability AI*, *Kneschke v. LAION*, *French authors v. Meta*	Fair use, licensing, dataset legality, authors' rights

Source: author's compilation

Table 1 illustrates the two primary legal dimensions in current copyright disputes involving AI. The first layer concerns the status of AI-generated outputs, focusing on questions of originality, authorship, and protectability. The second layer addresses the use of copyright-protected materials as training data, raising issues of consent, fair use, and dataset legality. While distinct, these layers are increasingly interconnected, as the legitimacy of AI outputs may depend on the legality of their underlying inputs.

Table 2. Judicial approaches to AI-generated works – Comparative overview

Case	Type of AI-generated work	Legal basis	Ruling (Outcome)	Court reasoning (Summary)
***Thaler v. Perlmutter* (US, 2023)**	Artwork created by "Creativity Machine"	US Copyright Act (requires human authorship)	Rejected registration	Copyright requires human creativity; AI systems cannot be authors.
***Andersen v. Stability AI* (US, ongoing)**	Images generated using Stable Diffusion	Copyright infringement, unauthorized dataset use	Pending	Questions raised on originality, authorship, and derivative use of copyrighted inputs.

Case	Type of AI-generated work	Legal basis	Ruling (Outcome)	Court reasoning (Summary)
***Getty Images v. Stability AI* (UK, ongoing)**	AI-generated images trained on Getty images	Copyright infringement under UK law	Pending	Focus on whether training on copyrighted images constitutes infringement and if outputs reflect protected expressions.
***Nova v. Mazooma Games* (UK, 2007)**	Video game imagery generated by software	Copyright, authorship under CDPA	Human arranger recognized as author	Protected expression must involve a human; skill/labor; mere ideas not protected.
Changshu People's Court "Half-Heart" (China, 2025)	Midjourney-generated image refined with Photoshop	Chinese Copyright Law	Copyright protection granted	Human-created prompts and editing decisions demonstrated originality.
Beijing Internet Court (China, 2025)	Image created with Stable Diffusion	Chinese Copyright Law	Protection granted	Human-directed input and aesthetic decisions established authorship.
***Fei Lin v. Baidu* (China, 2023)**	Automatically generated database content	Chinese Copyright Law	Partially protected	Only outputs with added creative human input are protected.
***Ultraman Case* (Hangzhou, China, 2025)**	AI-assisted depiction of Ultraman character	Infringement, human involvement	Infringement recognized	Substantial similarity to protected work; required evidence of human contribution.
***Telstra v. Phone Directories* (Australia, 2010)**	Automated telephone directories	Copyright Act 1968	No copyright	No identifiable human authorship; automation alone insufficient.
***Acohs v. Ucorp* (Australia, 2012)**	HTML code auto-generated by program	Copyright Act 1968	No copyright	No human intellectual input in output; authorship not attributable.
***Czech DALL·E Case* (Prague, 2024)**	AI-generated image from DALL·E	Czech Copyright Law	Not protected	Only natural persons can be authors; no human creativity evident.

Case	Type of AI-generated work	Legal basis	Ruling (Outcome)	Court reasoning (Summary)
Kneschke v. LAION **(Germany, ongoing)**	Images used for AI training (not output)	German Copyright Law	Pending	Focus on unauthorized dataset use, not output; authorship of training inputs at stake.
French Authors v. Meta **(France, 2025)**	Use of copyrighted texts in AI training	French IP Law & EU AI Act	Pending	Claim over unconsented use in training; authors not asserting rights over outputs but over data inputs.

Source: author's compilation

The comparative table illustrates a consistent judicial approach: courts distinguish between AI-assisted and fully autonomous AI-generated works. Copyright protection is typically granted only where there is demonstrable human involvement – most often in the form of detailed input or subsequent refinement. Chinese courts appear more flexible in recognizing such involvement as sufficient for protection, while courts in the U.S., Australia, and the EU largely reject claims lacking clear human authorship. The UK takes an intermediary position, assigning authorship to the individual responsible for enabling the creation. This emerging pattern reflects efforts to uphold the principle of human authorship within existing legal frameworks, despite the increasing complexity of AI-assisted production.

When viewed collectively, the jurisdictions examined can be grouped into two broad doctrinal approaches:

(1) Human-centric authorship required. Australia, the United States, the United Kingdom, and the European Union all adopt the position that copyright subsists only in works produced through identifiable human intellectual creation. These systems maintain that originality must flow from human authorship, even if technology aids the process. Fully autonomous AI-generated works are generally excluded unless substantial human creative control – such as detailed selection, arrangement, or iterative refinement – can be demonstrated. This approach offers

strong legal certainty, but may leave economically valuable AI outputs outside the scope of protection.

(2) Technology-neutral originality threshold. By contrast, China applies a more flexible test. Courts focus on whether the work reflects sufficient intellectual achievement, regardless of the degree of AI involvement, provided that a human's creative input can be identified. This opens the door to recognizing a wider range of AI-assisted or AI-driven works, but grants courts greater interpretative discretion and may lead to less predictable outcomes.

The divide between these approaches has important implications. In our opinion, the human-centric model reinforces traditional copyright principles but risks under-protecting AI-driven creativity, potentially discouraging investment in certain AI-based creative sectors. On the other hand, the technology-neutral model accommodates evolving creative practices but raises questions about the threshold for human involvement and the consistency of judicial application. In both models, the treatment of AI-generated works ultimately hinges on how originality is defined and how closely it is tethered to human authorship.

5. Conclusion

This paper has examined the evolving relationship between copyright law and AI-generated works mainly through the lens of case law. The analysis revealed two parallel judicial trends. The first concerns the protection of outputs: across jurisdictions, courts are consistently upholding the requirement of human intellectual input as a condition for copyright protection. While the standards vary, from the strict human authorship requirement in the U.S. and Australia to the more flexible UK and Chinese approaches, the underlying principle remains consistent as copyright subsists only where a work reflects identifiable human creativity. Even in AI-assisted contexts, courts assess whether the individual's contribution demonstrates originality through meaningful creative control.

The second trend relates to the inputs used in training AI systems. Although these cases are still pending, disputes such as *Getty Images v. Stability AI* (UK), *Kneschke v. LAION* (Germany), and *French Authors v. Meta* (France) signal a growing concern with how datasets are built, particularly

when they rely on copyrighted materials. Unlike output-focused cases, these proceedings question whether training practices themselves comply with existing copyright norms and exceptions. This indicates a shift toward evaluating not just what AI systems produce, but how they are trained.

Together, these findings suggest that courts are responding to generative AI with a dual inquiry: they ask not only whether the final output qualifies for protection, but also whether the process of creating it respects copyright boundaries. While legislative reform remains limited, judicial reasoning is gradually shaping the contours of how authorship, originality, and use of protected works are understood in the AI context. Current case law reveals an effort to preserve core copyright principles while adapting them to machine-assisted production, even if coherence across jurisdictions is still lacking.

In addition, the tables and comparative analysis presented above illustrate that, while all jurisdictions face similar challenges in applying established copyright principles to AI-generated works, their responses diverge in important ways. These differences reflect broader doctrinal patterns, with some systems maintaining a strict human-centric authorship requirement and others adopting a more flexible, technology-neutral threshold for originality. How these approaches evolve, and whether they move toward convergence, will be central to determining the scope of protection for AI-generated creativity in the years ahead. At present, the case law suggests only partial alignment, with agreement on rejecting purely mechanical "industrious collection" standards but persistent divergence over how much human input is necessary. This lack of uniformity creates uncertainty for cross-border enforcement and investment, making gradual judicial convergence or targeted regional harmonization the most plausible paths toward greater predictability.

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The Quiet Quitting Phenomenon in Digital Workplaces: A Legal-Theoretical and Comparative Analysis

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Abstract: Quiet quitting has recently emerged as a widely discussed phenomenon in organizational science, primarily due to its implications for business operations and employee productivity. However, its impact on labor law should not be overlooked. This paper employs legal-theoretical and comparative methods to explore the key aspects of conceptualizing quiet quitting within both individual and collective labor law frameworks. It also examines how company law addresses the unique status of managers and directors as employees. The analysis is limited to a general legal assessment of the Quiet Quitting phenomenon, acknowledging its conceptual ambiguity and its intersection with organizational management, labor law, and company law.

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1. Introduction

Labor law is encountering significant challenges due to changes in the labor market, with a new generation of workers (Gen Z) entering the workforce, coupled with technological and digital innovations that introduce novel approaches to work organization, ultimately transforming working conditions. Organizational management practices undeniably influence working conditions, while workplace culture plays a central role in shaping employment models. Additionally, employees are responding to these changes, with one notable reaction being the phenomenon of "quiet quitting" (QQ). QQ refers to employees meeting only the minimum expectations outlined in their employment contracts, without going above and beyond. This form of resistance has historical roots. In the 20th century, it was commonly referred to as a "go-slow," a type of industrial action in which work was deliberately delayed or slowed down to express dissent or exert pressure without engaging in a full strike. A recently published study on Gen Z workplace tendencies reveals that Gen Z employees are more likely to engage in disengagement activities, such as QQ, and often draw inspiration from influencers on social media.[1] Furthermore, the study finds that QQ behavior is likely to spread within the organization, especially in environments where social media influence is prevalent, further affecting employee engagement and workplace dynamics.[2]

In organizational management theory, QQ is often viewed as a consequence of poor management, whereas, in labor law, it is examined within the context of the employment relationship, specifically regarding the employee's duty to perform work tasks in good faith. This raises a central question: can QQ activities be considered a breach of the employment contract under individual labor law, or, if adopted by a majority of employees, could it be interpreted as a form of strike action under collective labor law? Additionally, the authors will examine how company law addresses the issue of QQ, particularly when performed by top managers or directors.

The paper is structured to trace the emergence of the phenomenon of QQ within organizational management and to examine its implications as

1 Karina Ochis, "Generation Z and 'Quiet Quitting': Rethinking Onboarding in an Era of Employee Disengagement," *Multidisciplinary Business Review* 17, no. 1 (2024): 91.

2 Ibid.

a labor law issue. It aims to explore the connection between management strategies and labor law frameworks, recognizing that the legal implications of QQ have been identified in both individual and collective labor law contexts. Additionally, the authors seek to analyze how company law addresses QQ behaviors performed by top managers and directors, with the broader goal of proposing a conceptual and regulatory framework for future legal developments in this area.

2. Quiet Quitting Phenomenon – From Organizational Management Concern to Labor Law Issue

2.1. Quiet Quitting in Organizational Management Science

The phenomenon of "quiet quitting" – working with the minimum effort but well enough not to violate the employment contract – has been the focus of organizational management and behavioral economic scientists as one of the emerging professional trends nowadays. The main factors that impact workers' behavior and cause QQ are those related to the work organization model as an objective, and the individual perception regarding work as a subjective factor. Thus, in organizational management literature attention has been made, primarily, towards the work orientation of an individual, i.e. beliefs regarding the role of work in a person's life that further impacts job satisfaction, and consequently the QQ intentions of the worker.[3] Moreover, the socio-demographic characteristics of individuals also influence work engagement in terms of QQ posing socio-cultural differences that increase the QQ trends. Having said that, recent empirical studies have shown that QQ is particularly linked to the Generation Z demographic cohort born between 1997 and 2012 and younger Millennials as a means to express their dissatisfaction with the work organization model[4] forming a *sui generis* social class movement group in a digitalized work era.

From the perspective of organizational management scientists, the QQ trend has been explored in the context of offering a new model/approach in dealing with workers' dissatisfaction and disengagement at work,

[3] Milena Nikolova, "Loud or Quiet Quitting? The Influence of Work Orientations on Effort and Turnover" (GLO Discussion Paper, No. 1429, Global Labor Organization GLO, Essen, 2024), 1.

[4] Sanja Jelača and Marko Golubović, "The Impact of the Quiet Quitting Phenomenon on Employees in Serbia," *The European Journal of Applied Economics* 21, no. 1 (2024): 60–80.

mainly caused by the COVID-19 health crises and the Fourth Industrial Revolution, i.e. workplace digitalization. The altered working and living conditions during the pandemic gave rise to two notable reactions among workers: (1) the "Great Resignation" and (2) "QQ".[5] The term "Great Resignation" was coined by Professor Anthony Klotz of Texas A&M University, who predicted that many employees would leave their jobs as the COVID crisis subsided and life returned to normal.[6] In contrast to this mass exodus, the QQ trend emerged as an alternative response to the changing work landscape.

Nevertheless, the QQ trend has been primarily explored from an organizational management perspective as a workplace-cultural trend, particularly among younger workers who refuse to dedicate their whole lives to work and who choose to work and live with expanded autonomy as a new work value in a changed world of work. The values of the younger generation of workers (Gen Z), particularly their desire for self-determination in the workplace, align with the principles outlined in self-determination theory of management. This theory emphasizes that personal motivation at work is closely tied to fulfilling innate psychological needs for competence, autonomy, and relatedness.[7]

2.2. Quiet Quitting – Bridging the Gap between Organizational Management and Labor Law

The socio-cultural characteristics of a young generation entering the labor market significantly challenge the traditional labor-law institutes and the very foundation of the employment relationship. The work orientation and values of the so-called "digital natives" – Gen Z – combined with the ongoing digital transition, have transformed the work environment and impacted employment relationship, prompting the need for his redefinition.

Some forms of flexible employment such as platform work, particularly "crowd work," promote worker's autonomy over the employer's

5 Nastja Pevec, "The Concept of Identifying Factors of Quiet Quitting in Organizations: An Integrative Literature Review," *Izzivi prihodnosti/Challenges of the Future* 8, no. 2 (2023): 128–47, http://dx.doi.org/10.37886/ip.2023.006.

6 Ibid., 131.

7 Henrik Nordgren and Anders Björs, *Quiet Quitting, Loud Consequences: The Role of Management in Employee Engagement* (Uppsala: Uppsala Universitet, 2023).

subordination power, i.e. transferring the management tasks to the online workers.[8] However, some studies suggest that while algorithms on online labor platforms increase job autonomy for workers during the initial stages of work preparation and execution, they simultaneously reduce autonomy in the digital reputation and job evaluation phases, while also extending working hours and workloads.[9]

From the standpoint of labor law scholars, QQ has been considered as an idea of fundamental labor rights' protection that is grounded on respect for the worker's dignity and the work-life balance, an emerging concept, in a changed world of work.[10] Accordingly, Gen Z have different expectations about work that include demands for autonomy and flexibility, searching for meaning in work, and have greater commitment to balancing work and life responsibilities.[11]

The work-life balance concept gained wide attention among social scientists, including sociologists, demographers, and lawyers. There are different approaches to the concept considering the particular science field, but, generally, work-life balance is holistic and subjective in its nature, grounding on the individual's, subjective assessment of the balance between work and private responsibilities.[12] At the level of the European Union (EU), the Work-Life Balance Directive[13] was adopted in 2019 and by 2022 most of the Member States implemented the Directive by introducing new policies or updating the existing ones. The main objectives of the Directive are generally focused on enhancing leave policies to benefit both parents, implementing measures to support workers' caregiving responsibilities, and

8 Christine Gerber, "Community Building on Crownwork Platforms: Autonomy and Control of Online Workers?," *Competition & Change* 25, no. 2 (2021): 190–211.

9 Liu Shanshi, Pei Jialiang, and Zhong Chuyan, "Is the Platform Work Autonomous? The Effect of Online Labor Platform Algorithm Management on Job Autonomy," *Foreign Economics & Management* 43, no. 2 (2021): 51–67.

10 Bernadett Solymosi-Szekeres and Sanja Stojković Zlatanović, "Approaching Quiet Quitting from the Labor Law Perspective: A Case Study of Hungarian and Serbian Legislation," *Legal Records Journal*, no. 1 (2024): 218–38.

11 Elsa Islammia Pasha, "The Phenomenon of Work-Life Balance among Generation Z: A Case Study of Creative Workers," *American Journal of Open Research* 3, no. 11 (2024): 335.

12 Chandrani Sen and Himangini Rathore Hooja, "Work-Life Balance: An Overview," *International Journal of Management and Social Sciences Research* 7, no. 1 (2018): 1–6.

13 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers (OJ L188, 12 July 2019).

expanding flexible work policies, including the right to disconnect and the option for flexible work arrangements.

The latter, the right to disconnect could be explored in the context of QQ, considering that, by definition, right to disconnect means the right of employees not to be engaged in work-related communication after working hours, i.e. the right to ignore emails, messages, and calls related to work in their free time. The EU policymakers, by introducing the right to disconnect, gave some form of legitimacy to the QQ activity of employees, considering that QQ among other things presupposes the employee's denial to work overtime and to engage in extra hours. Moreover, given that QQ is a phenomenon that emerged in the digital era, there is an indirect connection with the right to disconnect, which could also be seen as a policy and legal answer to the QQ. On the other side, the right to disconnect is considered as a modern interpretation of the traditional right to rest and leisure.[14] The final aim is the protection of workers' health, both physical and mental and overall well-being. Thus, in this context, QQ represents a worker's attempt to prioritize his/her mental health and overall well-being at work in an environment where hustle and always-on culture expectations prevail.

2.3. Approaching the Concept of Quiet Quitting in Labor Law: Prioritizing Mental Health in Legislation

The conceptualization of QQ can be further expanded in both its legal-philosophical and semantic dimensions. While the term "quiet quitting" is commonly used, it does not fully capture the essence of the phenomenon. QQ is not about actually resigning from a job. Instead, we argue that it is more accurately described as "quiet distancing," as it involves disengagement from the role without formally leaving it.[15] This interpretation reflects the shift in employee involvement and motivation, rather than a complete resignation from their responsibilities. During QQ, the worker is still performing his/her work duties but is no longer subscribing to the hustle and always-on

[14] Sanja Stojković Zlatanović and Milena Škobo, "The 'Twilight' of Health, Safety, and Well-being of Workers in the Digital Era – Shaping the Right to Disconnect," *Journal of Work Health and Safety Regulation* 2, no. 2 (2023): 129–44.

[15] Solymosi-Szekeres and Stojković Zlatanović, "Approaching Quiet Quitting From the Labor Law Perspective."

culture expectations.[16] In doing so, the worker performs the minimum level of job duties, does not work overtime voluntarily,[17] and does not look for extra opportunities to work, and the employer or even the co-workers may feel that he/she has lost engagement in work. This is a kind of distancing from the employer's (owner) expectations. While it is easy to pin this trend on the pandemic,[18] studies indicate that it was building up long before COVID-19 struck, catalyzing long-forming movements toward Gig Work.[19]

The concept of QQ does not have a singular definition. It encompasses a range of employee behaviors, from those who only meet the minimum requirements of their employment contract during working hours, to those who work diligently within their hours but refuse to engage in any tasks outside of their scheduled time.[20] In addition to work-life balance considerations, QQ is closely associated with the concept of burnout at work.[21] Studies reveal that an individual's satisfaction of mental and overall social well-being plays a significant role in this connection.[22]

Therefore, we advocate for addressing the issue of QQ in labor law from a mental health perspective, incorporating the concepts of well-being in traditional occupational safety and health models. The normative solutions implemented by EU Member States for promoting and protecting mental health can be considered preventive mechanisms for highlighting QQ behaviors in the workplace. QQ is a phenomenon that has emerged in organizations where management has been seeking effective policy models to shift from an "always-on" culture to one focused on care. Although labor law has not explicitly recognized QQ as a breach of the employment contract, nor fully embraced the dominant view linking QQ activities to mental health issues, recent comparative legislation has introduced various

16 Victoria Masterson, "What Is Quiet Quitting and Why Is It Happening?," World Economic Forum, September 2, 2022, accessed May 5, 2025, https://www.weforum.org/agenda/2022/09/tiktok-quiet-quitting-explained/.

17 Ibid.

18 Ibid.

19 Bernadett Solymosi-Szekeres, "Hustle Culture and Quiet Quitting – Trends Between Young Workers in the Era of Digital Work," *Hungarian Labour Law E-Journal*, no. 2 (2024): 19–30.

20 Hanna Cashion, "The Struggle for Work-Life Balance: Quiet Quitting as a Hyper Individualized Tool of Neoliberal Resistance" (PhD diss., University of Arkansas, 2024), 7.

21 Ibid.

22 Ibid.

mechanisms aimed at safeguarding and prioritizing mental well-being. This evolving approach could serve as a preventive framework for addressing QQ behaviors, complementing recent initiatives such as the right to disconnect.

France was among the first EU countries to address this issue through normative regulation. In Part IV of the Labor Code, titled "Health and Safety at Work," France explicitly recognizes the employer's duty to protect both the physical and mental health of workers by implementing all necessary measures. The Labor Code also emphasizes the issue of moral harassment/bullying in the workplace as a significant risk to both physical and mental health.[23] The principles of occupational safety and health (OSH) in French legislation are outlined as follows: avoiding risks, assessing unavoidable risks, addressing risks at their source, adapting work to individuals – including work design, equipment, and methods – creating prevention plans that integrate technology, work organization, working conditions, social relationships, and environmental factors, including the risks of bullying and sexual harassment.[24] The focus is placed on collective protection measures rather than individual ones.[25] On the other hand, in 2016, France introduced the right to disconnect in its labor legislation, specifically in the Labor Code. Constant connectivity is recognized as a significant occupational risk related to technology, which must be addressed preventively to protect the physical and mental health of workers, forming a key component of the core principles in the OSH field.[26]

France, as the first country in the EU to introduce the right to disconnect, enacted legislation ensuring that employees are not contacted through digital devices after working hours. However, the legal nature of the right to disconnect remains theoretically unclear. The dominant view is that the right to disconnect derives from the traditional right to rest and leisure,

23 "Occupational Safety and Health – France," International Labour Organization, 2015, accessed April 25, 2025, https://wwwex.ilo.org/dyn/legosh_en/f?p=14100:1100:0::NO::P1100_ISO_CODE3%2CP1100_SUBCODE_CODE%2CP1100_YEAR:FRA%2C%2C2015.

24 Ibid.

25 Ibid.

26 Loïc Lerouge and Francisco Trujillo Pons, "Contribution to the Study on the 'Right to Disconnect' From Work. Are France and Spain Examples for Other Countries and EU Law?," *European Labour Law Journal* 13, no. 3 (2022): 455.

while the perspective of its autonomy as a digital right is less prominent in the literature.[27] However, in the context of placing QQ concept within labor law, the approach linking the right to disconnect to privacy-related issues and the concept of "home invasion through ICT"[28] – particularly in terms of autonomy – is quite interesting and worth analyzing. In this regard, privacy-related rights from a liberal perspective are linked to the "manifestation of individual autonomy" and an individual's right to establish boundaries between their private and public spheres and interests.[29] Therefore, by introducing the right to disconnect into national legislation, states (with France as the pioneering country in the EU) address concerns related to QQ in a preventive manner, while simultaneously providing protection for mental health from an OSH (Occupational Safety and Health) perspective and indirectly recognizing the employee's autonomy as an emerging value in modern labor relationship.

On the other hand, while German legislation in the field of occupational safety and health (OSH) imposes a duty on employers to assess work-related risks – including psychosocial risks – and emphasizes the obligation to design workplaces in a way that prevents both physical and mental harm; empirical studies have shown that this is not fully implemented in practice. Most German employers either do not conduct workplace risk assessments at all or do so without considering psychosocial risks in the process.[30] However, many German employers address psychosocial risks as part of their established workplace culture and business strategy objectives, framing the issue within the realm of organizational

27 Stojković Zlatanović and Škobo, "The 'Twilight' of Health, Safety, and Well-Being of Workers in the Digital Era – Shaping the Right to Disconnect," 139.

28 Fabienne Kéfer, "The Right to Disconnect: A Response to One of the Challenges Raised by the Digital Transition? European and Belgian Perspectives," in *Work in a Digital Era: Legal Challenges*, eds. Maria do Rosário Palma Ramalho, Catarina Carvalho, and Joana Nunes Vicente (Portugal: AAFDL EDITORA, 2022), 429–47, accessed April 7, 2025, https://orbi.uliege.be/bitstream/2268/259740/1/F.K%C3%A9fer_right_to_disconnect.pdf.

29 Stojković Zlatanović and Škobo, "The 'Twilight' of Health, Safety, and Well-Being of Workers in the Digital Era," 140.

30 David Beck and Uwe Lenhardt, "Consideration of Psychosocial Factors in Workplace Risk Assessments: Findings from a Company Survey in Germany," *International Archives of Occupational and Environmental Health* 92, no. 3 (2019): 435–51.

management, even though it is directly regulated under OSH legislation.[31] When it comes to the right to disconnect, this right has not been explicitly recognized as a standalone entitlement in German labor legislation. However, working time restrictions are directly established under the Working Hours Act, which aims to protect employees from harm related to excessive overtime and to prevent health risks.[32] The protection of employees from being available after working hours, as established by the Working Hours Act, has been degraded by a recent court decision. In 2023, the German Federal Labor Court ruled that an employee is obligated to respond to messages received during rest periods if the actual start time of the next shift can only be determined by the employer on short notice and the employee is expected to anticipate such communication.[33] On the other hand, in Germany, there is an established practice of incorporating the right to disconnect into individual employment contracts or collective agreements adopted at the company level.[34]

France addresses mental health and well-being in the workplace primarily through a strict legal-normative approach, while Germany largely relies on organizational practices, internal employer policies, and workplace culture. Changes in workplace culture and business practices inevitably influence labor standards, and vice versa. Therefore, organizational management and labor law must work in tandem to respond to the dynamic transformations in the world of work. In this context, the traditional dichotomy between hard and soft law mechanisms is becoming increasingly blurred.

The hustle and always-on cultures, which serve to increase production while simultaneously endangering mental health and overall well-being of the workers, are so strongly present in the labor market that it is not enough to think only in terms of normative options open to the legislator to protect

31 Elke Van Hoof, *Legislation and Practical Management of Psychosocial Risks at Work* (Brussel: Vrije Universiteit, 2019).

32 Tina Weber, "Right to Disconnect: Legal Provisions and Case Examples," Eurofound, April 16, 2020, 6, accessed March 12, 2025, https://www.eurofound.europa.eu/en/publications/eurofound-paper/2020/right-disconnect-legal-provisions-and-case-examples.

33 Hagen Köckeritz and Guido Zeppenfeld, "Germany: The Right to Disconnect Q&A," Lexology, March 24, 2025, accessed May 10, 2025, https://www.lexology.com/library/detail.aspx?g=0106acc4–5bc4–4912-a20f-ff0bdb6716aa.

34 Weber, "Right to Disconnect."

the work-life balance and the dignity of the worker, but also to allow room for grassroots efforts on the part of individual workers. Yet, as there may be several negative consequences of QQ activities on employers' productivity from organizational and business perspectives, it is also worth examining how this persistent behavior can be assessed through the lens of labor law. Accordingly, the central research question is whether a worker engages in unlawful conduct by participating in QQ, and whether the employer is entitled to impose sanctions in response to such behavior. This issue becomes particularly significant when an employer becomes aware that QQ is spreading among employees and evolving into a form of collective action.

3. Quiet Quitting vs. Work-To-Rule in Collective Labor Law

As mentioned before, the QQ trend could become particularly challenging when it spreads among workers, from the standpoint of an employer. It could directly affect his economic interest and profit goals. Thus, QQ activities performed by only one employee where he/she is going backward to the minimum of the employment contract with the intention of being dismissed by the employer and being eligible for social benefits are considered in terms of individual labor law and addressed in every particular case that will be significantly difficult to prove. On the other side, QQ activities that a majority of employees have been performing had to be analyzed from the perspective of collective labor law.

In that regard, in collective labor law, there is a form of industrial action, i.e. a form of strike that, in its essence, corresponds to QQ – named work-to-rule strike. According to the Justia Legal Dictionary, work-to-rule is defined as "strategy where employees adhere strictly to the rules of their job in order to slow down work progress,"[35] while in Cambridge Dictionary states that work-to-rule is "a form of protest in which employees do exactly what is stated in their contracts, and nothing more, in order to slow down the production."[36]

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35 *JUSTIA Legal Dictionary*, s.v. "work-to-rule," accessed March 30, 2025, https://dictionary.justia.com/work-to-rule.

36 *Cambridge Dictionary*, s.v. "work-to-rule," accessed March 30, 2025, https://dictionary.cambridge.org/dictionary/english/work-to-rule#google_vignette.

The two main elements of work-to-rule action are: (1) performing work tasks only in terms of employment contract and nothing more, and (2) intent/motive to slow down the production. On the other side, QQ action certainly includes the first element (working in the framework of an employment contract and nothing more), but the second element is questionable, i.e. quiet quitters intend to find a balance between work and life and protect overall physical and mental well-being, in the work organization where always-on culture prevails. Thus, quiet quitters' motive is not to slow down production, but rather to express disagreement with the established workplace culture. The intent is to influence the change of the established management organizational model without jeopardizing the employer's economic interests and ultimately to improve working conditions.

Nevertheless, when the majority of employees in some organizations are engaged in QQ, it certainly raises the question of possible industrial action at the employer level. Accordingly, reference is further made to the legality of this industrial action, under national law. First, whether this form of strike is permitted under national law and then whether the other conditions stipulated by national law are met. The problem with work-to-rule strikes is related to the problem of strikes in general, considering that the International Labor Organization (ILO) does not define strike actions, including different forms/types of strikes. However, the Committee of Freedom of Association considers that, in addition to a complete work stoppage, other "softer" slowdowns – "brief and limited" – could also be considered a strike and be legal when a strike is guaranteed under national law.[37] This principle has been applied to the work-to-rule action as well.

Additionally, in collective labor law, the intent or objective of strike actions is also important to assess in terms of the legality of the action. In that regard, there is a classification of strikes as occupational, trade union, and political strikes, where the first two forms are mainly approved under ILO standards.[38] In contrast, a political strike is considered not legal.[39]

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37 Bernard Gernigon, Alberto Odero, and Horacio Guido, *ILO Principles Concerning the Right to Strike* (Geneva: International Labour Organization, 1998), 12.

38 Jorge Andrés Leyton García, "The Right to Strike as a Fundamental Human Right: Recognition and Limitations in International Law," *Revista Chilena de Derecho* 44, no. 3 (2017): 795.

39 Ibid.

Occupational strikes aim to improve the working conditions as also QQ activities do, i.e. work-to-rule action when QQ as individual action gains the collective dimension and spread among workers. In the era of workplace digitalization, always-on work culture, and flexible work forms introduction, QQ activities are considered as individual means to influence employers to improve working conditions and provide work-life balance.

The legitimacy of actions like QQ is further reinforced by growing demands for greater autonomy at work, which include also the freedom to initiate actions such as QQ – distinct from traditional union activities. This shift occurs within the context of emerging modern forms of worker organizations, often referred to as "new mutualism."[40] These organizations represent spontaneous initiatives that bring together workers from newly formed sectors, particularly digital workers, whose access to collective bargaining remains limited due to their unrecognized employment status. As a result, the intentions behind QQ can be viewed as legitimate actions advocating for worker autonomy and rights within the context of the emergence of a modern form of work organization, such as new mutualism. However, these kinds of organizations do not have the form of unions but provide workers help to raise their voices, advocate, and influence employers to change the management model and improve working conditions through soft-law approaches representing *sui generis* substitute for social partners. Some of them are engaged in strike actions, like Workers Centers established in the United States to represent immigrants and freelance workers, i.e. workers in non-standard employment. However, the work method of the Workers Centers is mainly to engage in producing consumers' pressure throughout supply chain and influence on the employers to change organizational practice.[41]

A new flexible form of work in a digitalized environment where an always-on culture prevails generate novel approaches to workers' engagement in influencing employers' behavior that is further supported by the change of generation of workers entering the labor market. The socio-cultural differences among workers' generations impact the methods they will

40 Sandrine Cazes et al., *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work* (Paris: OECD, 2019), 246, https://doi.org/10.1787/1fd2da34-en.

41 Ibid.

apply to enhance labor status and improve working conditions. Therefore, QQ activities might have the potential to grow from an individual action of an employee into a collective action of a new generation of workers.

4. Quiet Quitting Among Directors (Managers) – Company Law Approach

In the last decades, it has been known that one of the pivotal elements in worker retention is the relationship between a company's commitment to professional growth and employees' satisfaction at work. If companies invest in opportunities for professional development, career advancement, and lifelong learning, employees are more likely to feel valued and engaged. This, in turn, fosters loyalty and increases job satisfaction.[42] Employees who perceive that their employer is dedicated to their professional growth tend to stay longer, as they see opportunities for long-term success and fulfillment within the company.

However, some companies fail to offer employees a path for professional growth and development, leaving them with the impression that the current positions offer no possibility for progression and that the current position is essentially a dead end.[43] Conversely, a lack of company support can lead to employee frustration, disengagement, and ultimately higher employee turnover. According to Sturt and Nordstrom, numerous employers have consistently failed to address workers' needs and present an array of disturbing statistics about the ineffectiveness of many modern managers (officers).[44] Therefore, many top employees, including managers and/or directors (executive directors and non-executive directors) choose to disconnect from the organization and/or the company since they have lost faith that the company is committed to their long-term development.

QQ among directors (managers) is a relatively new concept that highlights a shift in the way some leaders approach their roles in a company. Therefore, QQ among directors represents a subtle but significant

42 Danica Bakotić, "Relationship Between Quiet Quitting and Leadership Orientation: The Case of Croatian Employees," *DIEM* 8, no. 1 (2023): 39.

43 Heidi Hiltunen, "Quiet Quitting Phenomenon in Finnish Aviation Industry" (BA diss., Helia University of Applied Sciences, 2023), 6.

44 Thalmus Mahand and Cam Caldwell, "Quiet Quitting – Causes and Opportunities," *Business and Management Research* 12, no. 1 (2023): 12.

withdrawal from the active and engaged leadership that organizations rely on. As opposed to "traditional" QQ which is often associated with employees disengaging from their tasks, doing only the bare minimum required; QQ among directors takes on a deeper, and more impactful meaning.

The phenomenon of QQ among managers does not manifest through dramatic actions. It is marked by a gradual and silent retreat from the enthusiasm and commitment that are usually present in effective management.[45] Having in mind that directors and/or managers have broader responsibilities, their roles often include leading teams, ensuring productivity, and being decision-makers for organizational direction. QQ among directors might be harder to identify than in other employees because of their more autonomous roles. Rather than making clear, and explicit decisions or taking drastic actions, QQ among managers manifests in a steady decline in active involvement, reduced enthusiasm for tasks, and a lack of proactive leadership, which can negatively impact team dynamics, and a company's productivity over time. In this context, the director's lack of visible commitment may not always be immediately noticed, but its cumulative effects can gradually erode organizational culture and the company's performance.

When directors and/or managers withdraw their active and effective participation, the entire decision-making process within the company is negatively impacted. Decisions adopted without the full engagement of management and/or board of directors, lack the depth and consideration of fully engaged leadership discussions.[46] Consequently, strategic decisions may lack the necessary perspective, leading to poor judgment and avoidable mistakes. In addition, initiatives may stray from the company's long-term objectives, as disengaged leaders are less likely to ensure alignment with broader objectives, ultimately undermining the company's overall success and direction.

From a company law perspective, QQ among directors and managers raises several concerns that can affect the company's legal obligations, interpersonal relations within the company, and business outcomes. Directors

45 Marcin Majka, "Quiet Quitting Among Managers," June 18, 2024, accessed February 25, 2025, https://www.researchgate.net/publication/381515236_Quiet_Quitting_Among_Managers.

46 Ibid.

and managers, like all employees, are bound by their employment contracts, which outline specific obligations, duties, and expectations. These often include duties of competence, fiduciary duty, and loyalty, as well as a responsibility to perform to the best of their abilities and in line with the company's objectives. Directors are required to act in good faith, i.e. they have a legal responsibility to act in the best interests of the company. Directors and managers are also expected to assess compliance risk.[47] In fulfilling their responsibilities, directors must avoid situations that create a conflict of interest between their obligations to the company and their personal interests.[48]

QQ could be seen as the neglecting of their fiduciary duty, especially if their inaction harms the company, brand equity, or its reputation. If a director's and manager's QQ results in neglect of their duties related to team management, it could inadvertently create a toxic workplace, leading to discrimination or harassment complaints. For instance, failure to address grievances or manage interpersonal conflicts properly could expose the company to liability. Additionally, if a company's performance declines due to a director's lack of engagement, this can lead to potential legal challenges from stakeholders (e.g. shareholders) or breaches of regulatory requirements (in cases where business outcomes are tied to legal or compliance standards). For example, failing to meet health and safety regulations or ignoring environmental obligations due to lack of management involvement could expose the company to fines or lawsuits.

If QQ is recognized, employers may need to address it through formal mechanisms, potentially including disciplinary action or even termination of the employment contract. If directors stop performing their duties adequately or fail to act in the best interest of the company, they may be also considered in breach of their duty of care under labor law. In extreme cases, this could lead to dismissal for failure to fulfill contractual obligations. Courts, particularly within the common law system, may find it especially challenging to evaluate the director's omissions stemming from

47 Alexander Dill, *Bank Regulation, Risk Management, and Compliance: Theory, Practice, and Key Problem Areas* (Abingdon: Informa Law from Routledge, 2020), 83.

48 The Institute of Company Secretaries of India, *Company Law* (New Delhi: ICSI House, 2021), 499–500.

QQ.[49] Namely, the courts in the common law system recognize that the decisions of directors often involve weighing and balancing legal, ethical, commercial, and promotional aspects, public relations, and other factors. Consequently, "courts will not sit in judgment on the wisdom of decisions made by directors."[50] If the directors have acted in good faith based on adequate information, courts will not enjoin the course of action taken by the directors. The business judgment rule protects directors who make diligent and lawful business decisions, even if those decisions negatively impact the company, its reputation or raise its costs.

From a company law perspective, managing QQ involves both legal and policy considerations. Company law may provide specific frameworks for performance management, such as probationary periods, performance reviews, and red flags, before dismissal is considered. The company should have formal processes to evaluate and address a director's and manager's performance issues, including documenting instances of disengagement, offering corrective action plans, and providing support to improve performance. Also, if QQ is related to personal or organizational issues (e.g., burnout, lack of resources, lack of proper communication, or unfair treatment), the company must ensure that it addresses the root cause while respecting anti-discrimination laws.[51]

5. Conclusion

QQ has evolved from an organizational management issue to a labor law and, further, a company law concern. However, the intersection of these areas remains blurred in both theory and practice, as legislation does not yet recognize QQ in legal terms. This raises significant questions in legal theory regarding the role and impact of organizational management issues on fundamental socio-economic rights.

From the perspective of individual labor law, the primary concern is to assess the objective of QQ: does it represent an individual employee's

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49 Mirko Vasiljević, *Corporate Management – Legal Aspects* (Belgrade: Faculty of Law University of Belgrade, 2007).

50 David P. Twomey and Marianne Jennings, *Anderson's Business Law and the Legal Environment*, 22nd ed. (Mason: South-Western Cengage Learning, 2014), 1082.

51 Abha Thakur, "Quiet Quitting: The New Corporate Trend," *International Journal for Multidisciplinary Research* 6, no. 1 (2024): 3–4.

warning to the employer, urging them to ensure work-life balance and protect their well-being in terms of occupational safety and health while remaining within the boundaries of the employment contract? Or does it represent an attempt to influence the employer to terminate the employment contract to access social benefits? This involves considering QQ in the context of the always-on culture *versus* a culture of care, as well as in relation to emerging labor law mechanisms, such as the right to disconnect. From the perspective of collective labor law, QQ must be explored in terms of its recognition as an approved form of strike under national law. This involves determining whether QQ can be classified as a legitimate collective action and what legal protections or consequences it might entail within the framework of labor strikes.

From the perspective of company law, addressing this issue requires a balance of ensuring managers and directors meet their contractual duties while also providing a supportive business and work environment. QQ among managers and/or directors represents a significant challenge for companies, both in terms of internal workplace culture and legal risk. To mitigate the adverse consequences of QQ, companies should implement a compliance program that fosters a psychologically safe environment for all employees, including directors and managers. This program should enable employees to find meaning in their work and cultivate a corporate culture that prioritizes their well-being. In addition, companies must monitor performance, create a culture of feedback, and implement clear processes for addressing disengagement, while ensuring that they are in compliance with labor law. Companies need to reevaluate their assumptions about the values of the next generation of workers (Gen Z) and develop programs, policies, and practices that reflect a more accurate understanding of those groups.

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"In Search of Lost Time": Key Trends in Regulating Rights to Limited Working Hours, Rest, and Leisure

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Abstract: The recognition of rights to limited working hours, rest, and leisure was preceded by a long struggle by workers to shorten their working time. International organizations also contributed to this process, notably by establishing standards designed to protect health, safety, and dignity at work. This article defines the concepts of working time, rest, and leisure, explores the evolution of the recognition of these rights, and critically examines the conditions and obstacles to their effective exercise in the contemporary world of work. This issue is particularly pressing as many workers today do not enjoy these rights, ranging from individuals in the informal sector to those who accept unlawful overtime work because they cannot afford the "luxury" of losing their jobs, while employers further intensify pressure through low wages. Furthermore, the extension of working hours is frequently rationalized as a means to protect the freedom of contract and workers' purchasing power, and meet the demands of the so-called 24-hour economy. Concurrently, there is a growing trend toward reducing working hours, which will be explored through examples of statutory reductions in full-time working hours and experimental transitions

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to a four-day working week, along with theoretical reflections on the potential for contemporary societies and individuals to reduce their dependence on productive labor.

1. Working Time, Rest, and Leisure – Notions and Interrelation

In the theory, legislation, and practice of labor law, the dichotomy of "working time" and "rest time" is widely accepted. From the perspective of labor law, this means that any given period of time may be classified as either working time or rest time, as these two concepts are mutually exclusive, with certain exceptional cases existing on the very margins of the notion of working time, such as on-call and standby periods. The legal qualification of working time is dependent not on the intensity of the employee's work, but rather on the requirement for the employee to be at the employer's disposal for the performance of work.

The employer generally enjoys the freedom to organize working time in accordance with business needs, as working time arrangements influence the quality of products or services, the productivity and competitiveness of the enterprise, and its ability to adapt to market changes while enabling more flexible work organization and reducing costs.[1] Nonetheless, working time must be organized within the limits established by statutory rules regarding the (maximum) duration of work, (minimum) periods of daily and weekly rest, and the protection of health, safety, and well-being at work. The enjoyment of rights to limited working hours and rest thus contributes to the prevention of occupational injuries and illnesses, and facilitates the reconciliation of professional and family responsibilities, workers' personal development, and, ultimately, their productivity and work results.[2]

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1 International Labour Organization, *Conclusions of the Tripartite Meeting of Experts on Working-Time Arrangements: Working Time in the Twenty-First Century* (Geneva: International Labour Office, 2011), para. 1; Carole Lang, Stefan Clauwaert, and Isabelle Schömann, "Working Time Reforms in Times of Crisis" (ETUI Working Paper 2013.04, European Trade Union Institute, Brussels, 2013), 6–7.

2 United Nations Committee on Economic, Social and Cultural Rights, General comment No. 23 (2016) on the right to just and favorable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23.2016, Geneva 2016, para. 34. This is particularly important since the risk of workplace injury is proportional to the number of hours worked, increasing exponentially when work exceeds a specific threshold of hours. Dominique Anxo and Mattias Karlsson, "Overtime Work: A Review

Traditional labor law has been constructed around the model of a male, full-time worker with an open-ended employment contract, often failing to adequately consider the specific needs of women in the labor market.[3] Within this context, rest has been traditionally perceived as leisure time, allowing workers to engage in preferred activities, from gardening to sports.[4] Still, it is essential to remember that rest time is used both for leisure as genuine free time and for activities essential to meet basic human needs (e.g., meal preparation, hygiene maintenance, and other domestic chores).[5] Thus, it is possible to identify two categories of rest time: the first is *basic* or *necessary time*, and the second is *leisure time*, which can include a wide array of activities, from sports and cultural engagement to gambling or complete inactivity.[6] The state may choose to promote or discourage some of these activities, but, in principle, it is left to the individual to decide how to utilize their free time. The right to leisure is also recognized as a fundamental human right, enshrined in both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, these instruments do not define the concept of leisure, while its clearer understanding is supported by the practice of the Committee on the Rights of the Child, since the Convention on the Rights of the Child guarantees the right of the child to rest and leisure.[7] This guarantee is interpreted in light of the idea that leisure brings children enjoyment and satisfaction while also fostering emotional

of Literature and Initial Empirical Analysis," *Conditions of Work and Employment Series*, no. 104 (2019): 1.

3 Ljubinka Kovačević, "Gender Perspective of Development of Labour Law," in *Gender Perspectives in Private Law*, eds. Gabriele Carapezza Figlia, Ljubinka Kovačević, and Eleonor Kristoffersson (Cham: Springer Nature, 2023), 114.

4 Jill Murray, *ILO and Working Conditions – An Historical Analysis* (Geneva: International Labour Office, International Institute for Labour Studies, 2009), 6.

5 John T. Haworth and Anthony J. Veal, "Introduction," in *Work and Leisure*, eds. John T. Haworth and Anthony J. Veal (New York: Routledge, 2004), 1; Alastair James, "Work Emails at the Breakfast Table: Proximity of Labour and Capital as an Unexamined Difficulty for the (Just) Distribution of Discretionary Time," *Journal of Applied Philosophy* 41, no. 2 (2024): 352, https://doi.org/10.1111/japp.12696.

6 Simone Varva, "… e se fosse ancor più `smart` lavorare soltanto quattro giorni all settimana?," *Labour & Law Issues* 8, no. 1 (2022): 37, https://doi.org/10.6092/issn.2421-2695/15022.

7 United Nations, Convention on the Rights of the Child, Treaty Series, vol. 1577, 3, Article 31, para. 1.

balance, conflict resolution, decision-making, exploration, and experimentation, through which they learn to understand and construct their place in the world.[8] Although this interpretation refers to a right to leisure exercised independently of work, it indicates that leisure should not be understood solely as idleness. Rather, leisure encompasses activities essential to individual life, given that "individual and societal benefits of 'recreation' and 'play' are not limited to children. They apply also to adults, who, so far, only enjoy 'rest' from work and an empty right to 'leisure.'"[9]

2. Limiting Working Hours and Recognizing the Right to Rest – Evolution and Objectives

The issue of working hours is closely linked to the development of society, industrial production, and the regulation of human labor. Before capitalism, working time depended on the seasons and weather conditions, while compensation for labor was determined by custom, regardless of the time spent on effective work.[10] Industrialization brought a new approach to the time coordinates of work: "by the division of labour; the supervision of labour; fines; bells and clocks; money incentives; preachings and schoolings; the suppression of fairs and sports – new labour habits were formed, and a new time-discipline was imposed."[11] The pursuit of profit maximization was, in fact, accompanied by demands for longer working hours: in the early stages of capitalism, workers worked about 14–16 hours a day, six or seven days a week.[12]

The recognition of right to limited working hours was preceded by a painful struggle that highlighted the need to protect physical integrity of

8 United Nations, Committee on the Rights of the Child, General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), CRC/C/GC/17, 2013, para. 9

9 Nicolas Bueno, "Article 24: The Right to Rest and to the Limitation of Working Hours," in *The Universal Declaration of Human Rights: A Commentary*, ed. Humberto Cantu Rivera (Brill, 2023), 12, ResearchGate.

10 Brendan Burchell et al., "The Future of Work and Working Time: Introduction to Special Issue," *Cambridge Journal of Economics* 48, no. 1 (2024): 3, https://doi.org/10.1093/cje/bead057.

11 E.P. Thompson, "Time, Work-Discipline, and Industrial Capitalism," *Past and Present* 38, no. 1 (1967): 90, https://doi.org/10.1093/past/38.1.56.

12 Gérard Aubin and Jacques Bouveresse, *Introduction historique au droit du travail* (Paris: PUF, 1995), 251.

workers, which further contributed to the broader effort to prevent workers from being reduced to mere tools. In this context, the issue of the length of the working day that could ensure workers' livelihoods while preserving their good health was raised. According to Robert Owen, the eight-hour workday was the embodiment of this standard, and it was adopted by the labor movement by the mid-19th century (with the call for "Eight hours to work, eight hours to play, eight hours to sleep"), based on the idea that without the statutory limitation of working hours, all other efforts for the emancipation of the working class would fail.[13]

Proposals to reduce working hours were criticized in the context of freedom of contract and workers' autonomy in choosing how much they work, on the grounds that those who wish to earn more should be able to work longer hours. Concerns were also raised that with shorter working hours, workers would have more opportunities to indulge in "low passions," especially excessive alcohol consumption, leading to a "moral decline" of the working class.[14] Finally, it was pointed out that reducing working hours would lead to a decrease in productivity and profits for industrial enterprises, benefiting employers from countries where such restrictions were not implemented.[15] Despite strong opposition from employers, many European countries implemented reductions in working hours to 10–12 hours per day – in Germany in 1891, France in 1906, Spain in 1907, Luxembourg in 1913, and Belgium in 1914.[16] The eight-hour workday was introduced after World War I, although some of these laws allowed exceptions, mainly due to the need to address the postwar economic crisis.

The regulation of working hours is closely tied to the recognition of the right to a weekly rest. Similarly the right to limited working hours, initially,

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13 Thilo Ramm, "*Laissez-faire* and State Protection of Workers," in *The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945*, ed. Bob Hepple (London: Mansell Publishing Limited, 1986), 105; Catherine Barnard, Simon Deakin and Richard Hobbs, "Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time" (Institute of Technology, Enterprise and Competitiveness Research Paper Series 04–14, 2004), 8.

14 Ramm, "*Laissez-faire* and State Protection of Workers," 106.

15 Aubin and Bouveresse, *Introduction historique au droit du travail*, 227.

16 Carla Spinelli, "ILO Convention 1: Hours of Work (Industry) Convention, 1919 (No. 1)," in *International and European Labour Law – A Commentary*, eds. Edoardo Ales et al. (Baden-Baden: Nomos, C.H. Beck, Hart Publishing, 2018), 1321.

it was granted only to children and women; however, between 1905 and 1910, it was extended to all workers.[17] Despite opposition to recognizing this right, primarily stemming from concerns about its harmful effects on small enterprises, the prevailing belief was that its enjoyment was essential for workers, their families and society, as it fostered the participation of workers in social life.[18] On the other hand, it was not until World War II that a right to paid annual leave was recognized as universal. Its duration was gradually extended as it began to serve other functions, such as fostering tourism and enhancing the entertainment industry, as "the working class, which had gained free time, now had to conquer the use of its free time."[19]

3. International and European Regulation of Working Hours, Rest, and Leisure

The call for the eight-hour workday was revived at the end of World War I when it became "the wartime cry of the masses; the employers retort that it can be introduced only by international action."[20] In that sense, the adoption of standards in this field has been a priority of the International Labour Organization (ILO) since its inception. Its founding document confirmed the introduction of an eight-hour working day and a 48-hour workweek as a standard to be aspired to, primarily to prevent unfair competition in the international market and to increase employment. This standard was confirmed by Conventions No. 1 and 30, although several exceptions were introduced to help the recovery of economies devastated by war.[21] The next phase was marked by Convention No. 47 (1935), which affirms the reduction of working hours to the extent possible, primarily to distribute available jobs between employed and unemployed individuals, thereby reducing unemployment after the Great Depression. However, the standard of

17 Aubin and Bouveresse, *Introduction historique au droit du travail*, 228–29.

18 It can be concluded that the recognition of the right to weekly rest has undergone a long journey – from acknowledging the obligations of workers as believers, to recognizing their family duties, and ultimately to recognizing their civil duties. Aubin and Bouveresse, *Introduction historique au droit du travail*, 230.

19 Aubin and Bouveresse, *Introduction historique au droit du travail*, 285; Gilles Auzero, Dirk Baugard, and Emmanuel Dockès, *Droit du travail* (Paris: Dalloz, 2023), 1198.

20 Stephan Bauer and Alfred Maylander, "The Road to the Eight-Hour Day," *Monthly Labor Review* 9, no. 2 (1919): 41, http://www.jstor.org/stable/41827595.

21 Lammy Betten, *International Labour Law – Selected Issues* (Deventer: Kluwer, 1993), 190–91.

a 40-hour workweek was set as a principle to be gradually implemented, with the condition that it should not negatively impact workers' wages; otherwise, they would not be able to benefit from the advantages of industrial development.[22] The importance of reducing working hours was highlighted again via Recommendation No. 116 (1962), since consensus could not be reached on a binding instrument. Finally, ILO has adopted dozens of acts that regulate the implementation of the principle of a 40-hour workweek in specific sectors, as well as the issues of weekly and annual leave, night work, and part-time work.

The rights to rest, leisure, and limited working hours are confirmed in the UDHR[23] and the ICESCR,[24] although these instruments do not specify maximum number of working hours. According to the Committee on Economic, Social and Cultural Rights, these provisions should be understood as allowing the regulation of working hours in accordance with national circumstances, but only within the limits of what is considered a reasonable maximum working time.[25] However, this flexibility does not exempt states from their obligation to introduce minimum standards that must be respected and cannot be abolished or lowered for economic or productivity reasons.[26] In this regard, a general recommendation has been formulated that daily working time (excluding overtime) should be limited to eight hours.[27] Given that certain states have opted for a 40-hour workweek, all states that have not adopted this standard are encouraged to progressively attain it and to recognize the right to at least 24 consecutive hours of weekly rest.[28]

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22 Carla Spinelli, "ILO Convention 47: Forty-Hour Week Convention, 1935 (No. 47)," in *International and European Labour Law – A Commentary*, eds. Edoardo Ales et al. (Baden-Baden: Nomos, C.H. Beck, Hart Publishing, 2018), 1333.

23 United Nations, Universal Declaration of Human Rights adopted on December 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), Article 24.

24 United Nations, International Covenant on Economic, Social, and Cultural Rights, Treaty Series, vol. 993, 3, Article 7, point d).

25 United Nations, Committee on Economic, Social and Cultural Rights, General comment No. 23 (2016), para. 36.

26 Ibid., para. 34.

27 Ibid., para. 35.

28 Ibid., paras 37–9.

The issue of working hours is also addressed in the European Social Charter (ESC), which established the obligation of contracting parties to "provide for reasonable daily and weekly working hours" as an essential element of guaranteeing the right to just conditions of work.[29] Due to national specificities, the ESC does not specify the number of hours that should be deemed "reasonable," but it should be assessed based on the economic and other circumstances prevalent in each state, particularly in light of protecting workers' health and safety, as well as the general interest.[30] At the same time, the ESC contains a programmatic provision urging that "the working week be progressively reduced to the extent that the increase of productivity and other relevant factors permit."[31] This ultimately means that contracting parties are expected to continue seeking opportunities for further reduction of working hours, which is interpreted as implicitly prohibiting the extension of working hours.[32]

At the European Union (EU) level, limiting working hours is seen as an integral part of the right to fair and just working conditions,[33] as well as a guarantee of dignity at work and an essential aspect of protecting occupational health and safety. Member states of the EU are thus required to limit working hours so that "the average working time for each seven-day period, including overtime, does not exceed 48 hours."[34] This average fund is calculated for a reference period of no longer than four months. Furthermore, Directive 2003/88/EC guarantees a minimum daily rest period of 11 consecutive hours for each 24-hour period, as well as a minimum weekly rest period of 24 consecutive hours.[35]

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29 Council of Europe, European Social Charter, European Treaty Series, No. 35, Article 2, point 1.

30 Lenia Samuel, *Droits sociaux fondamentaux: Jurisprudence de la Charte sociale européenne* (Strasbourg: Editions du Conseil de l'Europe, 2002), 41.

31 Council of Europe, European Social Charter, Article 2, point 1.

32 Klaus Lörcher, "Article 2: The Right to Just Conditions of Work," in *The European Social Charter and Employment Relation*, eds. Niklas Bruun et al. (Oxford: Hart Publishing, 2017), 172.

33 Charter of Fundamental Rights of the European Union (OJ C326, 26 October 2012), Article 31.

34 Directive 2003/88/EC of the European Parliament and of the Council of November 4, 2003, concerning certain aspects of the organisation of working time (OJ L299, 18 November 2003), Article 6, point b).

35 Ibid., Articles 3 and 5.

4. Contemporary Challenges in Regulating the Right to Limited Working Hours, Rest, and Leisure

4.1. General Remarks

Due to the differences between statutory and contractual working hours, as well as part-time work, overtime work, the specific nature of work in the private and public sectors, and other factors, calculating the exact working hour quota in a given country is often a challenging task.[36] With this in mind, it is noteworthy that in the first decade of the 21st century, only 30% of countries, mainly in Europe and Africa, had a 40-hour workweek limit; a larger number of countries established a maximum exceeding 40 hours, most commonly set at 48 hours per week.[37] Moreover, a considerable number of workers lack the right to limited working hours and rest, particularly those in the informal sector. This also pertains to new forms of work, while platform work illustrates a scenario where it is difficult to apply the standard working hours model, even in legal systems that qualify it as an employment relationship.[38]

The impact of digitalization on working hours is also reflected in the fact that information technologies and artificial intelligence can be helpful in recording and planning working hours, as well as controlling employee's attendance at the workplace and monitoring compliance with rules on limited working hours.[39] However, some authors identify the need to abandon a strictly quantitative approach to working time, with the belief that "replacing the monitoring time by an assessment of the workload would enable employers to better guarantee rest periods for employees."[40]On the other

36 Varva, "… e se fosse ancor più `smart` lavorare soltanto quattro giorni all settimana?," 30.

37 Spinelli, "ILO Convention 47: Forty-Hour Week Convention, 1935 (No. 47)," 1332–3.

38 The primary reason is the time spent waiting for client's requests, which is typically not considered working time and, consequently, is not included in the maximum daily and weekly working hour quotas, although regulations differ by country.

39 Employers are expected to establish "an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured", which should ensure that each employee effectively enjoys daily and weekly rest, along with the right to limited working hours. CJEU Judgment of May 14, 2019, Federación de Servicios de Comisiones Obreras – CCOO v. Deutsche Bank SAE, Case C-55/18, ECLI:EU:C:2019:402, para. 60.

40 Loïc Lerouge and Francisco Trujillo Pons, "Contribution to the Study on the 'Right to Disconnect' from Work. Are France and Spain Examples for Other Countries and EU Law?," *European Labour Law Journal* 13, no. 3 (2022): 464, https://doi.org/10.1177/20319525221105102.

hand, the digitalization of work leads to the dissolution of traditional spatial and time-based boundaries. This is particularly true for remote and hybrid work, where employees determine their own working hours with varying degrees of autonomy, which has now become a means for attracting and retaining workers.[41] For this, the consistent implementation of relevant rules is essential; otherwise, remote and hybrid work may lead to unpaid overtime and other risks. Moreover, development of digital technologies has fostered the development of an "always-on culture," which effectively prolongs working hours and blurs the boundary between working time and rest. In this sense, it is necessary to consider the legitimate expectations of employees regarding the use of digital devices,[42] which raises the issue of recognizing the right to disconnect from work, i.e., the right not to participate directly or indirectly in activities or communication related to work for the employer during periods of rest via digital devices. Namely, workers cannot suffer reprisals if they turn off their phone after working hours, refuse to respond to an employer's email sent during period of rest, or reject or not answer an employer's phone or video call outside of their working hours.[43] This right is explicitly guaranteed by the laws of several European states, including Belgium, France, Greece, Italy, Portugal, Slovakia and Spain, whereas in other legal systems, it is indirectly protected as part of fair working conditions, or occupational health and safety. As Blackham rightly concludes "this could prove to be an important complement to provisions relating to maximum working hours, ensuring the sanctity of non-working hours."[44]

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41 Iacopo Senatori and Carla Spinelli, "(Re-)Regulating Remote Work in the Post-Pandemic Scenario: Lessons from the Italian Experience," *Italian Labour Law e-Journal* 14, no. 1 (2021): 213, https://doi.org/10.6092/issn.1561-8048/13376.

42 BusinessEurope, SMEunited, CEEP and the ETUC /and the liaison committee EUROCADRES/, European Social Partners Framework Agreement on Digitalization, 2020, 10.

43 Cf. Sanja Stojković Zlatanović, "Pravo na digitalnu (ne)dostupnost u oblasti rada – Novo pravo svojstveno radu u digitalnom dobu," in *Međunarodni pravni odnosi i pravda*, ed. Jelena Perović Vujačić (Belgrade: Kopanička škola prirodnog prava – Slobodan Perović, 2023), 561–3; Sanja Stojković Zlatanović and Milena Škobo, "The 'Twilight' of Health, Safety, and Well-Being of Workers in the Digital Era – Shaping the Right to Disconnect," *Journal of Work Health and Safety Regulation* 2, no. 2 (2023): 129–44, https://doi.org/10.57523/jaohlev.oa.23-003; Mario Reljanović and Ana Knežević Bojović, *Pravo na privatnost na radu* (Belgrade: Institut za uporedno pravo, 2025), 129.

44 Alysia Blackham, "Productivity and the Four-Day Work Week," *Alternative Law Journal* 50, no. 3 (2025): 199, https://doi.org/10.1177/1037969X251345189.

4.2. The Trend of Extending Working Hours

The contemporary organization of working time is defined by two opposing trends, both linked to efforts to influence specific economic variables through working time regulation.[45] The first trend is connected with the exploitation of workers through unlawful overtime, especially in countries with an underdeveloped institutional framework for labor rights protection and low unionization rates. Moreover, many workers agree to unlawful overtime because they cannot afford the "luxury" of losing their jobs, while many low-paid workers agree to it as they would otherwise be unable to provide for their families sufficiently.

As for policymakers and lawmakers, they exhibit an ambivalent attitude toward the duration of working hours, both in terms of encouraging the extension of working time and the trend towards its reduction. The extension of working time is thus endorsed as a means to mitigate the effects of economic and financial crises, and as a tool for supporting the so-called 24-hour economy. There are also proposals for extending working hours to improve workers' purchasing power, echoing the slogan *travailler plus pour gagner plus* ("Work more to earn more"). This approach is reflected in Directive 2003/88/EC, which allows employers to offer employees the option to exceed 48 hours of work per week, provided that general principles related to occupational health and safety are respected. This provision has faced sharp criticism because of the risk that working time will become trivialized to the point where, as a factor in calculating wages, it will be regarded as a commodity that anyone can manage at will. This dilemma also marked the process of amending the Directive 2003/88/EC, which had been long stalled precisely due to disagreements among Member States, social partners, and EU institutions over whether and to what extent the rule on the maximum working time may be derogated. A compromise in this case seems attainable only if conditions are established to balance the protection of occupational health and safety with demands for flexibility.

[45] Alexandre Fabre, "Les temps du travail: entre libertés et pouvoir," in *13 paradoxes en droit du travail*, ed. Philippe Waquet (Paris: Lamy, 2012), 239.

Any other solution would amount to a complete victory of economic goals over a fundamental purpose of labor law.[46]

4.3. The Trend of Working Time Reduction

4.3.1. Reduction of the Statutory Duration of Full Working Hours

The reduction of working time has long been viewed as a tool for combating unemployment, facilitating the redistribution of available jobs to as many people as possible, in line with the slogan *travailler moins pour travailler tous* ("Work less so that everyone can work"). This idea is also gaining traction in the context of post-growth economics, as limiting working hours can help maintain low unemployment rates without relying on economic growth. This is all the more relevant given that working time reduction can contribute to gender equality, as well as to environmental sustainability, while previous growth-driven strategies have proven unsustainable, and the prospects for "green growth" remain uncertain.[47]

Statutory reductions in full-time working hours were already implemented in the 1930s to address the consequences of the Great Depression. The measure re-emerged in the late 20th century when several European countries started to gradually shorten the working hours to reduce unemployment. In France, for instance, reforms began in 1982, reducing the working week to 39 hours. Under the process of the so-called Aubry Laws of 1998 and 2000, the working week for large employers was reduced to 35 hours, while in 2002, this standard was extended to employers with fewer than 20 employees. Interestingly, despite the formal preservation of the 35-hour maximum, the legislator introduced various mechanisms that indirectly extended the working week.[48] For instance, in 2007, income

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46 This has been confirmed in the case law of the CJEU, which maintains that flexible working time introduced for the employer's benefit cannot be considered one of the objectives of the Directive 2003/88/EC. Vito Leccese, "Directive 2003/88/EC Concerning Certain Aspects of the Organisation of Working Time," in *International and European Labour Law – A Commentary*, eds. Edoardo Ales et al. (Baden-Baden: Nomos, C.H. Beck, Hart Publishing, 2018), 1288.

47 Bence Lukács and Miklós Antal, "The Reduction of Working Time: Definitions and Measurement Methods," *Sustainability: Science, Practice and Policy* 18, no. 1 (2022): 710, https://doi.org/10.1080/15487733.2022.2111921.

48 Marcello Estevão and Filipa Sá, "The 35-Hour Workweek in France: Straightjacket or Welfare Improvement?," *Economic Policy* 23, no. 55 (2008): 421, https://doi.org/10.1111/j.1468-0327.2008.00204.x.

from overtime and additional work was exempted from taxation, allowing workers to increase their earnings by working longer, while also attracting foreign investors.[49] This development effectively allowed employers to broaden their prerogatives, with adverse effects on workers' well-being.[50]

The most recent initiative for a statutory reduction in working time comes from Spain, where on February 5, 2025, the Government proposed legislation to reduce the working week from 40 to 37.5 hours, without reducing pay. The proposal is based on an agreement between the Government and trade unions *CCOO* and *UGT*, while the employers' association *CEOE* withdrew from negotiations after 11 months, citing concerns over reduced competitiveness, particularly for small employers. *CEOE* advocates a gradual reduction in working time via sectoral collective agreements, but the Government finds this unacceptable, particularly in light of the need to protect workers not covered by collective agreements. Moreover, it proposes subsidies to help small employers adapt to the new regime and aims to encourage further reductions through collective bargaining. It remains to be seen whether Parliament will successfully reconcile the interests of all stakeholders, especially since the new legislation will primarily benefit workers in the private sector.[51]

The social dialog is a powerful tool for reductions negotiated through collective agreements tailored to the needs of specific sectors or companies.[52] For instance, in Germany, trade unions began advocating for a 35-hour working week as early as the mid-1980s, which they ultimately achieved through sectoral and company-level agreements. On the other hand, in its 2000 policy statement, "An active working time policy: For employment, time sovereignty and equal opportunities," the European Federation of Public Service Unions confirmed that a 35-hour working week should be a core objective of collective bargaining and encouraged

49 Ibid.

50 Auzero, Baugard and Dockès, *Droit du travail*, 1103.

51 Thanks to collective agreements, most public sector employees already work fewer than 40 hours per week.

52 India Burgess, Hampus Andersson and Grace Western, "Bargaining for Working Time Reduction. ETUC Study on Working Time Reduction in Collective Agreements," European Trade Union Confederation, 2025, 12, accessed July 20, 2025, https://www.etuc.org/en/publication/bargaining-working-time-reduction-etuc-study-working-time-reduction-collective.

members to strive for even shorter working hours. This implies that only workers supported by strong unions and/or the state are likely to achieve reduced working hours.

4.3.2. Experimental Transition to a Four-Day Workweek

The five-day workweek has been the dominant standard in European countries for decades. Exceptions are countries with developed social dialog, where the working week is shortened in certain sectors based on collective agreements, such as in Germany and the Netherlands.[53] This aligns with the belief that a four-day workweek enables effective enjoyment of the right to leisure, as well as achieving gender equality. Nevertheless, most employers are not inclined to transition to a four-day workweek, despite its potential for reduced costs. The primary reasons contributing to this are tied to the imperative to maintain company profitability, along with new forms of work management, wherein employees are encouraged to meet work goals, often with the provision of certain financial incentives.[54] In such a climate, a shorter workweek is, in principle, considered acceptable only for carers. Furthermore, proposals to switch to a four-day workweek are rejected because many workers cannot secure decent income without overtime work, especially in light of the constant rise in the cost of living.[55] Some authors also point out that many workers want to work longer than the time needed to ensure economic security, since, in contemporary societies, being "busy" is believed to be indicative of an individual's competitiveness and ambition, regarded as desirable characteristics of "human capital," unlike in the past, when ample free time was regarded as a status symbol.[56]

The aforementioned *pro* and *contra* arguments are evident in several examples of six-month trial transitions to a four-day workweek in companies employing thousands of employees in Australia, Belgium, Iceland, Ireland, New Zealand, Spain, the United Kingdom, and the United States.[57] Unlike other legal systems, where the state (as the legislator or in the form

53 Burchell, Deakin, Rubery and Spencer, "The Future of Work and Working Time," 7.

54 Ibid., 7–8.

55 Bueno, "Article 24: The Right to Rest and to the Limitation of Working Hours," 16.

56 Silvia Bellezza, Neeru Paharia, and Anat Keinan, "Conspicuous Consumption of Time: When Busyness and Lack of Leisure Time Become a Status Symbol," *Journal of Consumer Research* 44, no. 1 (2017): 119–38, https://doi.org/10.1093/jcr/ucw076.

57 Burchell, Deakin, Rubery, and Spencer, "The Future of Work and Working Time," 20.

of statements of intent) and trade unions promote the reduction of working hours, these cases involved the voluntary decision of individual employers to transition to a shorter workweek, primarily motivated by a desire for improvement of work quality and encouraging employees to join and stay in the companies.[58] The results of these experiments showed a positive impact on employees' well-being, while wages remained unchanged, and productivity was maintained or even improved: "essentially, adopting a four-day workweek means people get more done in less time, and adapt their work behaviors to become more efficient and productive (including, perhaps, because they are aware they are taking part in a trial)."[59] However, the reliability of the results is questioned because most experiments were conducted in the service sector, and in wealthy countries. Therefore, it remains uncertain whether the positive effects are achievable in other sectors, and in a less favorable economic context.[60] Moreover, there exists a risk that a shorter workweek, under the guise of greater flexibility, may lead to greater control over employees and increased job insecurity.[61]

5. Theoretical Insights in Possibilities for Reducing Society's and Individuals' Dependence on Productive Work

Many scholars reassess the content and purpose of the right to rest and leisure. Among them, particularly noteworthy is André Gorz, whose book *Metamorphoses of Labor: A Critique of Economic Reason* stresses the necessity of reducing working hours without lowering employees' wages.[62] This author argues that unjustified overtime work is inextricably linked to the

58 Agnieszka Piasna, Armanda Cetrulo, and Angelo Moro, "Negotiating Working Time Reduction" (Working Paper 2024.12, European Trade Union Institute, Brussels, 2024), 6.

59 Kyle Lewis et al., *The Results Are in: The UK's Four-Day Week Pilot* (Hampshire: Autonomy, 2023), 5–7; Blackham, "Productivity and the Four-Day Work Week," 201.

60 Kata Hidasi, Tímea Venczel, and Miklós Antal, "Working Time Reduction: Employers` Perspectives and Eco-Social Implications – Ten Cases from Hungary," *European Journal of Social Security* 25, no. 4 (2023): 2, https://doi.org/10.1177/13882627231214547.

61 Geraldo Tessarini Junior and Patricia Saltorato, "Reduced Working Time as Political, Management and Control Instrument," *Organizações & Sociedade* 29, no. 103 (2022): 725, https://doi.org/10.1590/1984-92302022v29n0035EN.

62 André Gorz, *Métamorphoses du travail: Critique de la raison économique* (Paris: Galilée, 1988), https://monoskop.org/images/a/ab/GORZ_André_-_Métamorphoses_du_travail_Critique_de_la_raison_économique_(OCR_A5).pdf.

issue of wages, as employers, by paying low wages, pressure employees to work long hours in order to secure sufficient income for their livelihood. Notably, this wage reduction is intended not only to reduce labor costs but also to exert greater control over employees and increase their dependence on employers. Gorz believes that technological development makes it possible to shorten working hours with a statutory maximum of 1,000 working hours per year for workers in all sectors, which employers could distribute throughout the year according to the needs of the production process.[63] This would provide individuals with more opportunities to engage in "autonomous" activities, which serve as sources of meaning and happiness, such as art, philosophy and charity work.[64] This development would build upon the historical struggle of workers, while also protecting those who do not work, as well as those who perform unpaid household work.[65]

The examination of possibilities to reduce the economic dependency on productive labor is also a central focus of the theory of human economy. Its proponents warn against the harmful consequences of neglecting the potential of people to create outside the realms of goods production and service provision.[66] Thus, the concept of "freedom from work" is affirmed as the freedom to enjoy life devoid of economic pressures (negative freedom from work), as well as the freedom to engage in meaningful activities, including work.[67] In this sense, Bueno advocates for an end to the continued waste of human potential, particularly in light of the almost exclusive development of skills that create economic value, as well as the treatment of unemployed individuals as societal burdens.[68] Therefore, a universal basic income should enable each individual to have control over the pace and

63 Ibid., 216.
64 Ibid., 209.
65 Ibid.
66 Manuel C. Branco, "Economics for the Right to Work," *International Labour Review* 158, no. 1 (2019): 71, https://doi.org/10.1111/ilr.12130.
67 Nicolas Bueno, "Freedom *at*, *through* and *from* Work: Rethinking Labour Rights," *International Labour Review* 160, no. 2 (2021): 19, https://www.ius.uzh.ch/dam/jcr:97708075-2b44-4f44-9e01-54c8bd254878/Freedom-at-Work,-Freedom-through-Work,-Freedom-from-Work.pdf.
68 Nicolas Bueno, "From the Right to Work to Freedom from Work," *International Journal of Comparative Labour Law and Industrial Relations* 33, no. 4 (2017): 476, https://doi.org/10.54648/ijcl2017020; Alain Supiot, *L'esprit de Philadelphie. La justice sociale face au marché total* (Paris: Seuil, 2010), 63–4.

intensity of their work, the ability to leave unsuitable jobs, and more opportunities for volunteering.[69] Similarly, de Becker and Klaus propose to recognize the "right to laziness,"[70] which resembles the stance expressed by Paul Lafargue in 1880 in his satirical attack on the work ethic.[71] These authors argue that the recognition of the right to leisure is insufficient to affirm the right to laziness, as people not only need the right to recover from work, but also the right not to be engaged in work.[72] Therefore, it is proposed that the right to laziness be recognized and its enjoyment enabled through a universal basic income. This is particularly important as the right to social security implicitly includes a duty to work, as professional activity form the basis for social insurance, while beneficiaries of unemployment benefits are required to actively seek job and accept suitable employment, or else they will lose social benefits.[73] In this respect, an alternative way of funding the social security system should ensure sufficient resources for a decent life for everyone, while granting individuals the freedom (but not the duty) to work. This is especially pressing considering unsustainability of contemporary social security systems, even with the introduction of activation measures for unemployed individuals.[74]

6. Conclusion

In the contemporary world of work, the organization of working time falls within the core managerial prerogatives of the employer, who generally enjoys the freedom to structure working hours in accordance with the needs of the enterprise. This freedom, however, operates within the limits established

69 Bueno, "From the Right to Work to Freedom from Work," 481.

70 Alexander de Becker and Flore Claus, "Social Security and the Right to Laziness Beyond Just Basic Income," in *Labour Law Utopias. Post-Growth & Post-Productive Work Approaches*, eds. Nicolas Bueno, Beryl ter Haar, and Nina Zekić (Oxford: Oxford University Press, 2024), 212.

71 Pol Lafarg, *Pravo na lenjost. Opovrgavanje `Prava na rad` iz 1848. godine*, trans. Goran Bojović (Loznica: Karpos, 2016), 22, 44.

72 De Becker and Claus, "Social Security and the Right to Laziness Beyond Just Basic Income," 212.

73 Similar duties are placed on recipients of social assistance, ranging from the requirement to register as unemployed, to the obligation to seek employment and participate in training programs, to the demand to engage in public works.

74 De Becker and Claus, "Social Security and the Right to Laziness Beyond Just Basic Income," 217–18.

by statutory norms regulating working time, rest periods, and occupational safety and health. These temporal coordinates of work reflect the efforts of the labor movement, as well as international and regional initiatives aimed at setting standards for working time. Limited working hours, rest, and leisure are today protected as fundamental human rights, accompanied by gradual but continuous progress in reducing working hours. Moreover, the importance of programmatic provisions in relevant legal instruments (e.g., the European Social Charter) must not be overlooked. These provisions call on states to progressively reduce working hours as far as allowed by increased productivity, the nature of work, and other relevant factors.[75] More precisely, they reflect an expectation that states, social partners and other relevant actors will actively seek opportunities for further reduction of working hours, while that expectation ultimately implies a prohibition on extending working time.[76]

The regulation of working time is connected to various economic variables, both in terms of using working time reduction as a tool to combat unemployment, and in terms of extending effective working time to enable workers to earn more. However, the primary objective of working time regulation at the international, European, and national levels is the protection of health and safety at work, although this is often accompanied by the marginalization of other goals that complement occupational safety and health, such as the reconciliation of professional and family responsibilities of workers, or the achievement of substantive gender equality, particularly with regard to equal participation of men and women in unpaid domestic work.[77] Furthermore, it is concerning that, even in the 21st century, a significant number of workers are still denied rights to limited working time, rest, and leisure. This is primarily because many workers in the informal sector, as well as those engaged in new forms of work, are excluded from the scope of relevant legal instruments. Moreover, these instruments often

75 Lörcher, "Article 2: The Right to Just Conditions of Work," 172.

76 Ibid.

77 Aleksandar Ristovski, "Working Time and Regulatory Discourse in the Legal Frameworks of the EU and Macedonian Labour Law," in *Labour Law and Changes in the World of Work: Lessons for Advancing Macedonian Labour Legislation and Its Application in Practice. Book of Abstracts*, ed. Todor Kalamatiev (Ohrid: Združenie za trudovo i socijalno pravo na Severna Makedonija, 2025), 22.

fail to address the economic roots of widespread violations of working time regulations, such as low wages and job insecurity, which compel workers to accept exploitative and unlawful overtime.[78] At the EU level, the possibility of individually extending working hours has been introduced in order to safeguard contractual freedom and workers' purchasing power, promoting the troubling idea that "anyone who wants to earn more is free to waive even their fundamental human rights," by viewing working time as a commodity that can be freely disposed of.

In this context, the call to persist in efforts to further reduce working hours remains relevant, including reducing the statutory full-time working hours, and launching experimental initiatives for a four-day workweek aimed at achieving various economic, social, and environmental objectives, or even creating the conditions for the effective enjoyment of freedom from work, in line with the human economy approach. These initiatives are commendable, although many still lack reliable evidence of their long-term effects, especially in light of efforts to promote work-life balance within an "always-on" work culture.

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[78] Bueno, "Article 24: The Right to Rest and to the Limitation of Working Hours," 13; Rita Berger, Erasmus Keli Swanzy, and Jan Philipp Czakert, "The Relevance of Workload and Working Time in Current Times," in *Decent Work Worldwide: Universal Values, Diverse Expressions*, eds. Izabela Maria Rezende Taveira, Nuno Rebelo dos Santos, and Leonor Pais (Curitiba: CRV, 2023), 76.

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Tax Commitments in the *Compromiso de Sevilla* – Critical Issues in Financing for Development

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Abstract: Crucial financial topics have been debated during the latest International Conference on Financing for Development. After taking stock of different stakeholders' input, their contributions within the tax field are systematized, and the outcome document is critically assessed. The renewed framework for Domestic Resource Mobilization (DRM) comprises stronger tax policies and administrations, tax reforms based on smart use of context-specific data, and the improvement of specific categories of taxes. It addresses progressivity, solidarity and international tax cooperation, taking into consideration human rights. African countries have relied on their own efforts to strengthen DRM capacity but call for support in the fight against illicit financial flows. They are simultaneously working collectively to shape the UN Framework Convention on International Tax Cooperation and its protocols. In any reconfiguration of the domestic or international financial architecture, the oversight by audit institutions should be reinforced. Despite wishes to quickly put into practice several commitments with The Sevilla Platform for Action, the *Compromiso de Sevilla* may fall short regarding taxation.

1. Introduction

A recent UN SDG Progress Report shows that "extreme poverty rates have risen beyond pre-2019 levels, hunger has regressed to 2005 levels, and the financing gap for the [Sustainable Development Goals] SDGs has ballooned

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from a pre-pandemic estimate of $2.5 trillion to at least $4.2 trillion annually."[1] The 4th International Conference on Financing for Development (FfD4) has been held from June 30th to July 3rd, 2025, in Seville, Spain – building on the foundations laid by the Monterrey Consensus in 2002, the Doha Declaration in 2008, the Addis Ababa Action Agenda in 2015 and the Pact for the Future in 2024.[2]

Many tax issues have been debated in both special and side events. The following pages try to review the main contents in the agenda that have deserved attention from the stakeholders involved in taxation (tax officials, academia, representatives of non–governmental organizations, among others). This is an attempt at systematizing and critically assessing some of their contributions.[3]

2. A Renewed Framework for Domestic Revenue Mobilization

Since the Addis Ababa Action Agenda[4] was adopted ten years ago, the Addis Tax Initiative (ATI) has driven political momentum for DRM, advancing the implementation of this Agenda and fostering cooperation to strengthen tax systems. ATI has proposed the introduction of the "Seville Declaration on Domestic Revenue Mobilization"[5] in support of the SDGs. This Declaration outlines new commitments to advance fair and effective DRM with progressive fiscal systems, policy coherence, and reinforce the social contract between governments and their citizens through collaborative partnerships

1 "Inter-Agency Task Force on Financing for Development, Financing for Sustainable Development Report 2024: Financing for Development at a Crossroads," United Nations, New York, 2024, accessed July 28, 2025, https://desapublications.un.org/file/20487/download.

2 According to the closing press release, there have been over 15,000 participants, including around 50 Heads of State and Government, and more than 470 side and special events, alongside the International Business Forum, the SDG Investment Fair, and the Sevilla Platform for Action.

3 The following section is based on the public information made available in the Conference app with the announcements of all the events (that included several items: abstract, description, objectives, expected outcome, program, etc.). Here, specifically, those related to important topics in taxation are analyzed, irrespective of their chronological order.

4 UNGA Resolution 69/313 of July 27, 2015, on the Addis Ababa Action Agenda of the Third International Conference on Financing for Development.

5 "Seville Declaration on Domestic Revenue Mobilisation," ATI, accessed July 28, 2025, https://addistaxinitiative.net/sites/default/files/resources/ATI%20Seville%20Declaration%20on%20DRM.pdf.

and knowledge-building. The International Tax Compact (ITC)[6] with the ATI Steering Committee and the co-hosting countries and organizations – such as the South Centre, Germany, Nigeria, Ghana and Senegal – have encouraged its endorsement by various countries and stakeholders – irrespective of them being ATI members.

2.1. Stronger Tax Policies and Administrations

The International Monetary Fund, the Organization for Economic Co-operation and Development (OECD), the United Nations (UN) and the Word Bank Group joined efforts with the Platform for Collaboration on Tax (PCT) to strengthen public financing for sustainable development. At the FfD4, they have pointed out that improving tax revenues remains the most viable long-term strategy to cover SDGs spending needs, particularly in the recent context where Official Development Assistance (ODA) is declining, and international trade and investment patterns are increasingly uncertain. This Platform has recommended building on progress made since Addis to further strengthen tax policy and administration for an effective and equitable DRM. The PCT has also stressed that a significant number of developing countries remain with a tax-to-GDP ratio below 15% – which is definitively important for development and growth. It has highlighted some of its contributions regarding the Medium-Term Revenue Strategy or tax incentives, and the power of cooperative approaches to help countries build tax capacity.

In 2025, several processes in the UN are converging and inequality is generally perceived as a major barrier to tackling global challenges. But it is not inevitable. Best practices and policy innovations targeting the reduction of domestic and global inequalities have been discussed (e.g., concrete strategies that can expand fiscal space for inclusive growth and protect vulnerable populations). It is stressed that the Ministries of Finance have a role in advancing policies to enhance equitable wealth distribution, strengthen social safety nets, and ensure sustainable economic resilience. Progressive taxes and targeted taxing of high-net-worth individuals and investing in social protection systems are seen as potential solutions.

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[6] The ITC, implemented by the Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ, GmbH. acts as the secretariat of the ATI.

2.2. Tax Reforms Based on Smart Use of Context-Specific Data

UNU WIDER has highlighted that in the next decade the nexus between data and capacity development around information technology (IT) systems can support evidence-based policymaking related to fiscal systems and DRM. Low- and middle-income countries face an enormous financing challenge to meet the goals of the 2030 Agenda,[7] but data and digital capacity have a transformative potential. Many developing countries have already invested in IT systems that have generated vast amounts of administrative data. Their extensive use may produce useful insights for governments to improve policy design and evaluation for smarter, context-specific tax reforms. Some practical experiences with scalable data-driven models to measure the performance of DRM employing artificial intelligence and machine learning were shared.

2.3. Improvement of Specific Categories of Taxes

In the development finance sector, the trends of reduced funding from multilateral and bilateral donors globally have amplified the need for domestic resources, and the idea of leveraging of specific categories of taxes to better connect to resourcing and strengthening health system needs has arisen. The World Health Organization (WHO) and Development Gateway envision a way forward to improve tobacco tax policy in DRM for health system financing and to close the funding gap. The WHO has estimated that if all countries enacted an increase in tobacco taxes by 50% per pack, governments would earn an extra $101 billion in revenue. But they should review tax rates and ensure their effective administration. In this area, evidence-driven tax policies may help raise funds for investments in health services, data, and key systems that deliver better health outcomes for citizens.

2.4. Progressivity, Solidarity and International Tax Cooperation

The widening financing gap for sustainable development is intensifying inequalities within and between countries. Tax revenue is pictured as the most sustainable source of financing for development, including as

[7] UNGA Resolution 70/1 of 25 September 2015, Transforming our world: The 2030 Agenda for Sustainable Development.

a source of revenue for public services such as education, healthcare and environmental protection. International cooperation on mobilization of domestic public resources, including promoting fair taxation and democratic transparency, makes up a central part of the agenda in the Financing for Development process.

Strengthening international tax cooperation to advance fairer and progressive tax systems can mobilize new and additional resources to bridge it. At the COP28, the Global Solidarity Levies Coalition launched by France, Kenya and Barbados sought to mobilize resources for climate action and sustainable development. During the FfD4, the Brazil-Europe Dialogue on International Tax Cooperation and Solidarity for Climate Action and Sustainable Development explored the policy proposal on ultra-high-net-worth individuals,[8] innovative levies and other fiscal tools aligned with principles of climate and social justice.

On the basis of several UN General Assembly resolutions,[9] the Terms of Reference for a UN Framework Convention on International Tax Cooperation (UNFC) and two early protocols, to be finalized by the end of 2027, were adopted. In 2025, the Intergovernmental Negotiating Committee (INC) has started preparing these texts.

These Terms of Reference[10] make it clear that the UNFC will include intergovernmental commitments on international tax cooperation for sustainable development that are related to other issues that have also come up in the FfD4 negotiations (e.g., equitable taxation of MNCs; effective taxation of high-net worth individuals; transparency and prevention of illicit financial flows (IFFs), including tax evasion and avoidance). Besides, it has been discussed how to incorporate cross-cutting issues such as human rights, gender equality, and environmental protection.

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8 In 2024, Brazil, under its G20 presidency, introduced a proposal for the taxation of ultra-high-net-worth individuals – estimating that it could generate $250 billion annually.

9 UNGA Resolution 77/244 of December 30, 2022; UNGA Resolution 78/230 of December 22, 2023, and UNGA Resolution 79/235 of December 24, 2024, on the promotion of inclusive and effective international tax cooperation at the United Nations.

10 María Amparo Grau Ruiz, "The United Nations Framework Convention on International Tax Cooperation in the Making. Debate and Approval of its Terms of Reference," *Crónica Tributaria* 195, no. 2 (2025): 37–65, https://dx.doi.org/10.47092/CT.25.2.2.

2.5. Consideration of Human Rights

DRM to finance development needs to be rethought in the light of human rights. During the 58th session of the Human Rights Council, the Member States issued a joint declaration linking human rights and inclusive international tax cooperation.[11]

International coordination for DRM can advance both social welfare and environmental resilience. The Skatteforsk – Centre for Tax Research has moderated a debate on bridging the global financing gap for shared prosperity with rights-based universal social protection floors, equitable healthcare, quality education, and the sustainable management of natural resources, and climate action, through progressive taxation measures – like wealth taxes, and global solidarity mechanisms. There are questions as to what extent international tax reforms and multilateral agreements can bolster DRM, and whether they compromise bold national actions.

Indeed, international human rights law mandates governments to raise and deploy the maximum of their available resources to realize rights. Governments should cooperate to create the enabling environment to meet their human rights obligations.

Since 2023, the UN High Commissioner for Human Rights has advocated for a "human rights economy"[12] to align economic policymaking with international human rights standards, including for the fulfillment of economic, social, and cultural rights (ESCR). A human rights economy, grounded in international human rights norms and standards, obviously engages policy questions related to tax with a focus on the realization of all people's rights. The Committee on Economic, Social and Cultural Rights has issued a Statement in 2025[13] emphasizing the role of equitable tax

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11 Resolution 58/7, The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation, adopted by the Human Rights Council on April 2, 2025, A/HRC/RES/58/7.

12 Statement delivered by Volker Türk, UN High Commissioner for Human Rights at the 75th anniversary of the Universal Declaration of Human Rights, April 20, 2023, accessed July 28, 2025, https://www.ohchr.org/en/statements-and-speeches/2023/04/statement-un-human-rights-chief-human-rights-economy, and The Human Rights Economy Discussion Paper, https://www.ohchr.org/sites/default/files/documents/issues/sdgs/hre-discussion-paper-en.pdf.

13 E/C.12/2025/1: Committee adopts Statement on Tax Policy and the International Covenant on Economic, Social and Cultural Rights, February 28, 2025, accessed July 28, 2025,

policies in fulfilling ESCR, urging States to adopt progressive taxation and combat tax evasion to fund rights-based development. There is a call for financing strategies that prioritize the dignity, equality, and empowerment of all people, particularly those most marginalized.

3. Special Focus on Africa

3.1. Own Efforts to Strengthen Domestic Resource Mobilization Capacity

When turning commitments into impact, Africa is carefully assessing the path to sustainable financing through DRM. Africa alone faces an annual sustainable financing gap of $194 billion, equivalent to 7% of the continent's GDP (Africa's Development Dynamics 2023). African governments rely on DRM for over 70% of their budgets and there is room for improvement. For example, VAT, according to the African Tax Outlook (ATO),[14] contributes about 35% of African revenue and is inefficiently collected in more than half of the continent, with VAT efficiencies below 50%.

The African Tax Administration Forum (ATAF), since its foundation in 2009, has supported over 60 tax reforms across Africa. It has learnt lessons on strengthening DRM capacity from legislative and administrative reforms, and has facilitated the mobilization of $2.3 billion in additional tax revenue through country specific support to its 44 member countries. ATAF has explored practical solutions: taxing the informal sector, modernizing tax administrations to serve a youthful digital economy, combating IFFs to curtail leakage of vital resources, and advancing tax equity. It acknowledges that FfD4 could not come at a more pivotal time, because its commitments to domestic public resources, including tax equity, informal economy taxation, health taxes, climate financing, and capacity building, must translate into transformative action. There is hope in the efforts to combat IFFs, through focused implementation of multistakeholder solutions, that will lead to the mobilization of domestic resources for development.

https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=8R9thMaEFoSDwmWVuBCLvBLEjKJdxFdlCHNFjD%2FTM2XRPPaJykvzqHL0js1UApw2QzTnLr8iqHmZoA1Luds9qQ%3D%3D.

14 "African Tax Outlook – 2023 Edition," ATAF, accessed July 28, 2025, https://events.ataftax.org/index.php?page=documents&func=view&document_id=243.

3.2. The Call to Support the Fight against Illicit Financial Flows

Africa needs to mobilize an estimated $1.3 trillion annually to achieve the SDGs by 2030, as outlined in the UN Agenda 2030 and the African Union's Agenda 2063 (The Africa We Want). Nowadays, traditional financing tools like Foreign Direct Investment and ODA alone are no longer sufficient to meet Africa's development goals, so additional strategies for expanding Africa's fiscal space are being searched. Although the 10-year anniversary of the Mbeki Report is approaching, IFFs still drain significant resources from Africa each year. In the current landscape, there is a clear need to strengthen the IFFs measurement systems by harmonizing monitoring frameworks,[15] improving cross-border data coordination for decision-making, and tackling the systemic enablers of tax abuse and capital flight.

South Africa's G20 presidency offers an opportunity to reset the African-European financial cooperation on sustainable development. The Africa-Europe Foundation has hosted a high-level dialog to deepen sustainable cross-continental financial cooperation and to showcase African solutions to combat IFFs and Europe's contributions including through the Team Europe Initiative on Combatting IFFs and Transnational Organized Crime. It has also highlighted the chance for joint action between European and African Member States to drive momentum toward the UNFC. There have been discussions on how Europe can formulate a more visible agenda on IFF and fair global taxation, and what role Europe should play in supporting African leadership on IFFs and DRM financially, technically, and politically.

3.3. Ongoing Collective Action in the Continent to Shape the UN Framework Convention on International Tax Cooperation and Its Protocols

Continuing its work under the mandate received from the Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration in the Tunis Ministerial Declaration, the African Union and its partners – ATAF, the United Nations Economic Commission for Africa and

[15] Considering the UNCTAD-UNODC Conceptual Framework for the statistical measurement of IFFs and its definition. UNCTAD is the Custodian of SDG 16.4.1 on IFFs. Africa-Europe Foundation, the African Union Development Agency, and the UN Economic Commission for Africa provide coordination and technical support.

the Tax Justice Network Africa – updated the stakeholders on the ongoing reform of the global tax governance framework at the United Nations. Their main purpose was to obtain feedback, identifying pitfalls and solutions, to strengthen the continent's collective position in the negotiation.

They reflected on the challenges and strategies to be implemented by the African nations to amplify Africa's influence on global tax governance and collectively advocate for their priorities for equitable tax cooperation. According to the organizers, "the reform of international tax cooperation is a critical issue for African countries, as it addresses the challenges of tax evasion, tax avoidance through profit shifting by MNCs [multinational corporations], illicit financial flows, and the unfair distribution of taxing rights." They made a call to AU Member States and African stakeholders to provide inputs to this UNFC and related protocols, addressing resource constraints, political will and effective coordination.

4. Oversight as a Cornerstone in Any Reconfiguration of the (Inter)National Financial Architecture

Public audit and accountability are often keys to unlocking new resources. The International Organization of Supreme Audit Institutions (INTOSAI) Development Initiative, the Government of Ireland with Irishaid and Global Affairs Canada timely underlined how Supreme Audit Institutions (SAIs) contribute to closing financing gaps (e.g., by facilitating better use of existing domestic public resources). In fact, SAIs report on public resources of a country and enable Parliaments and citizens to hold governments accountable.

When governments need to accelerate DRM and identify new ways of investing, they must do so in a transparent way. SAIs work increases value for money and helps them better their spending – in turn leading to more available resources for citizens. SAIs usually make recommendations on how governments could use their domestic resources better or improve the delivery of public services. They advise on the strengthening of the financial management of the country, through effective procurement, tax collection and debt management, in order to make progress on the SDGs. However, SAIs can provide assurance not only on use of public domestic funds, but also on international assistance ones.

It is worth noting that, due to the negative trends in ODA volume, ensuring that available finances benefit as many as possible is becoming more important for countries relying on external financial support. SAIs can inform national governments and their international partners on where efforts need to be focused to reduce risks to good governance, and whether development assistance is being spent effectively, and leading to the intended results. In addition, they can assess the effectiveness of funds channeled to external providers for development programs, and parts of financial reform packages.

Since 2010 the INTOSAI-Donor Cooperation has been supporting SAIs in developing countries. This partnership between the 195 national members of INTOSAI and 23 donor organizations advocates for strengthening public sector audit as part of public financial management (PFM) and good governance. SAIs play a crucial role in the accountability chain on a country and global level. This is intrinsically linked to the relevant issue of public trust (e.g., when it affects tax management).

To correctly implement the commitments of FfD4, SAIs should be in a good institutional position to provide oversight on development support, DRM, public expenditure and anti-corruption efforts with prevention and investigation through audits and sanctioning. They should be allowed to provide external and independent information that can help inform the progress of sustainable financing.

5. The Sevilla Platform for Action

With the aim of turning political promises into action, there has been an attempt to begin implementing the Sevilla Commitment during the FfD4. This pragmatic approach has been articulated through The Sevilla Platform for Action.[16] Among the 130 initiatives launched over four days, some included actions to strengthen tax systems and DRM.

Apart from the two initiatives mentioned above – one devoted to enforcing the effective taxation of high-net-worth individuals, and the other with the Addis Tax Initiative's Seville Declaration on DRM – a couple of new coalitions have emerged. A Coalition for Global Solidarity Levies – led

[16] "Sevilla Platform for Action," UN DESA, accessed July 28, 2025, https://financing.desa.un.org/ffd4/sevilla-platform-action.

by France, Kenya and Barbados, supported by Benin, Somalia, Zambia and Spain – aims at the collection of new revenue by taxing premium-class flying and private jets to raise funds for climate action and sustainable development. Another Coalition for Tax Expenditure Reform has been propelled by the International Institute for Sustainable Development.

The OECD and the United Nations Development Programme (UNDP) have presented their shared initiative Tax Inspectors Without Borders (TIWB) 2.0 for a more targeted, peer-driven model of tailored technical assistance and institutional strengthening of both host and partner administrations, expanding into new areas of support (e.g., IFFs). Since TIWB was launched in 2015, it has enabled countries to mobilize an additional $2.4 billion in revenue, of which $1.91 billion has been raised across Africa alone. It has delivered $125 in additional revenue for every $1 invested.[17]

6. The Outcome Document of the Fourth International Conference on Financing for Development

A look into section II.A. of the Sevilla Commitment entitled "Domestic public resources" reveals that

> mobilizing additional domestic public resources and ensuring their effective and efficient use for sustainable development impact will require **decisive national action to strengthen fiscal systems, promote their progressivity**, build long-term financial resilience, and align them with sustainable development, including through the use of data and statistics to inform decisions.[18]

> In a globalized and increasingly digitalized world,
>
> domestic efforts must be **complemented by** international cooperation, including through **inclusive and effective international tax cooperation, improved capacity to collect revenues and robust measures to prevent and combat tax evasion, illicit financial flows and corruption** (Para. 26).

17 OECD-UNDP, *Tax Inspectors Without Borders Annual Report 2025: Ten Years of Hands-on Assistance in Developing Countries* (Paris: OECD Publishing, 2025), https://doi.org/10.1787/e9762366-en.

18 In this section, emphasis will be added by **bolding** the wording in different paragraphs on the relevant topics previously analyzed.

To ensure that countries have the necessary **resources**, and that they are **collected and spent transparently and efficiently**, the countries commit to **strengthening tax systems and ensuring transparency and accountability** in PFM, taking a whole-of-government approach. They encourage enhanced supreme audit institutions and parliamentary oversight. In particular, **oversight and management of tax expenditures**, including through transparent tax expenditure **reporting**. The **broadening of the tax base** and continuing efforts to integrate the informal sector in a socially inclusive way into the formal economy – **easing tax registration**, reducing the cost of compliance, and providing appropriate incentives – especially to support micro-, small- and medium-sized enterprises, are also encouraged.

The countries will promote progressive tax systems and enhance efforts to address tax evasion and avoidance by **high-net-worth individuals**. They encourage effective taxation of **natural resources** that optimize domestic revenue. They will advance discussion on **gender** responsive taxation and build capacity to identify and address gender biases within tax systems. To promote the consideration of the environment, biodiversity, climate, disaster risk, food security, nutrition, and sustainability of agrifood systems, they may consider taxes on **environmental** contamination and pollution, and taxes on **tobacco and alcohol**.

There is an agreement to scale up demand-based institutional, technological, and human **capacity-building support** to developing countries for fiscal systems and DRM, through strengthening tax policy, tax and customs administrations. This could be achieved through digitalization to allow simplification. They call on "development partners to collectively at least double this support to developing countries by 2030. This increase should be targeted at developing countries aiming to increase tax-to-GDP ratios, especially those seeking to increase their ratios to at least 15 per cent" (Para. 27. n)).

To ensure that **international tax cooperation** is fully inclusive and effective, and beneficial to all, the countries adopting the *Compromiso* will provide developing countries with demand-based technical assistance and capacity building programs. They will engage constructively in the negotiations on the UNFC and its protocols.

They have added: "We will (...) take note with appreciation the work of the United Nations' **Committee of Experts on International Cooperation**

in Tax Matters, including its subcommittees." They also "recognize the ongoing implementation of Pillar Two of the **OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting**" and call for country-based specific technical support to interested Member States in implementing the Global Anti-Base Erosion Model Rules and the Subject to Tax Rule. They will make sure that all companies pay taxes to the Governments of countries where economic activity occurs and value is created, and will enhance tax transparency, while ensuring data protection and information security. **Country-by-country reporting** will be strengthened and the creation of a central public database for the reports evaluated. They commit to enhance **beneficial ownership transparency** and information exchange among national beneficial ownership registries, considering the feasibility of a global registry, and to help developing countries in implementing the transparency standards (Para. 28).

They will promote measures to **eliminate safe havens, aggressive tax practices, and loopholes**. Additionally, they will take effective steps to prevent IFFs from entering their jurisdictions and will strengthen the **capacity of customs administrations** for their detection. They will enhance accurate and timely trade data exchange to address **smuggling** of commercial goods and trade **mis-invoicing**, and support developing countries to upgrade technology in their ports (Para. 29).

In section II.B on "Domestic and international private business and finance," the **need for policy frameworks and incentives for private investment,** at the national and global levels, that promote sustainable development is underlined. Countries will address regulatory obstacles and provide incentives for foreign direct investment in developing countries aligned with their sustainable development plans (Para. 31).

To ensure that development partners' policies strengthen development cooperation, **tax exemptions on government-to-government aid** will be reduced on a voluntary basis (Para. 39. g)). They will support developing countries in using technologies including through, *inter alia,* **incentives or conditions** linked to research and development, procurement or other funding and regulatory policy measures (Para. 59. d)).

7. Final Remarks

Many of the events of the FfD4 have taken stock of the achievements in advancing efforts by some Member States, international institutions and civil society organizations. In this sense, the work done to achieve the mainstreaming of the Social and Solidarity Economy (SSE) in the Financing for Development may be an example. This has been shown by the Intercontinental Network for the Promotion of Social Solidarity Economy (RIPESS),[19] the Global Fund for Cities Development and the United Nations interagency Task Force on the Social and Solidarity Economy (UNTFSSE),[20] in collaboration with the Ministry of Labor and Social Economy of Spain, the Special Administrative Unit of Solidarity Organizations of the Ministry of Labor of Colombia and the Iberoamerican Network of Governments for the Social and Solidarity Economy.

The Resolution 77/281 on Promoting the social and solidarity economy for sustainable development, adopted in 2023, was followed in 2024 by the UNGA Resolution 79/213, that contains an SSE development financing mandate. It calls on member States to facilitate access for social and solidarity economy entities to financial services and funding, and capacity-building; and "encourages multilateral, international and regional financial institutions and development banks to support the social and solidarity economy, including through existing and new financial instruments and mechanisms adapted to all stages of development".

In this vein, the final FfD4 outcome document, the *Compromiso de Sevilla* reads: "We will (…) facilitate the growth of micro, small and medium enterprises (MSMEs), cooperatives and social and solidarity economy"

[19] "Implementing UN Recommendations on Social and Solidarity Economy Financing: Proposals for a Generic Intermediary Organizational Approach," RIPESS Working Paper, accessed July 28, 2025, https://www.ripess.org/wp-content/uploads/2025/07/RIPESS-proposal-intermediary-mechanism-FfD4postcript-EN-1.pdf.

[20] "Financing for Development: Unlocking the Potential of the Social and Solidarity Economy," UNTFSSE, accessed July 28, 2025, https://unsse.org/wp-content/uploads/2025/05/En_UNTFSSE-Policy-brief_Financing-for-development_Unlocking-the-potential-of-the-social-and-solidarity-economy.pdf. UNTFSSE, "Strengthening Access to Finance and Support for SSE Entities: A Collection of Good Practices," report prepared by the Technical Working Group on Financial Access and Support for SSE entities, accessed July 28, 2025, https://unsse.org/wp-content/uploads/2025/05/RIPESS-Press-release-A-Call-to-Recognize-and-Mainstream-the-Social-and-Solidarity-Economy-in-the-FfD4-1.pdf.

(Para. 21, section I. A renewed global financing for development framework). "We encourage support for social and solidarity economy entities including access to tailored financial and non-financial assistance from local, national, and international financial institutions" (Para. 32. h), section II. B. Domestic and international private business and finance). "We also encourage MDBs [Multilateral Development Banks] and other development institutions to work as a system through enhanced cooperation and coordination with national development banks, in support of national priorities and plans" (Para. 30. b), section II.A. Domestic public resources). Sadly, the SSE demand of "fiscal" incentives is not explicitly contemplated in the final text, despite its unequivocal inclusion in former substantive UNGA Resolutions on SSE.[21]

It remains to be seen whether the statement made at closing press release comes true: that the FfD4 "delivers renewed hope and action for sustainable development." The following global interactive map published by the SDG Transformation Center[22] offers an overview of the propensity of the UN Members States to ratify UN Treaties, and it is relatively limited.

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21 Giulia Boletto and María Amparo Grau Ruiz, "A New Bottom-Up Perspective in International Tax Cooperation for Sustainable Development," *Revue Européenne et Internationale de Droit Fiscal*, no. 4 (2023): 473. María Amparo Grau Ruiz and Giulia Boletto, "International Financial and Tax Cooperation to Support Sustainable Development: Solidarity Reinterpreted," *Rivista di Diritto Tributario Internazionale*, no. 1 (2025): 67–101. María Amparo Grau Ruiz, "Impulso tributario a las entidades de la economía social en el ámbito interno e internacional," in *Fomento de la Economía Social: Instrumentos Fiscales y de Políticas Públicas. Administración pública y economía social: aliados para una prosperidad inclusiva*, eds. R. Chaves Ávila et al. (Valencia: CIRIEC, 2024), 215–26, accessed July 28, 2025, https://ciriec.es/novedades-bibliograficas/fomento-de-la-economia-social-instrumentos-fiscales-y-de-politicas-publicas-la-administracion-publica-y-la-economia-social-aliados-para-una-prosperidad-inclusiva/.

22 The Sustainable Development Solutions Network has tried to measure countries' support to UN-based multilateralism through indicators, focusing on the UN Treaties ratified, or countries' votes at the UNGA aligned with the vote of the international community, including timeseries. See: SDG Transformation Center, accessed July 28, 2025, https://dashboards-unmi.sdgindex.org/map/indicators/percentage-of-un-treaties-ratified/cross-sectional. However, despite the proclivity to sign multilateral conventions, sometimes the high number of reservations (like the ones on mutual assistance for the collection of taxes) may become an obstacle in policy implementation. Meanwhile, initiatives like TIWB could be supplemented with specific cooperation among tax enforcement officials as well.

One could easily guess that in more sensitive matters, like those involving taxation, their proclivity to do so probably diminishes.

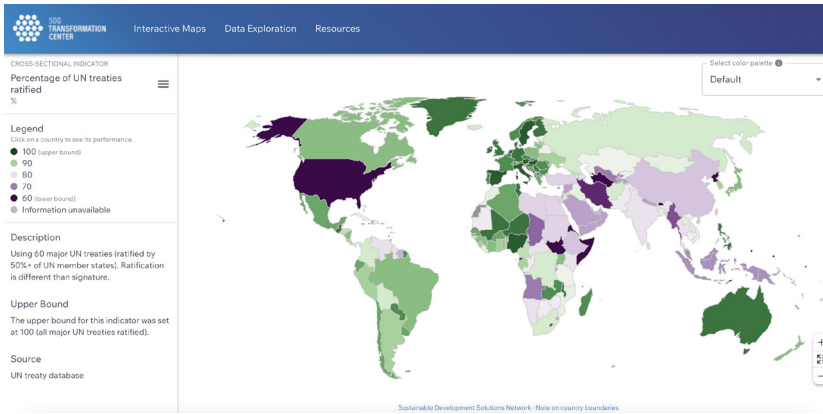

Fig. Percentage of UN treaties ratified. (SDG Transformation Center, accessed July 28, 2025, https://dashboards-unmi.sdgindex.org/map/indicators/percentage-of-un-treaties--ratified/cross-sectional.)

Member States have agreed to ensure that **deliberations of the special meeting of the Council on international cooperation in tax matters will be taken into account by the Forum** on an appropriate cycle to strengthen the follow-up process on Financing for Development, including the *Compromiso de Sevilla*; enhance monitoring and global policy coherence; and reinforce links to regional and national-level action, without creating significant new burdens (Para. 65, b)). However, in our opinion, the discourse remains basically unchanged in tax matters, although there is room for going further with innovative extra fiscal approaches with bottom-up strategies.

As suggested in the 2024 Financing for Sustainable Development Report, reform strategies need to bring together various government agencies involved in tax policy design and implementation, taxpayers and civil society engaging with the tax system and, if relevant, external development partners supporting tax reforms – bearing in mind that, when they affect distribution and incentives, social consensus is critical. International tax

cooperation should be oriented towards the respect of ability to pay, retributive and redistributive principles to expand the fairness of the national tax systems constitutionally designed to the bilateral, regional or multilateral legal instruments now being devised.

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Towards a European Union Federal Tax System: Legal and Fiscal Perspective. An International Comparison

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own resources,
European integration

Abstract: This paper offers a comprehensive and rigorous analysis of the feasibility of establishing a European federal treasury from a legal, institutional and comparative perspective. Based on a study of established federal tax systems, such as those in the United States of America, Germany and Switzerland, it identifies the structural elements necessary for the EU to develop its own tax structure: direct taxing power, a significant budget, borrowing capacity and effective mechanisms for redistribution and stabilization. The analysis is complemented by an examination of the EU's legal framework, the limitations imposed by the Treaties and the case law of the German Federal Constitutional Court. Finally, recent proposals for tax reform aimed at introducing new own resources and institutionalizing the issuance of common debt are evaluated. The central thesis argues that a European federal treasury is not only desirable but essential to safeguard the EU's strategic sovereignty, internal cohesion and capacity to act at the global level.

1. Introduction: Historical Context and Justification for a European Federal Tax System

The EU's tax system currently faces structural challenges that have been exposed by a series of interlinked economic, health, energy and geopolitical crises, which have highlighted the limited financial capacity of European

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institutions to respond effectively and in a coordinated manner to common challenges.[1]

With a budget equivalent to just over 1% of the Union's GDP, and without direct tax competition or structural borrowing capacity, the EU faces growing social and strategic demands without the institutional means to meet them.[2] This structural imbalance can be explained by the historically intergovernmental nature of European integration. Unlike traditional federal models, the EU lacks its own treasury and an autonomous fiscal system that would enable it to play a compensatory role in the event of economic imbalances or to adequately ensure territorial integration among its Member States. The result is a persistent asymmetry between the monetary union, equipped with a central bank and common fiscal rules, and the absence of a genuine fiscal union to give coherence to the project.

The COVID-19 pandemic marked a turning point. The creation of the Next Generation EU (NGEU) instrument, approved in 2020, allowed the European Commission to issue joint debt on international markets for the first time, financing transfers and loans to Member States with the aim of boosting economic recovery. Although initially designed as an exceptional and temporary measure, this mechanism has been considered by some as the seed of a federal treasury in the making.[3]

However, the institutionalization of a permanent fiscal structure at the European level faces significant challenges of various kinds: legal, political and constitutional. From a regulatory point of view, the existing Treaties greatly limit the EU's financial autonomy. Thus, Article 311 of the TFEU imposes the principle of budgetary balance and makes the creation of new own resources subject to unanimous approval by the Council and national ratification. In addition, some constitutional courts, notably the German Federal Constitutional Court, have set explicit limits on the transfer of fiscal powers, restricting the scope for European action to the maintenance of national budgetary sovereignty.

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1 European Commission, *Annual Report on the EU Budget 2022* (Brussels: Publications Office of the European Union, 2022).

2 Centre for Strategic and International Studies, *The Fiscal Future of Europe* (Washington: CSIS, 2024), https://www.csis.org.

3 Delors Centre, *Towards a Fiscal Union? The Next Generation EU as a Test Case* (Berlin: Jacques Delors Centre, 2023).

The aim of this paper is to analyze in depth the real possibilities for strengthening a European federal treasury. To this end, we will first undertake a comparative study of three consolidated federal systems (the United States of America, Germany and Switzerland) with the aim of identifying the common elements that make up a federal fiscal structure.

Secondly, the current situation of the European budget will be examined, paying particular attention to its limits and recent developments in terms of own resources and debt, before considering the legal constraints arising from the Treaties and the constitutional law of the Member States. Finally, the implications of all the above for the process of political integration, the democratic legitimacy of the European project and the effective functioning of its institutions will be assessed.

The central hypothesis of this paper is that a European federal treasury is not only desirable from the point of view of economic efficiency and redistributive justice, but also necessary to guarantee the strategic sovereignty of the Union in an increasingly competitive and fragmented international scenario. The question, therefore, is no longer whether the EU can afford a federal treasury, but whether it can really afford not to have one.

2. Comparative Federal Models: United States of America, Germany and Switzerland

In order to assess the feasibility of a European federal treasury, it is essential to resort to comparative analysis. In particular, the study of consolidated federal tax systems such as those in the United States of America, Germany and Switzerland allows us to identify the structural elements that characterize a true fiscal union. Specifically:

- the ability to dispose of the main sources of tax revenue,
- the power to resort to borrowing,
- the existence of effective instruments for territorial redistribution, and
- a legitimate institutional framework aligned with the principle of shared sovereignty.

In this regard, Zubiri (2017) highlights that these models of fiscal federalism effectively combine decentralization of powers with solid systems of coordination and fiscal compensation. This feature is essential to ensure, on the one hand, the autonomy of sub-state government entities and, on

the other, the articulation of common redistribution instruments, which contributes to preserving territorial cohesion and strengthening the democratic legitimacy of fiscal decisions.[4]

The models examined below represent three different configurations: centralized (United States of America), cooperative (Germany) and decentralized (Switzerland), which highlight the legal, political and institutional conditions necessary to articulate an effective federal fiscal system.[5]

2.1. United States of America: Fiscal Centralization

The US federal system is characterized by clear supremacy of the federal level in fiscal matters. Since the adoption of the 16th Amendment to the Constitution in 1913, Congress has had full authority to levy direct taxes on income without having to distribute them proportionally among the states (U.S. Const. amend. XVI). This arrangement has allowed the federal government to collect most of the tax revenue, with personal income tax being the main source of funding for the national budget.

The US federal system has considerable fiscal intervention capacity, with a budget equivalent to approximately 20% of national GDP. This allocation allows the federal government to finance key policies in areas such as defense, public health (through programs such as Medicare and Medicaid), social security, infrastructure, and scientific and technological research.

In addition, the Treasury Department has full authority to issue debt, subject to a limit set by Congress, which gives the federal government an essential instrument of macroeconomic stabilization. In fact, both during the 2008 financial crisis and in the context of the 2020 pandemic, the Treasury was able to implement ambitious fiscal stimulus packages whose importance was only possible thanks to its full sovereign capacity in tax matters.[6]

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4 Ignacio Zubiri, *Federalismo fiscal: Principios y aplicaciones* (Madrid: Instituto de Estudios Fiscales, 2017).

5 Jonathan Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (Cambridge: Cambridge University Press, 2006); Bernard Dafflon, *Fiscal Federalism in Theory and Practice* (Cheltenham: Edward Elgar Publishing, 2010); Alberto Alesina and Enrico Spolaore, *The Size of Nations* (Cambridge: MIT Press, 2003).

6 Center on Budget and Policy Priorities (CBPP), *Federal Aid to States: Trends and Policy Implications* (Washington: CBPP, 2023).

The US system also incorporates robust redistributive mechanisms. Through intergovernmental transfers and social spending programs, resources are redistributed among states to compensate for economic imbalances.

According to studies by the Centre on Budget and Policy Priorities, states such as Mississippi and New Mexico consistently receive more funds from the federal government than they contribute through taxes, while others such as New York and New Jersey are net contributors (CBPP, 2023). This model rests on solid institutional legitimacy, as the federal government is democratically legitimized by direct election and is backed by a constitutional framework that enshrines its taxing power and redistributive role.

In this sense, the US model represents a clear benchmark for the EU on how to structure an effective federal treasury, combining centralized tax regulations with genuine budgetary autonomy, based on solid democratic legitimacy and the existence of effective mechanisms for solidarity between territories.

2.2. Germany: Cooperative Federalism

The Federal Republic of Germany is a federal state in which fiscal policy is the result of institutional cooperation between the *Bund* (federal level), the *Länder* (federal states) and the municipalities. The Basic Law of 1949 establishes a structure for the distribution of powers and taxation based on joint responsibility.

The main taxes, such as personal income tax, corporation tax and value added tax, are shared by the Bund and the Länder in accordance with constitutionally established guidelines. Thus, basic tax legislation is adopted at the federal level with the participation of the Bundesrat (territorial chamber), while the tax administration is decentralized to the Länder. This ensures a balance between regulatory centralization and executive decentralization (Article 106 GG).

It should be noted that one of the key elements of the German model is the system of financial equality (*Länderfinanzausgleich*), which establishes automatic redistribution mechanisms between states with different fiscal capacities. This system is based on the principles of solidarity and horizontal equity and is implemented through federal transfers and contributions from the wealthier *Länder*. In 2023, the state of Bavaria contributed

approximately €9.1 billion to the interregional fiscal redistribution system, while Berlin was the main recipient region, receiving around €3.8 billion.[7]

Despite the recent constitutional reform approved in 2025, the German tax system continues to operate under strict regulatory restrictions on public borrowing. The reform has introduced greater flexibility in exceptional circumstances, but maintains the core of the so-called *Schuldenbremse*, introduced in 2009, which prevents the *Länder* from running structural deficits and limits the *Bund's* borrowing to 0.35% of GDP. These rules, enshrined in Articles 109 and 115 of the Basic Law, have generated intense debate about their compatibility with countercyclical fiscal policies, especially in crisis contexts. To address these tensions, extra-budgetary funds (*Sondervermögen*) have been used in recent years, although the Federal Constitutional Court ruled in 2023 that some of these mechanisms violated the constitutional principles of budgetary unity and transparency.[8]

From the above, it is clear that based on an analysis of the German experience, it is possible to establish an effective federal treasury through cooperation between different levels of government, with a balanced distribution of fiscal responsibilities and a fair redistribution of resources. However, transferring this model to the European level is not entirely straightforward, as the Union lacks a constitutional structure shared by the different Member States and a central fiscal authority with powers comparable to those of the *Bund*.

2.3. Switzerland: Cantonal Autonomy and Inter-Territorial Coordination

The Swiss case represents an atypical form of fiscal federalism, characterized by intense tax decentralization. The Swiss Confederation grants its 26 cantons broad fiscal autonomy, including legislative competence over income, wealth and inheritance taxes. Each canton can establish its own tax system, which has led to strong tax competition.[9]

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7 Federal Ministry of Finance, *Financial Compensation Between the Federation and the Länder in 2023: Monthly Report, March 2024* (Berlin: Federal Ministry of Finance, 2024).

8 Federal Constitutional Court, Judgment of the Second Chamber of 15 November 2023, 2 BvF 1/22, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2023/11/fs20231115_2bvf000122.html.

9 Adrian Vatter, *Swiss Federalism: The Transformation of a Federal Model* (London: Routledge, 2020).

The Swiss federal government also levies a direct federal income tax and value added tax; however, its regulatory capacity is limited by the need for periodic approval by popular referendum. Thus, the legitimacy of the system is based on direct citizen participation and the principle of subsidiarity that guides the entire Swiss political organization.

Despite its decentralization, Swiss fiscal federalism includes inter-territorial compensation mechanisms. Since 2008, the Swiss financial equality system (*Neuer Finanzausgleich*) has allowed for a balanced redistribution of resources among cantons, with the aim of ensuring equal access to public services and avoiding territorial fiscal imbalances. Its financing combines contributions from the federal government and the cantons with greater economic capacity, and its management is governed by objective technical criteria, with no room for arbitrary political decisions.[10]

Following the recent constitutional reform in Germany in 2025, which we referred to in the previous section, introducing a relaxation of debt limits in order to strengthen fiscal responsiveness in exceptional situations, we consider it relevant to contrast this development with the approach adopted in the Swiss model.

In fact, back in 2003, Switzerland incorporated a fiscal rule (known as *Schuldenbremse*) into its Constitution that requires maintaining a balanced budget, taking into account fluctuations in the economic cycle, and restricts the creation of structural deficits. The consistent application of this mechanism over the last two decades has helped the country maintain one of the lowest levels of public debt among OECD member states.[11]

As explained above, the Swiss federal model shows that a federal treasury can operate effectively without concentrating fiscal power at a single level of government, provided that there is a smooth institutional relationship between the different authorities, through the application of the principle of redistributive equity. However, adapting it to the European level is no easy task, as the Swiss system is based on a consolidated social and

10 Reto Schellenberg and Adrian Müller, "Equalisation Mechanisms in Swiss Federalism," *Swiss Political Science Review* 27, no. 3 (2021): 421–38.

11 Organisation for Economic Co-operation and Development, *Public Administration at a Glance* (Paris: OECD, 2023), https://www.oecd.org.

political consensus among the cantons, as well as a strong democratic tradition, all of which are not replicated with the same intensity in the EU.

3. Legal, Institutional and Structural Foundations of the EU's Fiscal Model

3.1. The EU's Fiscal Model: Evolution, Structural Constraints and the Case for a Federal Treasury

The evolution of public finances in the EU has been characterized, among other things, by tension between progress in economic integration and the limitations of the fiscal framework. Thus, while the monetary dimension has been consolidated with increasingly complex common mechanisms, the fiscal sphere remains anchored in the sovereignty of the Member States. The disconnect between a fully consolidated single currency and a still fragmented fiscal policy is one of the main constraints to achieving coherent and resilient European integration.

The Union's budget, framed by Article 310 TFEU, enshrines the principle of budgetary balance, while Article 311 TFEU subjects the introduction of new own resources to unanimous approval by the Council and subsequent ratification by all Member States in accordance with their constitutional requirements. This dual constraint prevents the use of structural deficits as a financing instrument and maintains a high degree of dependence on contributions from Member States, which makes it difficult to strengthen a direct fiscal link between European institutions and citizens.

The EU's financing system is currently based on three main sources of revenue: firstly, traditional own resources, which include customs duties and agricultural levies; secondly, a contribution derived from harmonized value added tax; and finally, a contribution based on each Member State's gross national income (GNI). Since 2021, a new source has been added to these three: a tax on non-recycled plastic waste. Among these, the GNI-linked contribution continues to account for the largest share of the EU budget (around 61–65%), highlighting a significant dependence on national contributions and, therefore, limited fiscal autonomy for the EU.[12]

[12] Council of the European Union, "Financing the EU Budget: Structure, Sources and Figures," 2025, accessed April 3, 2025, https://www.consilium.europa.eu/en/policies/financing-the-eu-budget/;

The EU's spending powers are also restricted. Most of the budget is allocated to cohesion policies and the Common Agricultural Policy (CAP), leaving little room for investment in European public goods such as common defense, energy transition, digitalization and technological innovation. Compared to federations such as the United States or Germany, where federal spending can exceed 15–20% of GDP, the EU budget barely reaches 1% of the EU's combined GDP.[13] This configuration reflects a lack of own tax capacity, which makes the EU fiscally dependent, restricting its effectiveness in the face of challenges such as the pandemic, the war in Ukraine, and the green transition.

The approval of the NGEU instrument in 2020 was an exceptional measure from the principle of budgetary balance enshrined in Article 310 TFEU, allowing the European Commission to issue joint debt for the first time for up to €750 billion. This extraordinary response to the crisis caused by the COVID-19 pandemic was designed as a temporary measure, limited to the period of the 2021–2027 multiannual financial framework.[14]

However, the possibility of transforming this mechanism into a permanent tool has generated intense controversy at both the legal and political levels. In Germany, the Federal Constitutional Court raised objections to the legality of structural mutualization of European debt, warning that a decision of such scope would require a profound reform of the Treaties and, predictably, approval by the citizens in a referendum.[15]

For this reason, the European Commission has proposed in recent years to introduce new own resources to reduce dependence on national contributions and strengthen the EU's financial autonomy. This debate has also gained urgency in view of the fact that, from 2028 onwards, the Union will have to start repaying the debt issued for NGEU, which could be partly covered through these new revenue streams. The proposals include

European Parliament – Research Service, *Breakdown of Current Own Resources in the EU Budget*, 2025, accessed April 3, 2025, https://www.europarl.europa.eu/thinktank/en/document.html.

13 CSIS, *The Fiscal Future of Europe*, 2024.

14 European Commission, *NextGenerationEU: A European Recovery Plan* (Brussels: Publications Office of the European Union, 2021).

15 Federal Constitutional Court (Bundesverfassungsgericht – BVerfG), Judgment of 15 April 2021, 2 BvR 547/21, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/04/rs20210415_2bvr054721en.html.

a resource linked to the Emissions Trading System (ETS), a Carbon Border Adjustment Mechanism (CBAM), a harmonized digital tax and a tax on non-recycled plastic waste, to which was added in June 2023 a new proposal for a statistical resource on corporate profits, calculated as 0.5% of the gross operating surplus of resident companies.[16] However, the budgetary impact of these initiatives remains limited, as they are estimated to generate less than 10% of the European budget planned for 2030.

The lack of its own fiscal capacity prevents the Union from playing a stabilizing role in the face of economic shocks. Instead of having a budget with countercyclical capacity, the response to crises has consisted of temporary relaxation of fiscal rules, such as the activation of the Stability Pact's safeguard clause, and recourse to the support of the European Central Bank. This configuration poses challenges in terms of democratic legitimacy, as fundamental decisions are concentrated in institutions that are not directly subject to electoral control.[17]

The Union's fiscal system continues to suffer from limitations that hamper its functioning, weaken its link with citizens and make it less capable of dealing with crisis situations. Overcoming this deadlock requires decisive steps towards a more integrated and autonomous model that allows the EU to act more effectively and legitimately when it is really needed.

In this context, the construction of a European federal treasury emerges in our opinion as both a necessary and complex endeavor. It poses multiple legal and political challenges, and its realization requires the transformation of the current budgetary model, based on an intergovernmental model and dependence on contributions from each Member State, into a truly federal fiscal system. This, in turn, demands a profound change in the Union's regulatory framework, as well as a reconfiguration of the balance of power between the European institutions and the Member States.

Below we examine the main legal obstacles, the room for maneuver available in the Treaties and the institutional reforms that would enable progress towards genuine fiscal capacity.

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16 European Commission, *Proposal for New Own Resources: Enhancing EU Financial Autonomy*, COM(2023) 323 final (Brussels: European Commission, 2023).

17 Gregory Claeys, Zsolt Darvas, and Guntram B. Wolff, *Benefits and Drawbacks of European Unification of Fiscal Rules* (Brussels: Bruegel, 2014).

3.2. The Current Regulatory Framework: Article 311 TFEU and the Limits to European Fiscal Autonomy

Article 311 TFEU constitutes the legal basis for the financing of the Community budget, stipulating that the Union shall have the necessary resources to achieve its objectives and carry out its policies. However, this provision incorporates significant limits, as any progress towards a more autonomous fiscal structure continues to depend on the unanimous consensus of the Member States, which in practice restricts their capacity for reform.

First the provision requires that any decision relating to the system of own resources be adopted unanimously by the Council, after consulting the European Parliament, and subsequently ratified by all Member States in accordance with their respective constitutions. This rigid legal clause prevents substantial progress without complete political consensus.

Specifically, Serrano Antón (2022) examines EU proposals such as Pillar 2 (regulated by Global Anti-Base Erosion Rules, GloBE) and highlights how Article 311 TFEU constitutes a mechanism for protecting national fiscal sovereignty by requiring unanimous agreement for any tax change and its subsequent implementation in accordance with national procedures. This approach, according to the author, reinforces the ability of each State to veto reforms that could limit its tax autonomy.[18]

These limitations have been upheld by the case law of the CJEU, which has interpreted the Union's fiscal powers very strictly and always in accordance with the express provisions of the Treaties. The implementation of innovative financial instruments, such as the NGEU, although made possible by a combined legal basis (Articles 122, 175 and 311 TFEU), has been understood as an exceptional measure, not as a model that can be repeated on a stable basis in the future.[19]

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18 Fernando Serrano Antón, "Crónica sobre la Fiscalidad de la UE: El fracaso en la adopción de la propuesta de Directiva sobre la tributación mínima global (Pilar 2)," *Unión Europea Aranzadi*, no. 6 (2022).

19 Pierre-Henri Verdier, "La cláusula del artículo 311 TFUE y la autonomía fiscal de la Unión Europea," *Revista de Derecho Comunitario Europeo* 26, no. 71 (2022): 89–112.

3.3. The Distribution of Powers and the Institutional Structure: Council, Parliament and Commission

The distribution of fiscal powers within the European institutional system is another major obstacle to fiscal federalization. Unlike classic federal systems, where the power to levy taxes lies directly with a democratically legitimate federal parliament, fiscal powers in the EU are fragmented among various institutions. The Council of the EU, as the representative body of the Member States, retains predominant control over budgetary and fiscal decisions. The European Parliament, although a co-legislator in many areas, plays a more limited role in matters of own resources and has no legislative initiative in tax matters. For its part, while the European Commission can propose new sources of financing and coordinate budgetary policy, it has no coercive power or direct taxing capacity.

This institutional configuration leads to a lack of fiscal sovereignty at the supranational level, as the EU lacks a unified political center capable of deciding and implementing its own fiscal policy. Furthermore, it raises serious problems of democratic accountability, as decisions on taxes and spending are not directly accountable to European citizens but are diluted in opaque and technocratic intergovernmental negotiations.[20]

Overcoming this institutional deadlock would require not only rethinking the legal framework of the Treaties to give the European Parliament a greater role in the allocation of resources and the composition of the Union budget, but also integrating the principle of shared fiscal sovereignty more coherently into the European constitutional order. Achieving this goal would require moving towards a parliamentary model more consistent with the idea of shared fiscal sovereignty, in which both chambers would assume joint responsibility for budgetary matters and there would be effective mechanisms for democratic control over how public resources are collected and managed at the European level.

[20] Jürgen Habermas, *The Lure of Technocracy*, trans. Ciaran Cronin (Cambridge: Polity Press, 2018).

3.4. National Constitutional Constraints: The German Case and the Doctrine of Competence-Competence

One of the most significant obstacles to the institutionalization of a European federal treasury lies in the limitations derived from national constitutional systems, especially in those countries where constitutional courts have exercised strict control over the transfer of fiscal sovereignty to the EU. The paradigmatic case is that of the German Federal Constitutional Court (*Bundesverfassungsgericht*).

In its well-known ruling of May 5, 2020,[21] on the European Central Bank's asset purchase program (PSPP), the BVerfG held that European institutions cannot exercise powers beyond those expressly conferred on them by the Treaties, and that control of *ultra vires* ultimately lies with the national constitutional courts (BVerfG, 2020). This doctrine has been reiterated in the context of the debate on the legality of the NGEU recovery fund, in relation to which the Court expressed reservations about the constitutionality of debt mutualization, considering that it violates the principle of budgetary responsibility of the *Bundestag*.[22]

In this context, moving towards European fiscal federalism with legal backing means gradually developing forms of fiscal integration that respect the constitutional frameworks of the Member States. These mechanisms must be built on the principle of subsidiarity, while ensuring that the Union has the necessary means and capabilities to fulfill its objectives in an environment where its competences are constantly expanding.[23] This gradual expansion has taken place in key areas such as financial and banking supervision, climate and energy policy, harmonization of indirect taxation, the design of own resources and joint borrowing instruments, and enhanced economic policy coordination, driven by Treaty reforms, secondary legislation, and measures adopted in response to major crises.

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21 Federal Constitutional Court of Germany, Second Chamber (Bundesverfassungsgericht, Zweiten Senats), Judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.

22 Federal Constitutional Court (BVerfG), Judgment on the EU Recovery Fund, 2021, https://www.bverfg.de.

23 Paul De Grauwe, *Economics of Monetary Union*, 13th ed. (Oxford: Oxford University Press, 2020). Fritz W. Scharpf, *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe* (Frankfurt: Campus Verlag, 2010).

A viable option for moving in this direction would be to create a common fiscal power, permanent in nature but with a limited scope, intended to finance public services that clearly serve the European interest. In order to preserve the legitimacy of this new fiscal framework, it would be essential to strengthen the components of democratic control, both at the level of the Union institutions and in national parliaments.[24] The concept of European public goods (EPGs) is subject to academic debate and lacks a universally accepted definition. In EU practice, it refers to cross-border projects whose added value increases when designed and financed jointly, meeting economic, institutional, and political criteria. Their production tends to deliver widely shared benefits, reducing the emphasis on national net balances and easing tensions between so-called creditor and debtor states. Priority areas often include cross-border energy and digital infrastructure, large-scale research and innovation, coordinated security and defense initiatives, public health cooperation, and strategic raw materials.

4. Political, Fiscal and Democratic Implications of a European Federal Tax System

The emergence of genuine European fiscal federalism is one of the most complex challenges facing the process of EU integration in the 21st century, from both a political and institutional point of view.

The current EU fiscal and budgetary system, based on national contributions and conditioned by the principle of budgetary balance, appears insufficient to effectively address contemporary global challenges. However, it could be considered efficient in maintaining budgetary discipline and stability under the existing rules, a feature that any reform should aim to preserve. That is why the transition to a federal taxation model cannot be considered a mere technical issue, but rather a decision of great political significance that directly affects the European constitutional foundations.

For a European federal treasury to be effectively consolidated, the Union's budget would need to be significantly increased, which would not

[24] European Fiscal Board, *Annual Report 2022* (Brussels: European Commission, 2022); Jean Pisani-Ferry, *The Euro Crisis and Its Aftermath* (Oxford: Oxford University Press, 2014).

only entail a profound change in the fiscal sphere, but also an institutional reorganization to adapt the functioning of the Union to this new reality.

Such a scenario would require strengthening accountability mechanisms, ensuring more solid democratic legitimacy and moving towards effective electoral representation at the European level. All of this would necessarily be accompanied by a profound reform of the Union's institutions in order to establish truly representative fiscal governance.[25] From this perspective, in the following section we will establish the political, fiscal and democratic implications of creating a fully-fledged European federal treasury.

4.1. The Principle of Subsidiarity as the Cornerstone of a New Institutional Balance

A federal treasury will require a reconsideration of the powers and responsibilities of the European institutions, particularly the role of the European Parliament, the Council and the Commission. Currently, fiscal decisions are subject to the principle of unanimity in the Council and to limited legislative initiative on the part of the Parliament.

The establishment of genuine federal taxation would involve transferring part of the Member States' tax sovereignty to the supranational level, which would require a thorough reform of the Treaties and a more effective application of the principle of subsidiarity, ensuring that powers are exercised at the most appropriate level to achieve common objectives.

From the perspective of democratic legitimacy, the principle of "no taxation without representation" requires that any taxation at the European level be subject to control by a representative authority with effective decision-making powers. In this context, strengthening the role of the European Parliament in tax matters appears to be an essential condition for ensuring this democratic link, by enabling it to participate actively in shaping the tax system, defining the budget and monitoring its implementation. This institutional development should also be accompanied by a functional reorganization that provides a European Treasury with the necessary means

[25] Fundación Alternativas, *Is a Fiscal Union in the EU Feasible?* (Madrid: Fundación Alternativas, 2023).

to operate autonomously, manage its own resources and ensure tax compliance throughout the Community.[26]

4.2. Consolidation of the Principle of Territorial Solidarity

One of the main reasons for giving the EU its own fiscal capacity is the need to strengthen the mechanisms that guarantee solidarity and cohesion between its different territories. In consolidated federal models, the central treasury plays a key role in correcting regional imbalances by channeling resources to areas with lower levels of development or more exposed to crisis situations. In the case of the EU, this redistributive function has been carried out mainly through structural and cohesion funds.

However, the effectiveness of these instruments has been limited, not only due to their weak adaptability to economic cycles, but also because, although the EU has reserve mechanisms such as the European Globalisation Adjustment Fund, the Solidarity and Emergency Aid Reserve, the EU Solidarity Fund, the Brexit Adjustment Reserve, the Single Margin Instrument and the Flexibility Instrument, their scale and flexibility are insufficient to deliver a rapid and substantial response to major external shocks.[27]

The development of a genuine federal treasury would enable the Union to deploy more ambitious redistributive policies that are better adapted to the social, economic and demographic realities of its Member States. Formulas such as permanent transfers between territories, automatic stabilizers at the European level or common crisis protection mechanisms would move us towards a more robust model of integration capable of sustaining real structural cohesion.[28] This approach requires, in any case, the establishment of binding rules that consolidate fiscal solidarity as a structural principle of the system, based on criteria of redistributive justice and institutional co-responsibility among Member States.[29]

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26 Vivien A. Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput," *Political Studies* 67, no. 1 (2019): 3–21, https://doi.org/10.1111/j.1467–9248.2012.00962.x.

27 Thomas Piketty, Emmanuel Saez, and Gabriel Zucman, "Towards a Fiscal Union for the EU," *Journal of European Public Policy* 28, no. 3 (2021): 350–73.

28 Ibid., 356–8; Sebastian Dullien and Ferdinand Fichtner, "A Common Unemployment Insurance Scheme for the Euro Area," *DIW Economic Bulletin* 3, no. 1 (2013): 9–14.

29 European Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* (Brussels: Publications Office of the European Union, 2017).

4.3. Redefining the Democratic Link between Citizens and European Institutions

The current EU tax system is characterized by a lack of a direct link between citizens and European finances. Citizens perceive the EU as a technical and distant structure, whose spending capacity depends on national decisions. A federal treasury would make it possible to reverse this distancing by establishing a direct fiscal relationship between taxpayers and the European tax authority, which would strengthen the visibility and legitimacy of European public action.[30]

The establishment of European taxes, such as those on polluting emissions, digital activities or financial transactions, must be accompanied by a process of fiscal democratization, which includes, as already stated above, mechanisms for accountability, citizen participation and fiscal transparency. European taxation can, thus, become an educational tool for strengthening European identity and a sense of shared responsibility between citizens and supranational institutions.

4.4. Tax Harmonization that Respects National Sovereignties

One of the most complex challenges in shaping European fiscal federalism is ensuring its compatibility with national tax systems without jeopardizing their stability or effectiveness. The coexistence of different levels of taxation requires careful coordination to clearly define competences, avoid duplication and prevent distortions that could lead to unfair tax burdens.

In light of the above, moving towards greater tax harmonization, especially in key areas such as corporate tax, value added tax and digital taxation, appears to be an essential condition. Initiatives such as the Business in Europe: Framework for Income Taxation (BEFIT) proposal, presented by the European Commission in 2021 as a revised replacement of the former Common Consolidated Corporate Tax Base (CCCTB) which has consequently been withdrawn, and the measures adopted on tax transparency through the DAC6 and DAC7 directives, are important steps in this direction, However, they remain insufficient to provide a structural response to the persistent fragmentation of the EU's tax landscape and the absence

[30] John Erik Fossum and Agustín José Menéndez, *The Gift of the Constitution: A Constitutional Theory for a Democratic European Union* (Lanham: Rowman & Littlefield, 2020).

of a fully harmonized framework capable of ensuring long-term revenue stability and fairness across Member States.

Consolidating a coherent European tax system would entail establishing a harmonized and well-integrated framework for taxation within the EU, including aligned tax bases, coordinated rates where appropriate, and consistent application of rules across Member States. Achieving this goal will also require the Union to further strengthen effective tools to combat tax evasion, artificial avoidance strategies, and the existence of tax havens, both within and outside its territory.[31]

4.5. Political and Institutional Challenges in Building a European Federal Treasury

Despite the potential benefits of a European federal treasury, its implementation faces significant political resistance. Some Member States have expressed concerns about the possible loss of fiscal sovereignty, the transfer of resources without proper control by national parliaments, or the risk of generating undesirable effects in the countries benefiting from the transfers.[32] These objections, which are partly understandable, require a rethinking of the institutional design to strike a balance between fiscal responsibility and effective transparency and accountability mechanisms at both the national and European levels.[33]

A legally viable strategy for moving in this direction is to adopt a gradual approach, based on the principle of flexible integration or "differentiated capacity," to which the European Commission has referred on several occasions. This approach would allow a group of Member States committed to deepening fiscal cooperation to develop common instruments without

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31 European Commission, *Towards a Fair and Efficient Tax System in the European Union* (Brussels: Directorate-General for Taxation and Customs Union, 2023), https://ec.europa.eu/taxation_customs/home_en.

32 Scharpf, *Community and Autonomy*; Sergio Fabbrini, *Which European Union? Europe after the Euro Crisis* (Cambridge: Cambridge University Press, 2021).

33 European Commission, *Reflection Paper on Strengthening the Economic and Monetary Union* (Luxembourg: Publications Office of the European Union, 2017), accessed March 28, 2025, https://ec.europa.eu/info/publications/reflection-paper-deepening-economic-and-monetary-union_en.

relying on unanimous consensus, by invoking the enhanced cooperation mechanism provided for in Article 20 of the TEU.[34]

In addition to respecting different integration speeds, this model would make it possible to test the proposed mechanisms institutionally, strengthen their democratic legitimacy and demonstrate, on the basis of experience, the concrete benefits of greater fiscal integration.[35]

5. Proposals for Institutional Reform

5.1. Need for Structural Reform of the European Fiscal Model

Comparative evidence shows that the current EU fiscal model, based on national contributions and the absence of its own taxing powers, is insufficient to ensure an effective response to systemic crises, to finance European public services and to articulate a coherent redistributive policy.[36]

It is therefore essential to push for structural reform that will enable the Union to move towards a genuine federal treasury. This transformation cannot be limited to a mere technical adjustment. It must be a major political decision aimed at consolidating financial autonomy, strengthening democratic accountability and reinforcing structural solidarity within the European project.[37]

5.2. Delimitation and Exercise of Fiscal Sovereignty at the European Level

A key step in this transformation is the recognition of the Union's own fiscal powers in the Treaties, in an explicit, permanent manner and with institutional guarantees. This recognition should include the possibility of establishing European taxes with their own regulatory basis, subject to parliamentary control and coordinated with national treasuries to avoid overlaps.

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34 Sergio Fabbrini, *The Future of Europe: Decoupling and Reforming Multilevel Democracy* (Cambridge: Cambridge University Press, 2019); Bruno De Witte, "Legal Instruments and Judicial Protection" in *The Evolution of EU Law*, 2nd ed., eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2012), 237–70.

35 Amy Verdun and Jonathan Zeitlin, "The European Semester as a New Architecture of EU Socio-Economic Governance in Theory and Practice," *Journal of European Public Policy* 25, no. 2 (2018): 137–48, https://doi.org/10.1080/13501763.2017.1363807.

36 Piketty, Saez, and Zucman, "Towards a Fiscal Union for the EU," 356–8; European Fiscal Board, *Annual Report 2022*.

37 Fabbrini, *The Future of Europe*; Jürgen Habermas, *The Crisis of the European Union: A Response*, trans. Ciaran Cronin (Cambridge: Polity Press, 2012).

To this end, Article 311 TFEU needs to be amended to remove the unanimity requirement and replace it with qualified majorities in the Council and co-decision with the European Parliament, following the model of the ordinary legislative procedure.[38]

5.3. Strengthening the European Parliament as a Fully-Fledged Fiscal Chamber

In order to ensure the democratic legitimacy of a federal tax system, it is essential to strengthen the role of the European Parliament in all phases of the budgetary and tax cycle. This means giving it the power of initiative in tax matters, defining its competence to approve the Union's own resources and enabling it to exercise political control over the European fiscal authority.[39] Only with a representative chamber with effective fiscal capacity can the principle of "no taxation without representation" be fulfilled, which is an essential element of any consolidated democratic system.[40]

5.4. Creation of a European Treasury with Debt Management and Issuance Capacity

The consolidation of a true federal treasury requires not only clear fiscal powers, but also an efficient and autonomous administrative structure. In this vein, some scholars advocate the creation of a European Treasury with powers to collect taxes, execute the budget and issue debt on behalf of the Union, as well as ensuring compliance with fiscal discipline.[41] This entity could be set up as an autonomous body within the European Commission or as a specialized mechanism under parliamentary control, which would strengthen the Union's operational capacity to manage its resources, deploy European funds effectively and react quickly to crisis scenarios.

5.5. Development of a European Fiscal Policy with Stabilizing and Redistributive Capacity

Beyond its institutional configuration, a true federal treasury must be structured around substantive functions that enable it to effectively address the

38 European Parliament, *Breakdown of Current Own Resources in the EU Budget*.
39 Fabbrini, *Future of Europe*.
40 Habermas, *Crisis of the European Union*, 2012.
41 Anne-Laure Delatte and Nicolas Valla, *A European Treasury: Facing the Next Crisis*, Bruegel Policy Contribution, no. 5 (2020).

present and future challenges of the integration process. In this regard, we consider it crucial for a common fiscal framework to assume a stabilizing role, through the possibility of resorting to debt for countercyclical purposes, while exercising a redistributive function aimed at strengthening economic, social and territorial cohesion within the internal market.[42] To achieve these goals, common fiscal policy should be closely aligned with the Union's strategic objectives, such as the ecological and digital transition, energy security and the construction of a common defense policy. Achieving these objectives requires a predictable and sufficient source of funding. In our view, this could be best ensured within the framework of a federal tax system, accompanied by medium-term and long-term budgetary planning.[43]

5.6. Gradual Implementation and Enhanced Cooperation Mechanisms

The establishment of a genuine European federal treasury cannot happen suddenly or through uniform implementation. It is essential to develop a phased implementation strategy that integrates, on the one hand, institutional reforms with a particular impact on structure and, on the other, intergovernmental mechanisms through a transitional regime that allows for progressive and realistic progress, depending on the political and institutional conditions at the time.

A particularly suitable option from a legal and political point of view is the use of the enhanced cooperation mechanism provided for in Article 20 of the TEU, which allows a group of Member States to move forward more ambitiously in certain areas without the need for unanimity.[44] This would facilitate the introduction of European-wide taxes in specific sectors, the creation of common investment funds or the design of experimental fiscal mechanisms, whose practical effectiveness would open the door to their eventual extension to the whole of the Union.[45]

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42 Dullien and Fichtner, "A Common Unemployment Insurance Scheme for the Euro Area," 9–14; Pisani-Ferry, *The Euro Crisis and Its Aftermath*.

43 European Fiscal Board, *Annual Report 2022*.

44 De Witte, "*Legal Instruments and Judicial Protection*."

45 Verdun and Zeitlin, "*European Semeste*."

5.7. Strengthening Fiscal Transparency and European Democratic Education

Finally, any reform of the tax system must be accompanied by an unequivocal commitment to transparency, accountability and tax education for citizens. The introduction of European taxes must be clearly communicated, explaining their purpose, impact and territorial distribution, with the primary aim of ensuring voluntary compliance with tax obligations by taxpayers in Member States.[46] Similarly, the use of the Union's own resources must be subject to rigorous public control mechanisms and ex post evaluation procedures.

Only through this requirement for transparency and accountability will it be possible to strengthen a critical European tax citizenship that is both informed and committed to the sustainability of the common project.

6. Final Reflections

The construction of a genuine European federal treasury is an essential step in the process of political and economic integration of the Union. The current fiscal structure, based on contributions from Member States and subject to unanimity rules, has proven insufficient to effectively address crises of all kinds, finance European public goods and services, and strengthen cohesion between Member States.

The COVID-19 pandemic, the war in Ukraine and the challenges of the ecological transition have highlighted the structural limitations of the current model and the need to provide the Union with its own stable and legitimate fiscal capacity. Reform in this area cannot be limited to technical adjustments but requires a profound transformation of the legal and institutional framework, explicitly recognizing the EU's fiscal competence.

This development must be accompanied by the amendment of Article 311 of the TFEU in order to overcome the obstacle of unanimity and move towards decisions based on qualified majorities and democratic control through the ordinary legislative procedure. It is also essential to strengthen the role of the European Parliament as a fully-fledged fiscal chamber, in line with the democratic principle of "no taxation without representation."

[46] Habermas, *Crisis of the European Union*, 2012; Fabbrini, *Which European Union?*.

In turn, the creation of a federal treasury must be accompanied by the development of redistributive functions structured around common strategic objectives such as the ecological and digital transition, energy security and European defense. These functions require not only innovative fiscal instruments, but also a European Treasury with the capacity to manage, collect and issue debt.

However, this transformation should not be seen as a break with the current model, but rather as a pragmatic evolution consistent with the logic of the European integration process. We understand that cooperation is the most appropriate legal mechanism for moving forward gradually, respecting the different paces of Member States. At the same time, it will be essential to promote an informed European tax citizenry that is aware of the collective benefits of this reform and committed to sustaining a more democratic, resilient, and supportive common project.

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Legal Protection of Ichthyofauna in Natura 2000 Sites in Poland: A Case Study of an Ecological Disaster in the Oder River

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environmental law, legal protection of ichthyofauna, ecological disaster in the Oder River, restoration and protection of aquatic ecosystems

Abstract: In EU legislation, the protection of ichthyofauna as an element of diversity takes place in the Habitats Directive 92/43/EEC. The purpose of the article is to present the legal status and legal instruments for the protection of ichthyofauna in Natura 2000 sites in the EU and Poland. The considerations were undertaken in the context of the ecological disaster in the Oder River. Analyzing the legal status of ichthyofauna protection, strengths and weaknesses were identified. The former include the establishment of a network of Natura 2000 sites, categories of priority species, strict, active and *in situ* species protection, prohibitions on fishing, trade and habitat destruction, and a program for the restoration and protection of fish stocks. However, a problematic issue has been the lack of procedures for dealing with threats to ichthyofauna, as exemplified by the ecological disaster in the Oder River. Although a law has been passed to revitalize the Oder River, it focuses on investments to regulate the riverbed and not on restoring the state of ichthyofauna and natural habitats.

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1. Introduction

The subject of the analysis is the legal protection of ichthyofauna. This concept has not been defined in legal terms, and in the literature it means the totality of fish species occurring at a given geological time in a specific body of water.[1] It should be noted that ichthyofauna is, on the one hand, an important element of biodiversity in aquatic ecosystems, and, on the other hand, a good indicator of water quality. The distribution of fish in Poland is determined by historical, anthropogenic and habitat factors. The species composition of the ichthyofauna is quite homogeneous, there are no endemic species, while foreign (invasive) species are increasing.[2] Fish communities are subject to a wide range of anthropogenic pressures that can alter their structure. This is especially true of flowing water ecosystems through pollution, regulation, and baffling, resulting in the phenomenon of the disappearance of fish species with specific high environmental requirements and a drastic reduction in their populations. Many fish populations are on the brink of ecological disaster.[3] A significant threat to ichthyofauna is climate change, especially extreme weather events (floods and droughts) and rising river water temperatures. The negative consequences of these environmental changes include changes or shifts in the life cycles of fish, impacts on the food base, increased mortality and disappearance of native, vulnerable species, and the expansion of invasive species. Another threat to river ichthyofauna is anthropopressure, manifested by the regulation of the river bed, technical developments and the close location of industrial plants, discharging sewage, that is, treating the river as a receiver of pollution. The diversity of nature conservation forms and varying degrees of land development mean that rivers are exposed to varying degrees of anthropogenic factors.

1 *Dictionary of the Polish Language*, s.v. "Ichthyofauna," accessed October 17, 2024, https://sjp.pwn.pl/slowniki/ichtiofauna.

2 See: Joanna Grabowska, Jan Kotusz, and Andrzej Witkowski, "Alien Invasive Fish Species in Polish Waters: An Overview," *Folia Zoologica* 59, no. 1 (2010): 73–85, https://doi.org/10.25225/fozo.v59.i1.a1.2010; Dagmara Błońska, "The Origin of Poland's Freshwater Ichthyofauna," *Kosmos. Problemy Nauk Biologicznych* 61, no. 2 (2012): 261.

3 Paweł Buras et al., "The Fish of the Nida River System – Present State, Threats and Possibility of Protection," *Roczniki Naukowe PZW* 14 (2001): 213–33; Wiesław Wiśniewolski, "Możliwości przeciwdziałania skutkom przegradzania rzek i odtwarzania szlaków migracji ryb [Factors Favorable and Harmful to the Development and Maintenance of Fish Populations in Flowing Waters]," *Supplementa ad Acta Hydrobiologica* 3 (2002): 45–6.

Often, river damming and the creation of large reservoirs have a number of environmental consequences for the river basin and, alongside water pollution and poaching, are the main factors affecting ichthyofauna.[4] The development of the riverbed and the regulation of its banks cause the loss of valuable natural habitats of species and also negatively affects ichthyofauna, which is manifested by the disappearance of the most valuable, rheophilic and migratory species in favor of less valuable species, the so-called ubiquitous, i.e., with low environmental requirements. Similarly, changes in ichthyofauna are caused by discharges of chemical pollutants into river waters. These impacts on fish can be both direct (e.g., increased morbidity and mortality) and indirect, by affecting the entire trophic system, including the fish food base and habitat quality (e.g., spawning substrate vegetation, sediment formation, etc.).[5] An example of a large-scale negative phenomenon created in the river ecosystem due to climate effects and increased industrial wastewater inflows is the ecological disaster in the Oder River, which occurred in July, August and September 2022. This event can certainly be classified as an environmental disaster, as the result was and is permanent, that is, naturally irreversible damage or destruction of a large area of the aquatic environment and adjacent ecosystems, negatively affecting, directly or indirectly, the health and lives of people.[6] This event has resulted in irreversible changes to the ichthyofauna on a very large scale, which requires remedial action.[7]

The above-mentioned threats to ichthyofauna raise the profile of the need for legal protection of these aquatic communities. In EU legislation, the protection of ichthyofauna as an element of diversity takes place in Council Directive 92/43/EEC of May 21, 1992, on the conservation of

4 Aneta Bylak and Krzysztof Kukuła, "Ichtiofauna Bieszczadzkiego Parku Narodowego: skład gatunkowy, struktura i zagrożenia," *Roczniki Naukowe Polskiego Związku Wędkarskiego* 28 (2015): 27–42, https://doi.org/10.12823/sapaa.0860-648X.15002.

5 Grzegorz Radtke, "Współczesne zagrożenia dla ichtiofauny dolnej Wisły," *Dzikie Życie* 239, no. 5 (2015), accessed October 17, 2024, http://dzikiezycie.pl/archiwum/2014/maj-2014/wspolczesne-zagrozenia-dla-ichtiofauny-dolnej-wisly.

6 *Encyklopedia PWN*, s.v. "Katastrofa ekologiczna," accessed October 17, 2024, https://encyklopedia.pwn.pl/haslo/katastrofa-ekologiczna;3921133.html.

7 See: Elżbieta Zębek and Agnieszka Napiórkowska-Krzebietke, "Działania prawne i naprawcze wobec szkód w środowisku wodnym. Studium przypadku katastrofy ekologicznej na rzece Odrze," *Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu* 79, no. 3 (2023): 48–72, https://doi.org/10.31268/ZPBAS.2023.52.

natural habitats and wild fauna and flora (Habitats Directive).[8] The basic prerequisite for the establishment of this legislation was the deteriorating condition of natural habitats and the increase in the number of wild species, including fish, which are seriously endangered. Therefore, it is necessary to take measures to protect them at the EU level. Due to threats to certain types of natural habitats and certain species, it is therefore necessary to introduce measures aimed at their protection and to declare them a priority. In order to restore or preserve natural habitats, Article 3 of the Directive indicates the need to designate special areas of conservation to create a coherent European ecological network, Natura 2000 sites. In this regard, Member States have been obliged to establish such areas in proportion to the occurrence of such types of natural habitats and species habitats on its territory, and, if necessary, to take measures to improve the ecological coherence of Natura 2000 by preserving and, where appropriate, developing landscape features of great importance for wildlife.

In Polish law, the protection of ichthyofauna as an element of biodiversity of aquatic ecosystems and an indicator of water quality has been comprehensively regulated in such legal acts as the Law of April 16, 2004 on Nature Protection (NCA),[9] the Law of April 18, 1985 on Inland Fisheries (IFA), [10] the Law of July 20, 2017 – Water Law (WL)[11] and implementing acts, as well as in the Act of July 13, 2023 on Revitalization of the Oder River.[12] The purpose of the article is to present the legal status and legal instruments for the protection of ichthyofauna, especially in Natura 2000 sites in the EU and Poland. The present considerations were undertaken in the context of the ecological catastrophe in the Oder River, during which there were massive die-offs of fish species under legal protection at the EU and national levels, including in Natura 2000 sites. The article uses a legal-dogmatic method based on the analysis of EU and national legal regulations for the legal protection of ichthyofauna and the literature on the subject.

8 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L206, 22 July 1992), 7–50 (Habitats Directive).

9 Consolidated text: Journal of Law 2024, item 1478.

10 Consolidated text: Journal of Law of 2022, item 883.

11 Consolidated text: Journal of Law of 2024, items 1087, 1089, 1473.

12 Journal of Law of 2023, item 1963.

2. Legal Protection of Ichthyofauna as an Element of Biodiversity

Protection of ichthyofauna consists primarily of multidirectional measures aimed at preserving and restoring, at an appropriate level, the natural population size of individual fish species and enabling their rational use. Such protection consists of legal actions, leading to the protection of species in the area of their occurrence through, e.g., prohibitions on the trapping, keeping and preparation of fish and the destruction of their habitat. Local protection of fish populations is also distinguished, which serves to preserve the genetic distinctiveness of individual fish populations. Moreover, economic protection represents measures to protect usable fish from overharvesting and to counteract the effects of adverse environmental transformations. Such measures include the introduction of conservation sizes and periods, catch limits, protection of spawning and wintering sites, denaturalization and making rivers passable for fish migration, and protection of populations of endangered and economically valuable species.[13]

Fish as an element of the environment and biodiversity are subject to legal protection at both EU and national levels. The most relevant act of EU law in this regard is the Habitats Directive. This directive aims to contribute to ensuring biodiversity through the protection of natural habitats and wild fauna and flora, including ichthyofauna. Measures taken in accordance with this Directive are aimed at preserving or restoring, at a favorable conservation status, natural habitats and species of wild fauna and flora of Community interest. Actions under this Directive take into account economic, social and cultural needs and regional and local characteristics (Article 2). Measures pursuant to this Directive take into account economic, social and cultural requirements and regional and local characteristics (Article 2). In order to strengthen species protection, two categories of protected species were specified, i.e., species of community interest and priority species. The first category includes the following species: (a) endangered – with the exception of those species whose natural range in the territory is negligible and which are not endangered or vulnerable in the Western Palearctic region; (b) vulnerable – species that are thought to be likely to move into the endangered category in the near future if the factors causing the threat

[13] *Encyklopedia PWN*, s.v. "Ochrona ryb," accessed October 17, 2024, https://encyklopedia.pwn.pl/haslo/ochrona-ryb;3949676.html.

continue to affect them; (c) rare – species with small populations that are currently neither endangered nor vulnerable, but are subject to risk of endangerment; and (d) endemic – requiring special attention due to the special nature of their habitat and/or the potential impact of their exploitation on that habitat and/or the potential impact of their exploitation on their conservation status.[14] These species are listed in Annex II and/or Annex IV or V of the directive. Meanwhile, priority species means species for the conservation of which the Community has special responsibility because of the size of their natural range within the territory. Species are listed in Annex II of the directive and marked with an asterisk. Annex II lists plant and animal species of Community interest, the protection of which requires the designation of special areas of conservation.[15] Among them are the following freshwater fish species: steelhead (*Hucho hucho*), marbled trout (*Salmo marmoratus*), noble salmon (*Salmo salar*), as well as white bleak, barbel, whitetail gudgeon, European roseate, great goat, common goat, sculpin, golden goat, striped carp, barbel, and within this the mud minnow has been included as a priority species. In turn, Annex IV indicates plant and animal species of Community interest that require strict protection, i.e., the western sturgeon (*Acipenser sturio*) and the mud minnow (*Phoxinus percnurus*). Meanwhile, Appendix V identifies animal and plant species of Community Interest, the harvesting from the wild and exploitation of which may be subject to management actions, i.e., river lamprey (*Lampetra fluviatilis*), grayling (*Thymallus thymallus*), steelhead, common asp (*Aspius aspius*), and whitetail (*Rutilus friesii meidingeri*).

Species protection is implemented by taking measures to establish a system of strict protection for animal species listed in Annex IV (a), including fish, in their natural range. These measures include the following prohibitions: (a) any form of intentional capture or killing of specimens of these wild species; (b) intentional disturbance of these species, particularly

[14] See: Paweł Pawlaczyk and Andrzej Jermaczek, *Natura 2000 – narzędzie ochrony przyrody. Planowanie ochrony obszarów Natura 2000* (Warsaw: WWF Polska, 2004), 28–30; Grażyna Łaska, "'Natura 2000' Ecological Network in the Aspect of Sustainable Development," *Ecological Questions* 15 (2011): 9–21; Wiesław Pływaczewski, Elżbieta Zębek, and Joanna Narodowska, *Odpowiedzialność za środowisko z perspektywy prawa, kryminologii i nauk przyrodniczych* (Warsaw: Difin, 2020), 29–31.

[15] The symbol "*" indicates a priority species.

during the breeding, rearing, winter sleep and migration periods; (c) intentional destruction or egg-picking; and (d) deterioration or destruction of breeding or resting areas. For these species, prohibitions have been imposed on keeping, transporting, selling or exchanging, and offering for sale or exchange, specimens taken from the wild, except for those legally taken before the implementation of this directive. These prohibitions provided for apply to all life stages of these animals, including fish. In addition, Member States have been obliged to establish a monitoring system for the incidental capture or killing of animal species listed in Annex IV (a). In the context of the information collected, Member States shall undertake any further research or conservation measures required to ensure that the incidental capture and killing does not have a significant negative impact on these species (Article 12). Based on an assessment of the status of habitat types and species covered by the Habitats Directive, it was shown that the overall status of species and habitats in the EU did not change between 2007 and 2012 and even some protected species and habitats showed signs of recovery. However, the European Commission stressed the significant role of the Natura 2000 sites in stabilizing habitats and species with an inadequate conservation status, especially if the necessary conservation measures were implemented on an appropriate scale. Nevertheless, the conservation status of numerous habitats and species is inadequate, and the condition of a significant portion of them is deteriorating to an even greater extent, which includes some freshwater fish species.[16] It is therefore necessary to make much greater conservation efforts to reverse the unfavorable aforementioned trends, significant pressures and threats from, e.g., changes in agricultural practices and constant changes in hydrological conditions, as well as from overexploitation and pollution of the water environment must be reduced.[17] The impact of climate change and growing anthropogenic pressure must also be taken into account in the appropriate management and

[16] European Commission, Report from the Commission to the Council and the European Parliament, The State of Nature in the European Union. Report on the status and trends of habitat types and species covered by the Birds and Habitats Directives 2007–2012 required under Article 17 of the Habitats Directive and Article 12 of the Birds Directive, Brussels, May 20, 2015, COM(2015) 219 final.

[17] European Commission, Financing Natura 2000. Investing in Natura 2000. Delivering benefits for nature and people, Brussels, December 12, 2011, SEC(2011) 1573 final.

conservation of fish stocks to ensure the preservation of biodiversity and ecological balance.[18] These measures will significantly contribute to improving the status of species and natural habitats protected within Natura 2000 sites, by significantly reducing anthropopressure, as well as funding such projects.[19]

2.1. Legal Management and Protection of Ichthyofauna under the Inland Fisheries Act

The IFA is responsible for regulating issues related to the protection, breeding, cultivation and fishing of fish in inland surface waters. It also specifies which administrative bodies are obliged to take actions that influence the fisheries economy.[20] K. Gruszecki distinguishes three basic forms of ichthyofauna (fish stock) protection, i.e., conservative, utilitarian, and humanitarian-veterinary. The primary purpose of the first form is to protect certain elements or values of the environment from degradation for ecological reasons, while the purpose of the second form is to carry out rational fisheries management, and the third form is to preserve the fish stock in good health and reduce unnecessary suffering in the breeding process.[21] For the present article, the analysis will be limited primarily to conservation of ichthyofauna. The subject of the IFA regulation is the rules and conditions for the protection, rearing, breeding and catching of fish in inland surface waters, in aquatic facilities and in objects intended for the rearing or breeding of fish. Thus, the spatial scope of the cited law primarily covers inland surface waters, in aquatic facilities (fish ponds being aquatic facilities) and facilities intended for raising or breeding fish.[22]

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18 Alina-Adriana Tudor, "Observations on the Ichthyofauna of 'Balta Mică a Brăilei' Nature Park," 11th edition International Scientific-Practical Conference "Training by research for a prosperous society," January 2024, https://doi.org/10.46727/c.v1.16-17-05-2024.p304-309.

19 Pływaczewski, Zębek, and Narodowska, "Odpowiedzialność za środowisko z perspektywy prawa, kryminologii i nauk przyrodniczych," 35–6.

20 Krzysztof Gruszecki, "Rybactwo śródlądowe. Komentarz," accessed November 15, 2024, https://sip.lex.pl/komentarze-i-publikacje/komentarze/rybactwo-srodladowe-komentarz-587822379.

21 Krzysztof Gruszecki, "Ochrona prawna rybostanu w Polsce," *Zeszyty Naukowe Wyższej Szkoły Pedagogicznej w Bydgoszczy. Administracja Publiczna* 11, no. 1 (1997): 74.

22 Wojciech Radecki, *Kompendium prawa rybackiego* (Poznań: Polskie Towarzystwo Rybackie, 2011), 57.

Fish farming is considered to be activities aimed at maintaining and increasing the production of fish, and breeding is considered to be breeding combined with selection and farming, with the aim of preserving and improving the utility value of fish. Thus, fish and other aquatic organisms living in water constitute its benefits (Article 1). Fish farming means activities aimed at maintaining and increasing fish production. A type of fish farming is fish breeding, which is the rearing of fish combined with selection and preservation, with the aim of keeping and improving the functional value of the fish.[23] For the protection of fish stocks, these resources must be managed in a rational way, as is the case with Article 2a of the IFA. Thus, the protection and recovery of fish stocks in waters, with the exception of fish species protected under the provisions of the NCA, is ensured through the rational management of resources. This involves taking measures to maintain, restore or reestablish the proper state of these resources and the natural relationships between their various components, in accordance with the principles of sustainable development (Article 2a of the IFA). An important legal instrument is a program for the protection and recovery of stocks of certain fish species. Such a program is developed by the minister in charge of fisheries (Article 2b of the IFA). The purpose of this program is to create the conditions necessary for the protection and restoration of fish stocks of certain species, in particular to restore fish feeding or spawning grounds, as well as to maintain or restore in selected river basins the possibility of fish spawning and migration. First of all, the conservation and restoration program shall define the general objective and specific objectives for the conservation and restoration of stocks of specific fish species, taking into account short-term and long-term priorities. Then indicate the type, scope and timing of primary and supporting activities. The former include recommended legal, economic, control and monitoring measures, while the latter include research and development, promotion, education and training activities to ensure proper implementation of the basic activities. The program also identifies the entities authorized or obligated to undertake basic measures and supporting measures, including public

[23] *Encyklopedia PWN*, s.v. "Chów i hodowla ryb," https://encyklopedia.pwn.pl/szukaj/ch%C3%B3w%20ryb.html; Janusz Guziur et al., *Poradnik hodowcy ryb* (Olsztyn: PWRIL, 2016), 124–6.

administrations and water users, as well as possible sources and methods of financing these measures.[24] The detailed conditions and procedure for providing financial support are set forth in the Regulation of the Minister of Agriculture and Rural Development of September 5, 2022, on the detailed purpose, conditions and procedure for providing support for the processing or marketing of agricultural, food, fishery or aquaculture products under the National Plan for Reconstruction and Increasing Resilience.[25]

2.2. Legal Protection of Ichthyofauna under the Nature Conservation Act

The protection of species of ichthyofauna is regulated by the 2004 NCA, which defines the goals, principles and forms of protection of living and inanimate nature and landscape (Article 1). Thus, nature protection consists in the preservation, sustainable use and restoration of resources, creations and components of nature, i.e., (a) wildly occurring plants, animals, and fungi, including those under species protection; (b) animals with a migratory lifestyle; (c) natural habitats, and (d) habitats of endangered, rare and protected species of plants, animals and fungi. This protection is carried out under the forms of nature protection specified in Article 6(1) and (2) of the NCA, i.e., national parks, nature reserves, landscape parks, protected landscape areas, Natura 2000 sites, nature monuments, documentary sites, ecological land uses, natural and landscape complexes, and species protection of plants, animals and fungi. In addition, border areas of natural value may be established in agreement with neighboring countries for their joint protection. For the purposes of this article, Natura 2000 areas are discussed in more detail. Pursuant to Article 25 of the NCA, the Natura 2000 network of areas includes: (1) special bird protection areas; (2) special habitat protection areas; (3) areas of Community importance. Natura 2000 sites are often seen as a combination of site and species protection, protecting both sites of particular importance to the EU and protected species, in particular wild birds, but also mammals, reptiles, and amphibians, as well as natural

[24] See more: Elżbieta Zębek and Agnieszka Napiórkowska-Krzebietke, "Nielegalny połów ryb w aspekcie karnoprawnym i środowiskowym," *Studia Prawnoustrojowe*, no. 29 (2015): 247–60.

[25] Journal of Law of 2022, item 1898, as amended.

habitats.[26] Due to the high value of these areas of EU importance, Article 36 of the NCA provides for certain restrictions on activities in Natura 2000 sites. These relate to the maintenance of equipment and installations for flood protection and economic, agricultural, forestry, hunting and fishing activities, including recreational fishing, if they have a significant negative impact on the protection objectives of the site. The provisions of Article 34 of the NCA (based on Article 6(4) of the Habitats Directive) require compensation to be carried out if it is found that the project carried out will have a significant negative impact on the Natura 2000 site.[27] This applies where there are compelling reasons of overriding public interest, including social and economic reasons, and where there are no alternative solutions. If significant adverse impacts affect priority habitats and species, a permit may only be granted for the following purposes: (a) protecting human health and life; (b) ensuring public safety; (c) achieving beneficial consequences of primary importance for the natural environment; or (d) compelling reasons of overriding public interest, provided the European Commission has been consulted. It is worth adding that the concept of imperative requirements of overriding public interest is rather an exemption from the rigors of protection, rather than the establishment of protection.[28] An important legal instrument for species protection are conservation plans preceded by plans of conservation tasks. An essential element of these plans is the establishment of protective measures for maintaining or restoring the proper state of conservation of the objects of protection of the Natura 2000 site. The scope of such measures should include (a) active protection or restoration of natural habitats or habitats of plant and animal species; (b) water relations, including water management; and (c) agricultural, forestry and fishery management,

[26] See also: Elżbieta Zębek and Magdalena Szramka, "Ochrona ptaków i siedlisk przyrodniczych a realizacja przedsięwzięć na obszarach Natura 2000," *Journal of Modern Science* 18, no. 3 (2013): 323–36.

[27] Adam Habuda, "Ochrona przyrody a działalność gospodarcza na obszarach Natura 2000," in *Gospodarcze prawo środowiska*, eds. Janina Ciechanowicz-McLean and Tomasz Bojar-Fijałkowski (Gdańsk: Wydawnictwo UG, 2009), 177–8; Magdalena Szramka and Elżbieta Zębek, "Ograniczenia realizacji przedsięwzięć na obszarach Natura 2000," *Studia Prawnoustrojowe* 22 (2013): 195–206.

[28] Piotr Ćwiek, "Kompensacja przyrodnicza," accessed October 10, 2024, https://sip.lex.pl/komentarze-i-publikacje/komentarze-praktyczne/kompensacja-przyrodnicza-469906279; Gruszecki, "Rybactwo śródlądowe. Komentarz."

including directions for shaping the production space, as well as the indication of areas that should be afforested and areas excluded from afforestation, and inland flowing surface waters, in which the possibility of migration of fish and other aquatic organisms should be preserved or restored.[29]

Within the framework of species protection, the NCA provides for its various forms, i.e., active protection, which is the application, where necessary, of conservation measures to restore the natural state of ecosystems and components of nature or to preserve natural habitats and the habitats of plants, animals or fungi (Article 5(5)), and *in situ* protection, which consists in protecting species of plants, animals, and fungi, as well as elements of an inanimate nature, in places of their natural occurrence (Article 5(7)). The list of species protected within Natura 2000 sites is set out in the Regulation of the Minister of the Environment of April 13, 2010, on natural habitats and species of Community interest, as well as the criteria for selecting areas eligible for recognition or designation as Natura 2000 sites.[30] According to §3, the subject of the regulation is animal species of Community interest, with an indication of those that require protection in the form of designation of Natura 2000 sites, and animal species of priority importance. These species are indicated in Appendix 2, which lists more than 75 species, including 8 priority species (e.g., western sturgeon, sharp-tailed whitefish).

3. Importance of Ichthyofauna as an Indicator of Water Quality in EU and National Law

Fish communities are a valuable component of the environment also because of their usefulness in assessing water quality. Ichthyofauna are used for this purpose because of the following characteristics: (a) a wide distribution range, covering a variety of aquatic ecosystems, (b) a well-studied life cycle, (c) relatively easy species identification, and (d) a long life span, enabling long-term assessment of environmental stress levels.[31] Thus, fish, on the one hand, are good indicators of water quality, but, on the other hand,

[29] Pływaczewski, Zębek, Narodowska, "Odpowiedzialność za środowisko z perspektywy prawa, kryminologii i nauk przyrodniczych," 45–52.

[30] Journal of Law of 2014, item 1713, as amended.

[31] Alan K. Whitfield, "Fishes and the Environmental Status of South African Estuaries," *Fisheries Management and Ecology* 3 (1996): 45–57, https://doi.org/10.1111/j.1365-2400.1996.tb00129.x.

they are subject to a wide range of anthropogenic pressures, i.e., pollution of waters with nutrients and harmful substances or impacts associated with fishing. The aforementioned factors contribute to changes in the functioning and structure of ichthyofauna communities, which can be monitored to obtain information on the state of the environment.[32]

The assessment of ichthyofaunal biodiversity is related to a systematic action for the sustainable preservation of all components of aquatic ecosystems, and, above all, to the validation of the current status of a given taxon in the place of its natural occurrence. Natural monitoring consists of observations and measurements of selected components of living nature on the basis of which certain conclusions are formulated about the phenomena taking place or the economic activities carried out, both in time and space.[33] The obligation to conduct such monitoring stems from national and international law. Within the framework of State environmental monitoring, natural monitoring of biological and landscape diversity is carried out in accordance with the provisions of Article 112 of the NCA in connection with the implementation of the provisions of the Habitats Directive, in particular those contained in Article 12. Such monitoring shall consist of the observation and assessment of the status and ongoing changes in the components of biological and landscape diversity, including natural habitat types and species of Community interest. It shall have a particular focus on natural habitat types and species of priority importance, as well as on the evaluation of the effectiveness of nature conservation practices. With regard to ichthyofauna, the obligation of monitoring is imposed in the IFA within the framework of the Fish Stock Protection and Restoration Program (Articles 2a–2d). In Slovakia, for instance, ichthyofauna monitoring

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32 Alberto Barausse et al., "Long-Term Changes in Community Composition and Life-History Traits in a Highly Exploited Basin (Northern Adriatic Sea): The Role of Environment and Anthropogenic Pressures," *Journal of Fish Biology* 79, no. 6 (2011): 1453–86, https://doi.org/10.1111/j.1095-8649.2011.03139.x; Sofia Henriques et al., "Response of Fish-Based Metrics to Anthropogenic Pressures in Temperate Rocky Reefs," *Ecological Indicators* 25 (2013): 65–76, https://doi.org/10.1016/j.ecolind.2012.09.003; Szymon Smoliński, "Wskaźniki ichtiofauny w ocenie stanu środowiska morskiego," in *95-lecie Morskiego Instytutu Rybackiego: aktualne tematy badań naukowych*, vol. 2, *Stan Środowiska Południowego Bałtyku*, ed. Iwona Psuty (Gdynia: Morski Instytut Rybacki 2016), 65–6.

33 Małgorzata Makomaska-Juchiewicz, ed., *Monitoring zwierząt. Przewodnik metodyczny*, part I (Warsaw: GIOŚ Biblioteka Monitoringu Środowiska, 2010), 16–8.

relies on traditional research methods such as electrophilization and netting. It also incorporates information about the study area, habitats and fishing activity. Sensitivity monitoring should consider pollution, the presence of non-native species (particularly invasive ones) and potential fishing interventions.[34] Meanwhile, in Romania, as part of the monitoring and protection of ichthyofauna in 2007, a project entitled "Scientific validity of a model law enforcement Nature 2000" took place, taking as a study case the animal species listed in the Habitats Directive.[35]

Water monitoring methods in Poland result from the regulations of the Water Framework Directive (WFD)[36] and the 2017 Water Law. Indeed, the environmental goals of the WFD prescribe the pursuit of enhanced protection and improvement of the aquatic environment, as well as the gradual reduction of emissions of hazardous priority substances.[37] The WFD also identifies a monitoring system for surface water status as one of the legal instruments for water protection in the EU. Member States are required to ensure that water status monitoring programs are established to provide a coherent and comprehensive overview of water status in each river basin district for surface waters, including volume and level or rate of flow as appropriate to ecological status, ecological potential and chemical status (Article 8). These programs are also established for the protected areas listed in Annex IV of the Directive. These include the abstraction of water for human consumption, the protection of aquatic species of economic importance, aquatic species used for recreational purposes, aquatic species sensitive to nutrients, and the protection of habitats or species for which the maintenance or improvement of water status is an important factor in their protection, including Natura 2000 sites designated under the Habitats and

[34] Ján Koščo and Pavol Balázs, "Fishes Protected of Natura 2000 System in Slovakia," *Acta Agraria Debreceniensis*, no. 25 (2007): 9–12, https://doi.org/10.34101/actaagrar/25/3030.

[35] Vasile Otel and Aurel Năstase. "Researches on Ichthyofauna in the Natura 2000 Sites from Banat (Romania)," *Scientific Annals of the Danube Delta Institute* 16 (2010): 33–8.

[36] Directive 2000/60/EC of the European Parliament and of the Council of October 23, 2000, establishing a framework for Community action in the field of water policy (OJ L327, 22 December 2000), 1–73.

[37] See: Janina Ciechanowicz-McLean, "Wpływ Ramowej Dyrektywy Wodnej na bezpieczeństwo ekologiczne Morza Bałtyckiego," *Gdańskie Studia Prawnicze* 32 (2014): 85–97; Janina Ciechanowicz-McLean, "Ramowa Dyrektywa Wodna a ochrona środowiska morskiego," *Prawo Morskie*, no. 29 (2013): 107–15.

Birds Directives. The directive establishes three types of monitoring: (a) diagnostic, (b) operational, and (c) for protected areas.[38] In the Polish legal system, the types of monitoring are defined in the Regulation of the Minister of Infrastructure of July 13, 2021, on the forms and manner of monitoring of surface water bodies and groundwater bodies.[39] According to §4 of the regulation, four types of monitoring have been defined for surface water bodies, i.e., diagnostic, operational, research, and protected areas. Diagnostic monitoring of surface water bodies is established to assess the status of these waters, including those occurring in protected areas, taking into account significant anthropogenic impacts and priority substances, and to assess the degree of eutrophication of surface waters. Operational monitoring of surface water bodies is established to assess the status of those waters deemed at risk of failing to meet the environmental objectives set for them, including those bodies occurring in protected areas. Research monitoring of surface water bodies is established in order to clarify the reasons for the failure to achieve the environmental objectives set for a given body of these surface waters. This type of monitoring is applicable if it is impossible to explain these causes on the basis of data and information, obtained as a result of measurements or studies conducted as part of diagnostic monitoring or operational monitoring. Meanwhile, the purpose of protected area monitoring is to assess the fulfillment of additional requirements established to meet environmental objectives for protected areas (§5), including protected species.

The WFD and WL define the ecological status (natural) or ecological potential (heavily modified) of surface waters, based on physical and chemical parameters and bioindicators, with fish being one of the key elements of this system. These indicators are defined in the Regulation of the Minister of Infrastructure of June 25, 2021, on the classification of ecological status, ecological potential and chemical status and the method of classifying the status of surface water bodies, as well as environmental quality standards for priority substances.[40] According to the regulation, the biological

[38] Elżbieta Zębek, "Legal Solutions of Lake Monitoring Systems in Poland in Compliance with the Water Framework Directive," *Review of European and Comparative Law* 48, no. 2 (2022): 173–201, https://doi.org/10.31743/recl.13419.

[39] Journal of Law of 2021, item 1576.

[40] Journal of Law of 2021, item 1475.

indicators determining the ecological potential of waters are phytoplankton, phytobenthos, macrophytes, benthic macroinvertebrates, and ichthyofauna (fish population). Similarly, in the case of ecological status, where the bioindicators of water quality are the Phytoplankton Index for Polish Lakes (PMPL), Multimetric Diatom Index (IOJ), Macrophytic Ecological Status Index (ESMI), Benthic Macroinvertebrates, and Lake Fish Index LFI+, LFI-EN. Thus, the Lake Fish Index includes two methods: (1) LFI+, based on the results of multi-year commercial ichthyofauna fishing harvests, and (2) LFI-EN, based on the results of a single fish catch with a Nordic wonton set conforming to EN 1475735. Both methods assume that changes in the state of the environment translate directly into the composition and structure of the ichthyofauna, and vice versa – the composition and structure of the ichthyofauna are direct indicators of the state of the environment. Thus, the variables are the weight shares (%) of species or functional groups of fish (LFI+) or the weight shares (%) of species in the total fish yield of the Nordic wonton set (LFI-EN). The variables characterizing the pressure on the lake environment are Secchi disk visibility, total phosphorus content, chlorophyll a content and, calculated from these values, the Trophic State Index (TSI) indicators.[41]

4. Case Study – Environmental Disaster in the Oder River

4.1. Legal Protection of the Oder River under International Agreements

The Oder River is legally protected through international agreements. Notably, the International Commission for the Protection of the Oder River against Pollution plays a key role in this area. This commission was established by the Ministers of Environmental Protection of the Republic of Poland, the Czech Republic, and the Federal Republic of Germany, as well as the European Community, with the aim of intensively working to improve the quality of the Oder River's water resources. The "Quick Action Programme for Protecting the Oder River from Pollution" is the first document to be developed jointly by the countries involved, and it defines

[41] Łucjan Chybowski et al., *Przewodnik metodyczny do monitoringu ichtiofauny w jeziorach* (Warsaw: Biblioteka Monitoringu Środowiska, 2016), 43; David Ritterbusch et al., *Water Framework Directive Intercalibration: Central-Baltic Lake Fish Fauna Ecological Assessment Methods. Part A: Descriptions of Fish-Based Lake Assessment Methods*, EUR 28022 EN 2017, Publications Office, 2017, https://data.europa.eu/doi/10.2791/084375.

the scope of investment activities for the years 1997–2002. The program is aimed at restoring the balance of the river ecosystem in the Oder basin. In accordance with the agreement between the countries and the EU, the following objectives were specified: (1) preventing and permanently reducing the pollution of the river and the Baltic Sea by harmful substances; (2) creating aquatic and coastal ecosystems that resemble natural ones, with their inherent species diversity; and (3) enabling the use of Oder waters for drinking water supply via shore intakes, as well as for irrigation, fish farming and tourism.[42] Therefore, the focus of this program was the improvement of the chemical status of the Odra River through the modernization of sewage treatment plants. An analysis of subsequent reports prepared by this committee shows that the next ones in 1999–2004 mainly concerned flood protection.[43] In 2010, the Commission published a brochure describing some of the most common fish species found in this river, such as vimba, barbel, pike, and burbot, but did not indicate any conservation measures.[44] The next report, from 2013, concerned the implementation of the water management plans that had been submitted to the European Commission in March 2010. These plans focused primarily on water and sewage management, as well as the installation of fish migration structures on the Czech side.[45] The 2019 report focused on protecting ichthyofauna, setting out specific goals to protect migratory species of particular importance to the Oder River system, such as sturgeon, eels, and salmon. Potential spawning areas for these species should be identified and their migration, which has been disrupted by river development, should be facilitated. Efforts should be made to maintain and restore stable population sizes and genetic diversity as indicators

42 *Program szybkiego działania dla ochrony rzeki Odry przed zanieczyszczeniem 1997–2002* (Wrocław: Międzynarodowa Komisja Ochrony Odry przed Zanieczyszczeniem, 1999).

43 For example: *Wspólna strategia i zasady działań przeciwpowodziowych w dorzeczu Odry* (Wrocław: Międzynarodowa Komisja Ochrony Odry przed Zanieczyszczeniem, 1999); *Program działań przeciwpowodziowych w dorzeczu Odry* (Wrocław: Międzynarodowa Komisja Ochrony Odry przed Zanieczyszczeniem, 2004).

44 *Ryby. Odra jakiej nie znacie* (Wrocław: Międzynarodowa Komisja Ochrony Odry przed Zanieczyszczeniem, 2010).

45 *Stan wdrażania programów działań na Międzynarodowym Obszarze Dorzecza Odry* (Wrocław: Międzynarodowa Komisja Ochrony Odry przed Zanieczyszczeniem, 2013).

of good ecological status through habitat restoration.[46] However, the 2024 report was related to the establishment of an emergency plan. The parties to the agreement agreed on preventive measures and measures to combat extraordinary water pollution. They will also develop a unified alarm and warning system which will be updated based on experience gained following the ecological disaster on the Odra River. This will be achieved using lists of point and area pollution sources, as well as action programs developed to prevent emergency water pollution, in accordance with the guidelines contained in Directives 2012/18/EU,[47] 2011/92/EU,[48] and 2010/75/EU (IED).[49] Such a plan should include the following: (a) a list of potential point sources of emergency pollution (i.e., plants with a high or increased risk of a major industrial accident); (b) line sources of potential emergency pollution; (c) transport sources involved in the transportation of hazardous substances; (d) alarm procedures and template forms for emergency water pollution; (e) procedures for conducting rescue operations in protected areas (e.g., Natura 2000).[50]

4.2. Environmental Disaster in the Oder River – Consequences and Recovery Program

The subject of this article's analysis is an ecological disaster that occurred in the summer of 2022 in the Oder River. A toxic bloom of the haptophyte algae known as golden algae (*Prymnesium parvum*) has been identified as a possible cause. The cumulation of a set of weather, hydrological and environmental factors, as well as those resulting from anthropogenic activities,

46 *Strategia wspólnego rozwiązywania istotnych problemów gospodarki wodnej na Międzynarodowym Obszarze Dorzecza Odry* (Wrocław: Międzynarodowa Komisja Ochrony Odry przed Zanieczyszczeniem, 2019).

47 Directive 2012/18/EU of the European Parliament and of the Council of July 4, 2012, on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (OJ L197, 24 July 2012), 1–37.

48 Directive 2011/92/EU of the European Parliament and of the Council of December 13, 2011, on the assessment of the effects of certain public and private projects on the environment (codification) (OJ L26, 28 January 2012), 1–21.

49 Directive 2010/75/EU of the European Parliament and of the Council of November 24, 2010, on industrial emissions (integrated pollution prevention and control) (recast) (OJ L334, 17 December 2010), 17–119.

50 *Plan Awaryjny dla Odry* (Wrocław: Międzynarodowa Komisja Ochrony Odry przed Zanieczyszczeniem, 2024).

such as the availability of nutrients, high water temperature, slowed flow, a prolonged lack of precipitation resulting in low water levels and elevated conductivity, may have contributed to the initiation of the appearance of mass algal blooms, including in particular *Prymnesium parvum*.[51]

According to the Reports of the Oder River Situation Team,[52] the simultaneous occurrence of the above-mentioned factors contributed to optimal conditions for the mass development in the form of a water bloom of the golden alga (*Prymnesium parvum*) – a species characteristic of saline environments in the seas (such as the Norwegian Sea or the Baltic Sea) and industrial areas. This species has produced fish-killing toxins called prymnesin. Laboratory studies of the waters of the Oder River, the Gliwice Canal and reservoirs hydrologically related to the Oder River, carried out by the Stanislaw Sakowicz Institute of Inland Fisheries – National Research Institute (PIB), have shown high abundances of *Prymnesium parvum*, exceeding the level of 50-100 million cells/L, at which, according to the literature, die-offs of fish and other gilled organisms can already be recorded. In addition, simultaneous ichthyopathological studies confirmed that the histopathological picture of all examined animals from waters with a high abundance of *P. parvum* indicated acute damage to the organs with the strongest blood supply (gills, spleen, kidneys). Disruption of hematopoietic processes and damage to the gills are associated with the action of hemolytic toxins, which include prymnesin secreted by *Prymnesium parvum*, as indicated by necrotic lesions in the spleen, involving both the white and red pulp, and activation of the melanomacrophage centers of the spleen and

51 Elżbieta Zębek and Agnieszka Napiórkowska-Krzebietke, "Rozwój przepisów prawnych w zakresie bioindykacji środowiskowej a stan jakości wód jeziorowych," *Studia Prawnoustrojowe*, no. 43 (2019): 375–93, https://doi.org/10.31648/sp.4616; Agnieszka Napiórkowska-Krzebietke, "Ocena jakości/stanu/potencjału ekologicznego jednolitych części wód powierzchniowych – kryteria i unormowania prawne w Polsce," in *Odpowiedzialność za środowisko w ujęciu normatywnym*, eds. Elżbieta Zębek and Michał Hejbudzki (Olsztyn: UWM, 2017), 142–7.

52 Agnieszka Kolada, ed., "Wstępny raport zespołu ds. sytuacji na rzece Odrze," IOŚ-PIB, September 30, 2022, accessed October 15, 2024, https://ios.edu.pl/aktualnosci/wstepny-raport-zespolu-ds-sytuacji-na-rzece-odrze; see more: Zębek and Napiórkowska-Krzebietke, "Działania prawne i naprawcze wobec szkód w środowisku wodnym," 52–4; Agnieszka Kolada, ed., *Raport kończący prace zespołu ds. sytuacji w Odrze*, IOŚ-PIB, September 30, 2023, accessed October 15, 2024, https://ios.edu.pl/aktualnosci/raport-konczacy-prace-zespolu-ds-sytuacji-w-odrze/.

kidney interstitium. In order to reduce the negative impact of golden algae on ichthyofauna, a number of experiments were conducted. Among them, the most significant was the use of perhydrol as an effective agent for complete control of *Prymnesium parvum* blooms, which did not have a significantly negative impact on fish populations, inhabiting the Klodnica River.[53]

In view of the above, this was most likely the cause of the sudden and massive fish die-offs on a scale previously unrecorded in this river at 249 tons. The fish die-offs covered five provinces (Silesian, Opolean, Lower Silesian, Lubuskien, and West Pomeranian) and involved such species as bream, krib, roach, rudd, pikeperch, perch, catfish, barbel, chub, asp, pink, mumps. Among these fish species were protected species listed in Annex II (e.g., asp and roseate) and Annex V of the Habitats Directive, and in Polish legislation in the Regulation of the Minister of Environment of April 13, 2010, on natural habitats and species of Community interest, as well as the criteria for selecting areas eligible for recognition or designation as Natura 2000 sites.[54] It is worth mentioning that there are Natura 2000 sites along the Oder River, including Grądy Odrzańskie (site code PLB020002), Łęgi Odrzańskie (site code PLB020008), Dolina Środkowej Odry (site code PLB080004), and Dolina Dolnej Odry (site code PLB320003).[55]

As part of the remediation of the Oder River, recommendations were developed, including the establishment of a system of continuous measurement of water quality for selected parameters associated with blooms, as well as periodic monitoring of the algae *Prymnesium parvum* itself, and the fauna (including fish, mollusks) for environmental contamination (dioxins, heavy metals, pesticides, toxic compounds). In this regard, the Chief Inspectorate of Environmental Protection has developed an appropriate procedure for monitoring the occurrence of golden algae in the Oder River, which takes into account three degrees of threat (I–III) indicating, respectively, medium, high and very high risk of a bloom caused by the presence

53 Łukasz Weber et al., *Eksperymentalne zastosowanie nadtlenku wodoru do ograniczenia zakwitu Prymnesium parvum w rzece Kłodnicy latem 2024 r.* (Warsaw: Instytut Ochrony Środowiska-Państwowy Instytut Badawczy, 2024).

54 Journal of Law of 2014, item 1713.

55 Regulation of the Minister of Environment of January 12, 2011, on special bird protection areas (SPAs) (Journal of Law of 201, No. 25, item 133), as amended by the Regulation of the Minister of Environment of June 22, 2017, amending the Regulation on special bird protection areas (Journal of Law of 2017, item 1416).

of *Prymnesium parvum*.[56] Other recommendations for remedial actions include (a) continuing inspections of entities discharging polluted water into the Oder River and its tributaries, (b) immediate removal of illegal sewage discharge outlets, (c) reviewing and verifying existing permits for the discharge of wastewater into waters in the Oder River basin, (d) improving the flow of information, (e) implementing an early warning and response system, and (f) improving procedures within emergency management. An important issue in the restoration of the river ecosystem is the inventory of post-disaster species, the analysis of the population structure, the creation of a gene bank and the restoration of the Oder River ecosystems in accordance with the assumptions of the recovery plan for the restoration of the Oder River ecosystems, which is currently being developed.[57] Currently, programs for the restoration of the Oder River's ecosystem and biodiversity are being implemented in 2022–2025, financed by the Provincial Fund for Environmental Protection and Water Management (WFOŚiGW). The purpose of these programs is to restore the Oder River ecosystem by restocking, including the acquisition of spawners as a genetic base for the production of stocking material; restoration of spawning grounds as natural sites for the restoration of the ecosystem of flora and fauna associated with the proliferation of fish and crustaceans, and monitoring of the Oder River ichthyofauna.[58] In 2023, the Law on Revitalization of the Oder River (LRO) was also enacted, the subject of which are detailed rules and conditions for the preparation of investments aimed at improving the environmental conditions of the Oder River in terms of the quantity and quality of water in the river, as well as the aquatic environment, and increasing the water retention capacity of the river's catchment area. Also included are measures to determine the extent of anthropogenic impact on the Oder River and rules for implementing measures to restore ichthyofauna in the river (Article 1).

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56 Główny Inspektorat Ochrony Środowiska, "Procedura monitorowania interwencyjnego Prymnesium parvum złotej algi," 3rd ed., November 7, 2023, accessed November 5, 2024, https://www.gov.pl/web/odra/opis-procedury.

57 Kolada, "Raport kończący prace zespołu ds. sytuacji w Odrze," 180–2.

58 Wojewódzki Fundusz Ochrony Środowiska i Gospodarki Wodnej, "Program 'Odbudowa ekosystemu i różnorodności biologicznej rzeki Odry'," accessed October 28, 2024, https://www.wfosigw.opole.pl/oferta/program-odbudowa-ekosystemu-i-roznorodnosci-biologicznej-rzeki-odry/.

Article 2 indicates a catalog of 51 investments aimed mainly at regulating the riverbed, such as the construction of water stages, culverts, damming structures. However, in this catalog, with regard to the restoration of the Oder River, there are only a few activities aimed at actual improvement of the river ecosystem (revitalization as the title of the law indicates), i.e., those included in item 9 d–f consisting of (a) restoration of the Barłożna River and part of ditch A, leading to the connection of the Oder River with the old riverbed; (b) land reclamation and construction of an anti-filtration screen of the left-side flood control embankment; and (c) construction of migration corridors for animals with plantings of vegetation. There is no mention of any restocking aimed at restoring the biocenosis in the rest of the Act. With regard to ichthyofauna, the provisions contained in Article 7 of the LRO imposing an obligation on the State Water Company Wody Polskie to act within the scope of the Oder River Basin Management Plan adopted in 2022 apply. The catalog of these activities first includes: (1) analysis of the possibility of reconstruction of damming structures to ensure biological and morphological continuity and meet environmental objectives on rivers; (2) assessment of the impact of transverse structures on biological continuity and environmental objectives of surface water bodies. If negative impacts of these structures on biological continuity and environmental objectives are found, an analysis of the feasibility of implementing measures to ensure biological continuity should be carried out; (3) inspection of the operation of fish migration devices to determine their proper operation and allow for adequate fish migration; and (4) monitoring of the effectiveness of existing fish migration devices to verify the proper operation of these devices. If the negative impact of construction on biological continuity and environmental objectives is found – analysis of the possibility of implementing measures to ensure biological continuity and the meeting of environmental objectives must be carried out. Analyzing this catalog of measures, it should be considered reasonable to minimize the effects of construction on the Oder River and restore its continuity and natural course, allowing the migration of fish, which should be previously introduced into the environment through stocking.

5. Conclusions

Ichthyofauna is a very important element of biodiversity and an important indicator of water quality; however, due to anthropogenic activities, especially illegal activities, it is under threat and should, therefore, be subject to special legal protection. At the EU level, species protection is established mainly in the Habitats Directive, and in national legislation in the Law on Nature Protection, Inland Fisheries, Water Law and implementing acts. An analysis of the legal status of the protection of ichthyofauna in the EU and Poland will be the basis for the identification of strengths and weaknesses. Among the former are: (a) the establishment of a special form of nature protection, i.e., Natura 2000 sites aimed at strengthening species protection, including ichthyofauna; (b) the establishment of priority species categories, i.e., endangered, vulnerable, rare, and endemic; (c) the introduction of strict, active and *in situ* species protection, i.e., in places of their natural occurrence; (d) the introduction of bans on inappropriate fishing methods, trade, habitat destruction; (e) the establishment of a program for the restoration and protection of fish stocks aimed at maintaining, restoring their proper condition; and (g) a monitoring program in protected areas. These measures will significantly contribute to improving the status of species and natural habitats protected within Natura 2000 sites.

However, extraordinary threats to ichthyofauna are becoming a problematic issue, as exemplified by the ecological disaster in the Oder River. The late reaction of public administration bodies due to the lack of proper procedures in such situations may have contributed to such a wide-scale degradation of ichthyofauna. Admittedly, after the incident, the Oder River Revitalization Law was passed in 2023, theoretically aimed at improving environmental conditions in terms of water quantity and quality in the river. Unfortunately, the provisions in this law should be criticized. This is mainly due to the fact that the legislation focuses on investments aimed at regulating the river bed, such as the construction of water stages, culverts and dams for the generation of hydroelectric power, and largely ignores investments aimed at the actual restoration of the Oder. The stocking of the river to restore the biocenosis was only mentioned. Only attention was paid to the need to monitor the impact of these structures on biological continuity and fish migration.

In order to more fully protect ichthyofauna species, especially in cases of ecological disasters, all measures should be taken to limit the negative consequences in order to restore populations, especially of priority species. To this end, habitats should be restored first, taking into account the provisions for the protection of surface waters contained in the Water Law and under the rules of the Inland Fisheries Law. Only comprehensive protection and restoration of aquatic ecosystems will ensure the protection of fish species and the preservation of protected and priority species as the natural heritage of the EU.

It is important to take measures to carry out an inventory of ichthyofauna species and to monitor their status; to introduce systemic solutions to improve water quality in rivers, as well as appropriate measures to deal with water pollution threats. The scope should include, among other things: (1) improvement of conditions for protected areas, including, in particular, reduction of pollutant inflows and protection of habitats and ichthyofauna species, as well as measures aimed at revitalization and reduction of regulation of river channels; (2) improvement of hydromorphological conditions of rivers and streams, including, in particular, but not limited to, protection and restoration of natural processes and reduction of the negative impact of hydraulic engineering structures on fish migration and survival; (3) reduction of pollutant emissions, and (4) ensuring biological and morphological continuity of rivers and streams.

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Banking Secrecy in Comparative Perspective: Remarks on the Background of French and Czech Law

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Abstract: Banking secrecy is an institution that is well known in many European legal systems, as its regulation is an important element of the creation of a legal framework for the protection of individual data of national citizens. The method of regulating the described secrecy is always referring to some type of compromise between the public and the private interest of the economic actors in the given national system. The purpose of this article, in which the authors use the dogmatic, historical-descriptive method and, above all, the comparative method, will be to compare the way and scope of introducing the definition of banking secrecy in French and Czech law. The comparative analysis will allow for the drawing of a number of conclusions in the discussed scope, including the response to the question if despite European Union regulations, we can observe some important differences in that field at the national level. Another issue is related to the technological neutrality of the language that is being used, as an element that could give the response about the compatibility of national regulations to current technological evolution. The different ways of regulating banking secrecy in France and in the Czech Republic, presented in this paper, can be an interesting element of a broader discussion of the changes that may be needed in other national systems of EU member states.

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1. Introduction

In the EU countries, banks are being very often considered as business entities having a specific role and function.[1] As banking secrecy is one of the crucial elements of a given national banking system, the Authors would like to present this comparative study in order to formulate the response for several scientific questions. Namely, it would be interesting to check if, despite the European Union general framework, we can observe some important differences in that field at the national level. Another issue is related to the technological neutrality of the language that is being used, as an important element of ensuring the compatibility of national regulations to current technological evolution.

The choice of the French and Czech law as the examples of comparative analysis was already done in other several studies[2] and was also motivated by some historical reasons. Also, the Authors think that the juxtaposition of two countries, where one is representing the western EU countries and other central and eastern EU countries, could contain some interesting conclusions in the analysed field.

In this aspect, it would be interesting to verify, if in terms of banking secrecy, we can observe the process of harmonization rather than unification of national regulations. The above mentioned purpose of the study can be achieved by the description of the French regulations and, secondly, its equivalent in the Czech Republic. The methodology used in the article will also give the possibility to reveal some substantive differences between these two legal systems, as, in general, national specifics were detected in the doctrine of several nations.[3] The present article may also be an interesting supplement for the comparative studies in the field of banking law

1 Kristina Kocisova, Beata Gavurova, and Marcel Behun, "The Evaluation of Stability of Czech and Slovak Banks," *Oeconomia Copernicana* 9, no. 2 (2018): 205, https://doi.org/10.24136/oc.2018.011.

2 Michał Mariański and Richard Bartes, "The Financial Law in the Constitution from a Comparative Perspective. Reflections Based on the Example of France and Czech Republic," *Przegląd Prawa Konstytucyjnego*, no. 6 (2024): 287, https://doi.org/10.15804/ppk.2024.06.20.

3 Zana Pedic, "Interconnectivity and Differences of the (Information) Privacy Right and Personal Data Protection Right in European Union," *Review of European and Comparative Law* 30, no. 3 (2017): 125, https://doi.org/10.31743/recl.4264.

that were already done, and where also the comparison between the Czech Republic and other EU countries was described.[4]

As already mentioned, banking secrecy is an institution present in many European legal systems, but its regulation is very difficult due to the fact that in this matter we have both public and private interests that compete with each other. This is also one of the main characteristics of financial market law, including banking law, that was underlined several times by the European doctrine.[5] In relation to the topic of this study, the comparative method, used by the authors, will not limit the analysis to only one legal system but to present the view from the supranational perspective, i.e., related to more than one legal system. The comparative method is especially important for the analysis of legal provisions that are potentially having a cross-border nature and, in consequence, are subject to the freedom of capital movement. In the doctrine, this aspect was already underlined, and banking law as a part of financial market regulations was described as a challenge for the national and European legislator.[6]

Regarding the information used by banks, first, it is necessary to clarify the relationship between the legal regulation of banking secrecy and the general regulation of the processing of personal data. The term personal data is defined in Article 4, point 1 of the General Data Protection Regulation (GDPR)[7] as any information relating an identified or directly identified or indirectly identifiable natural person. Information protected by banking secrecy is basically all data relating to clients or former clients using or interested in using a payment service provided by the bank. In the

4 Ewa Kowalewska, "The Role of the Central Bank in Foreign Exchange Inspection in Selected Countries of the European Union – as Seen in the Example of Poland, the Czech Republic and Germany," *Review of European and Comparative Law* 45, no. 2 (2021): 183, https://doi.org/10.31743/recl.12282

5 Mariola Lemonnier, "Prawo publiczne a prawo prywatne. Uwagi prawnoporównawcze na podstawie prawa francuskiego," *Studia Prawno-Ekonomiczne* 100 (2016): 67.

6 Michał Mariański, "Freedom of Establishment and Freedom of Capital Movement as a Limitation to Excessive Regulation of the Financial Market," *Prawo i Więź* 49, no. 2 (2024): 27, https://doi.org/10.36128/PRIW.VI49.845

7 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L119, 4 May 2016).

case of clients (natural persons), these two sets of information overlap to a large extent.

2. Banking Secrecy in French Law

First of all, it is important to underline that the Banque de France, founded by a decree of the 19th century, was originally independent of the French government, as it was a private enterprise.[8] Due to the above, the regulation of banking secrecy, especially in French law is another example of an already-mentioned compromise between private and public law regulations. This is also one of the four main obligations of the banking sector that is described by French doctrine, next to the right to information, principle of non-interference and the duty of vigilance.[9]

Generally in France, banking secrecy is a professional secret like any other[10] and is regulated in the French Monetary and Financial Code (fr. *Code monétaire et financier*), where in Title I of Book no V, was created Section V related to professional secrecy (fr. *Le secret professionnel*).[11] In this section there ae two main articles: L511–33, that was modified recently in April 2024,[12] and L511–34 that was modified in February 2020.[13]

The first of the above-mentioned articles, in its point I, states that any member of a board of directors, a supervisory board, and any person who, in any capacity, participates in the management or administration of a credit institution, a financing company, or an organization referred to in paragraphs 5 and 8 of Article L. 511–6, or who is employed by one of them, is bound by professional secrecy.

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8 Richard Bartes, "Public Property in the French Law," in *Public Economics and Administration 2021: Proceedings of the 14th International Scientific Conference: 8th September 2021, Ostrava, Czech Republic* (Ostrava: VŠB Ostrava, 2021), 36.

9 Thierry Bonneau, *Droit bancaire*, 15th ed. (Paris: LGDJ, 2023), 462.

10 See more about the different types of secrecy in France: Michał Mariański and Ewa Piechota-Ołoś, "Prawno-porównawcze aspekty regulacji tajemnicy skarbowej," *Studia Prawnoustrojowe*, no. 68 (2025): 305–20, https://doi.org/10.31648/sp.11117.

11 Alexandre Peron, *L'essentiel du droit bancaire*, 3rd ed. (Paris: Gualino, 2023), 139.

12 Loi n° 2024–317 du 8 avril 2024 portant mesures pour bâtir la société du bien-vieillir et de l›autonomie, JORF n°0083 du 9 avril 2024 [Act no. 2024–317 of 8 April 2024].

13 Ordonnance n° 2020–115 du 12 février 2020 renforçant le dispositif national de lutte contre le blanchiment de capitaux et le financement du terrorisme, JORF n°0037 du 13 février 2020 [Ordinnance no. 2020–115 of 12 February 2020].

In this point it is also underlined that, apart from cases where the law so provides, professional secrecy cannot be invoked against the Prudential Supervision and Resolution Authority (fr. *Autorité de contrôle prudentiel et de résolution*),[14] the Banque de France, the Overseas Departments Issuing Institute, the Overseas Issuing Institute, the judicial authority acting in criminal proceedings, or the commissions of inquiry established pursuant to Article 6 of Ordinance No. 58–1100 of November 17, 1958, relating to the functioning of parliamentary assemblies.[15]

Credit institutions and finance companies may also communicate information covered by professional secrecy; on the one hand, to rating agencies for the purposes of rating financial products and, on the other hand, to persons with whom they negotiate, conclude or carry out the operations set out below, provided that this information is necessary for them for one of seven enumerative cases. First is related to credit transactions carried out, directly or indirectly, by one or more credit institutions or finance companies. The second case is related to transactions involving financial instruments, guarantees, or insurance intended to cover a credit risk. The third situation covers acquisition of an interest or control in a credit institution, an investment firm, or a finance company. The fourth point alluded to disposals of assets or goodwill, and fifth to the assignments or transfers of receivables or contracts. The penultimate point refers to service contracts entered into with a third party with a view to entrusting them with important operational functions. Finally, the seventh situation covers facts when studying or preparing any type of contract or transaction, provided that these entities belong to the same group as the author of the communication.

In the fourth indention of Article L.511–33, the French legislator specifies that when dealing with financial contracts, the credit institutions and finance companies may also disclose information covered by professional secrecy when legislation or regulations of a State that is not a member of the European Union provide for the reporting of such information to a central repository. This information should constitute personal data subject to

[14] See more: Michał Mariański, "Uprawnienia i kompetencje francuskiego pomocniczego organu nadzoru nad rynkiem finansowym Autorité de contrôle prudentiel et de resolution," *Przegląd Prawa Handlowego*, no. 4 (2023): 38–44.

[15] Ordonnance n° 58–1100 du 17 novembre 1958 relative au fonctionnement des assemblées parlementaires.

French Law No. 78–17 of January 6, 1978, relating to information technology, files and freedoms, and its transmission must be carried out under the conditions provided for by above-mentioned law.[16] Also, the French Court of Cassation[17] confirmed in its judgment from 2024, that banking secrecy is the obligation for all members of the management and supervisory bodies of credit institutions, as well as their employees carrying out banking activities, to keep confidential information they hold about their clients or third parties.[18]

The fifth indention of Article L.511–33 precises that, in addition to the cases set out above, credit institutions and finance companies may communicate information covered by professional secrecy on a case-by-case basis and only when the persons concerned have expressly authorized them to do so.[19] They may also communicate, only with the victim's consent, this information to the authorities mentioned in Article L. 119–2 of the Social Action and Families Code (fr. *Code de l'action sociale et des familles*) within the framework provided in Article L. 119–2, when this information concerns acts of mistreatment having an impact on the financial situation of an adult in a vulnerable situation, in particular due to their age or physical or mental incapacity. What is important, is that the persons receiving information covered by professional secrecy, which has been provided to them for the purposes of one of the operations set out above, must keep it confidential, whether or not the aforementioned operation is successful. However, in the event that the aforementioned operation is successful, these persons may in turn communicate the information covered by professional secrecy under the same conditions as those referred to in this article to the persons with whom they negotiate, conclude or carry out the operations mentioned above.

Another aspect of banking secrecy is regulated in Article L511–34 of Monetary and Financial Code. In this regulation, we can read that companies established in France and which are part of a financial group or a group including at least one financing company, or a group within the

16 Loi n° 78–17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés (JORF du 7 janvier 1978).

17 Cour de cassation is the highest court in the French judicial system.

18 Judgment of Cour de cassation, civile, Chambre commerciale, 27 March 2024, no. 22–15.797

19 This was confirmed by several judgments such as: Cour d'Appel de Poitiers, 2e ch. civ., on 17 January 2023, no. 22/01081 and Cour d'Appel de Paris on 10 May 2023 no. 21/15894.

meaning of Article L. 356–1 of the Insurance Code, or a mixed group or a financial conglomerate to which regulated entities within the meaning of Article L. 517–2 belong,[20] notwithstanding any provisions to the contrary, are required to transmit to companies in the same group four types of information.

First type of information is related to their financial situation necessary for the organization of consolidated supervision and supplementary supervision of these regulated entities or finance companies. The second type of information has to be necessary for the organization of the fight against money laundering and terrorist financing. The third type of information that companies are required to transmit has to be necessary for the organization of the detection of market abuse referred to in Article 16 of Regulation (EU) No. 596/2014 of the European Parliament and of the Council of April 16, 2014, on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. The last type of information refers to data necessary for the management of conflicts of interest within the meaning of Article L. 533–10 of the French Monetary and Financial Code.

It is also stated in the second part of Article L511–34 that this information may not be communicated to persons outside the group, with the exception of the competent authorities of the States referred to in the first paragraph. This exception does not extend to the authorities of States or territories whose legislation is recognized as inadequate, or whose practices are considered to hinder the fight against money laundering or the financing of terrorism, as determined by the international body for consultation and coordination on combating money laundering. The list of such States and territories is updated by order of the Minister of the Economy. Persons receiving this information are bound by professional secrecy under the conditions and subject to the penalties mentioned in Article L. 511–33, for any information or documents they may receive or hold. The provisions of this article do not preclude the application of already-mentioned Law

[20] With their registered office in a Member State of the European Union or a State party to the Agreement on the European Economic Area, or in a State where the agreements provided for in Articles L. 632–7, L. 632–13, and L. 632–16 of this Code are applicable.

No. 78–17 of January 6, 1978, relating to information technology, files, and civil liberties.

According to French doctrine, the banking secrecy is regulated in a very specific way, where one important restriction is present and related to certain administrations that automatically have access to the information they request.[21] Under the term of certain administrations, the French legislator understand not only tax and customs authorities, but also the financial market institutions like Banque de France, the Financial Markets Authority (AMF), and the Prudential Supervision and Resolution Authority (ACPR). It is also worth to underline that the ACPR authority is the main supervisory authority in relation to the banking sector.[22]

Furthermore, it should be underlined that courts may have access to information subject to banking secrecy in the context of criminal proceedings. Bank secrecy may, in very certain specific cases, also be lifted when the request comes directly from the beneficiary of the bank account, and when the bank is a party to the proceedings. Generally in France, the government has the right of direct access, without judicial review, to information held by banks and, as a consequence, the banking secrecy is, as a general rule, limited to the professional secrecy of its agents.[23]

3. Banking Secrecy in the Czech Republic

The legal institution of banking secrecy is defined relatively briefly in the Czech Republic. According to Section 38(1) of the Banking Act, banking secrecy applies to all banking transactions and monetary services of banks, including account balances and deposits. In other words, the Institute of Banking Secrecy protects information about bank clients, their assets, products used, and banking transactions. The Czech Banking Act devotes much more attention to individual exclusions from the prohibition on providing information protected by banking secrecy to other persons without the client's consent. In addition, the Banking Act generally authorizes banks to collect and further process personal data, including personal identification

21 Jérôme Lasserre Capdeville, *Le secret bancaire. Approches nationale et internationale* (Paris: Revue Banque, 2014), 12.

22 Alexandre Quiquerez, *Droit bancaire. Établissements, régulation, opérations de paiement et de financement* (Paris: Gualino, 2024), 113; Bonneau, *Droit bancaire*, 456.

23 Quiquerez, *Droit bancaire*, 155.

numbers, necessary for providing transactions without disproportionate risks for the bank (Section 38). However, banking secrecy in the Czech Republic is defined much more broadly by the doctrine of financial and commercial law.[24] At the same time, banking secrecy has been the subject of definition for a long time.[25]

It is clear from the purpose of banking secrecy and the wording of the breakthroughs that only bank information that can directly or indirectly identify a bank client or the fact that a certain person as bank client is protected. Subject to the protection of banking secrecy are also any information related to banking transactions or client assets managed by the bank, information about the payment card holder issued for the relevant client account, information about the client's personal situation obtained within the framework of the relationship with the client, data on the personal identification number, if assigned, on the client's financial circumstances, fingerprints and other biometric data, if available to the bank, any video recording of the client and all other information from which the bank's client or the fact that a certain person is a bank client can be directly or indirectly identified.

If the data protected by banking secrecy contains personal data of natural persons, in addition to banking secrecy under the Banking Act, the legal provisions on the protection of personal data, in particular the GDPR, apply. Certain data may also be protected as a trade secret or a contractual agreement. The bank may disclose data protected by banking secrecy to a third party only in cases where the law expressly provides for it or if the client agrees to the disclosure of data.

In the case of banks that are obliged entities under the Freedom of Information Act (especially state-established and controlled banks), the protection of banking secrecy constitutes an additional exception to the obligation to provide information.[26]

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24 Josef Bejcek, "On the Issue of Bindingness and Banking Secrecy," *Taxes: A Professional Journal for Tax Law and Practice*, no. 3 (1995): 2.

25 Johan Schweigl, "The Fundamental Events within the Development of Central Banking in the Czech Lands," *Journal on European History of Law* 7, no. 1 (2016): 136.

26 Provincial Administrative Court in Prague, Judgment of March 31, 2016, Ref. No. 6 A 84/2012 – 43, unreported.

The first condition related to legal breakthroughs in banking secrecy is related to the provisions of Section 38, and paragraphs 2–6, 8, 9, 11, and 12, as well as Section 38b of the Banking Act. In these regulations the legislator defines breaches of banking secrecy, i.e., cases where the provision of data protected by banking secrecy without the client's consent by the bank is not a breach of a legal obligation. This primarily concerns the provision of data protected by banking secrecy to a person entrusted with the performance of banking supervision (the Czech National Bank)[27] or supervision of compliance with regulations in the area of AML/CFT[28] (the Financial Analysis Bureau), to criminal authorities when filing a criminal complaint, or to some other public authorities.[29] A bank does not violate the law if it provides information protected by banking secrecy because it has such an obligation under the legal system of another country where it does business. Although the list of breakthroughs in the Banking Act should be exhaustive, it cannot be completely ruled out that there are other legal regulations that clearly regulate the obligation of a bank to transfer certain data or the authority of the competent authority to request data protected by banking secrecy. Such another breakthrough into banking secrecy is represented, for example, by the Act on International Cooperation for Tax Administration in Section 13k of the Act on the Processing of Personal Data in the Section 58(1).

A specific case of a breach of banking secrecy is further specified in Section 3(2)(o) of the Act on the Register of Contracts, according to which the obligation to disclose applies if the contract is between a bank and a person specified in Section 2(1) of the Act on the Register of Contracts, which concerns the use of public funds; this does not exclude the possibility that some information contained in such a contract is nevertheless not disclosed in the register for reasons pursuant to Section 3(1) of the Act on

27 Michael Kohajda, "Central Bank Independence – From the European Union Law to the Czech Republic Example," *European Studies* 9, no. 1 (2022): 234, https://doi.org/10.2478/eustu-2022-0011.

28 Anti-Money-Laundering/Countering the Financing of Terrorism.

29 Section 38(3) of the Banking Act obliges the bank to provide this data, for example, to a court for the purposes of civil proceedings, to tax administrators under the conditions set out in the Tax Code, and to a financial arbitrator deciding a dispute under a special legal regulation.

the Register of Contracts[30] (e.g., for reasons of protection of trade secrets within the meaning of Section 504 of the Civil Code).

In the case of protecting the health or life of the population in emergency situations, another breakthrough can be considered – the authorization for some authorities to issue emergency measures in the event of an epidemic and the risk of its occurrence. However, it always depends on the formulation of the specific measure and the specific request to the bank. The Bank may also provide data subject to banking secrecy to the extent necessary to the court in legal proceedings in order to exercise its right to judicial protection. The Bank may use not only data about the person who is a party to the proceedings, but also data about other persons, if this is useful in the context of evidence.

The second condition is related to the client consent to the transfer of data protected by banking secrecy and is regulated in Section 38(1) of the Banking Act. According to this act, a bank may generally disclose a client's data that is subject to banking secrecy upon request or with his consent. If the client agrees to the disclosure of data held about him, there is nothing to prevent the bank from complying with such a request. The client's consent may be granted generally, i.e., for all cases of a certain type (e.g., for the purpose of assigning a claim against the client if the client defaults on an obligation), or it may relate only to an individual case (e.g., for the purpose of a specific request from a police authority pursuant to Section 8(1) of the Criminal Procedure Code). The client may give his consent to the bank directly or the client's consent may be submitted to the bank by a third party. However, it is not contrary to the Banking Act if the bank insists that the client submit the consent himself. Although banks usually figure as honest entities satisfying liquidity needs via issuance of demand deposits and other short-term liabilities,[31] within the limits of the contract with the client, the bank also has the right to assess what procedure it considers sufficiently prudent in terms of documenting the consent (Section 12 of the Banking

[30] Section 3(1) of the Act on the Register of Contracts: "Information that cannot be provided in accordance with the regulations governing free access to information shall not be published through the register of contracts."

[31] Timothy Jackson and Laurence J. Kotlikoff, "Banks as Potentially Crooked Secret Keepers," *Journal of Money, Credit and Banking* 53, no. 7 (2021): 1593, https://doi.org/10.1111/jmcb.12841.

Act) and the bank cannot be accused of greater prudence from the perspective of the Banking Act.

The Banking Act does not regulate the form or other requirements of a client's consent to the provision of his data protected by banking secrecy to a third party. The client's consent must always meet the general requirements for legal acts set out in the Civil Code (i.e., the requirements for freedom of will, seriousness, certainty and comprehensibility of legal action). The consent granted must clearly state to whom the data will be transferred, the scope of the transferred data and the purpose for which the third party will process the data. It can be considered prudent within the meaning of Section 12(1) of the Banking Act if the consent is in written form and there is no doubt about its authenticity, i.e., it is usually associated with the reliable identification of the client.

The client's consent may take the form of a unilateral legal action. It may also be part of a contractual agreement between the client and the bank, and it is not entirely excluded that it may also be included in the terms and conditions. In such a case, however, its content may not represent a so-called surprise clause within the meaning of Section 1753 of the Civil Code. For example, it could be surprising for the client if the consent entitles the bank to broad or unlimited processing of their data.

Additional conditions for proper consent may arise from the GDPR. It should be noted that the client's consent to the provision of their data protected by banking secrecy to a third party needs to be distinguished from consent as a title for the processing of personal data under the GDPR. However, it is not excluded that in practice the client's consent to the provision of their data protected by banking secrecy to a third party under the Banking Act will also meet the conditions of consent under the GDPR. In other words, although consent to the disclosure of information subject to banking secrecy and consent to the processing of personal data are procedures under two different legal regulations (the Banking Act and the GDPR), these two regulations are, in fact, very close. If consent is granted by a natural person, he or she can express it in one act (e.g., through one form). In such a case, it is important that this act meets the requirements of both regulations and is transparent. It must be clear to the client what information he or she is consenting to be disclosed and that it concerns both his or her personal data and information of a banking secrecy nature.

Today, banks are part of the digital age and use digital technologies to reduce costs and streamline their processes.[32] The issue of comprehensibility in contracts concluded with consumers by adhesive means was addressed by the Constitutional Court in the Czech Republic, according to which the arrangement of the text is an expression of the principle of fairness: "contractual provisions must have a sufficient font size, they must not be significantly smaller than the surrounding text, they must not be placed in sections that give the impression of an unimportant nature."[33]

In the context of banking secrecy rules, a bank client can be considered anyone who has or had a business relationship with the bank (i.e., has concluded a contract, written, oral, or even implied), and has negotiated with the bank about establishing a business relationship (concluding a contract), regardless of whether the business relationship was ultimately established. According to Section 38(1) of the Banking Act, banking secrecy applies, among other things, to all banking transactions. The provisions of the Section 38(2) et seq. of the Banking Act introduce breaches of banking secrecy. Given the meaning of banking secrecy, which consists in protecting the legitimate interests of persons providing banks with information about themselves, their transactions or property circumstances (i.e., in particular the interest that this information is not provided by the bank to other entities), it is necessary to interpret the term "client" in a broader sense than simply as a designation of a person who currently has a business relationship with the bank and/or uses its services. The protection necessarily also applies to persons who have already terminated their business relationship with the bank or are currently negotiating or have negotiated to conclude it.

This may cause some interpretation problems. In particular, for persons who use a one-time payment service where they do not need to be identified, it may be complicated to obtain their consent to use information subject to banking secrecy. If a bank intended to use this information without having any of the legal titles listed in the Banking Act, it would be very difficult in practice to obtain demonstrable consent from such clients.

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32 Sylwia Wojciechowska-Filipek, "Automation of the Process of Handling Enquiries Concerning Information Constituting a Bank Secret," *Banks and Bank Systems* 14, no. 3 (2019): 175, http://dx.doi.org/10.21511/bbs.14(3).2019.15.

33 Czech Constitutional Court, Judgment of 11 November 2013, Ref. No. I. ÚS 3512/11, unreported.

The client is not only the debtor, but also, for example, the guarantor. At the moment of the guarantee, a legal relationship arises between the bank and the guarantor, in which the bank collects data subject to banking secrecy pursuant to Section 37(2) of the Banking Act. It is also irrelevant whether the business relationship arose directly or, for example, on the basis of an assignment of a receivable, even if it concerns receivables assigned to the bank within the framework of factoring. Banking secrecy applies to a bank even if its ATM is used by a person who has an account with another bank, as such a person is also a client of the monetary service provided by the bank operating the ATM.

These conclusions are important in terms of clients' trust in the institution of banking secrecy, but also in terms of sharing data on the creditworthiness and trustworthiness of clients in the so-called credit registers (Section 38a, paragraphs 1 and 2 of the Banking Act). Temporary storage and sharing of data on the payment history of clients even after the end of the business relationship (e.g., after the loan has been repaid), is desirable not only as a warning against the problematic payment history of some clients, but also for credit risk management for clients with a positive repayment history who can obtain a loan on more favorable terms in the future.

Temporary storage and sharing of information about clients who are negotiating with the bank to establish a business relationship is important in particular as a prevention of possible over-indebtedness of the applicant, an increase in the credit risk of creditors in the event of a successful loan application authorizing subsequent drawdown of credit from several banks at once, and also as a prevention of credit fraud. As for clients who have failed in their loan application, temporary storage of their data may be important as a warning that the creditworthiness or trustworthiness of the applicant may not be in order. This interpretation is also in line with the meaning of the provisions of Section 38a, paragraphs 1 and 2 of the Banking Act, which breaks bank secrecy in order to fulfill the obligation of prudent business conduct of banks

4. Conclusion

The topic of banking secrecy can also be linked to the field of economics, or to performance measurement.[34] In general, banking law issues in the Czech Republic belong to the non-fiscal part of financial law.[35] In French law, the regulation of banking secrecy is partly private law and partly public law regulation, while in the Czech Republic it is exclusively public law regulation. Another difference is the detail of the legal regulation. While in France, banking secrecy is regulated in the Monetary and Financial Code, where it is defined quite comprehensively within two main articles; in the Czech Republic, banking secrecy is regulated relatively briefly in only one paragraph of the Banking Act. As for banking secrecy as a legal institution, it can be examined according to European law[36] and national law, as it was done in the present study.

If a bank client or a person interested in a bank product is a natural person, then information about their use of banking products and related facts can largely be classified as both personal data and information protected by banking secrecy.

On the other hand, personal data also includes data on non-clients of the bank that the bank has at its disposal, or data on clients who use certain specific services, in particular identification or services of a public administration contact point. From the opposite point of view, it can be stated that information on legal entities such as (current or former) clients of the bank or those interested in banking products is information of a banking secrecy nature, but not personal data under the GDPR regime. The GDPR only affects information relating to natural persons.

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34 Sundus H.M. Al-Badri and Haidar J.M. Al-Fraiji, "The Role of Banking Secrecy in Improving Banking Performance," *Al-Ghary Journal of Economic and Administrative Sciences* 17, no. 4 (2021): 323, http://dx.doi.org/10.36325/ghjec.v17i4.13805.

35 Richard Bartes, "Guarantees of Legality and Selected Aspects of Legal Liability in Subsidy Law," *Financial Law Review* 17, no. 1 (2020): 1, https://doi.org/10.4467/22996834FLR.20.001.12042.

36 See more: Marek Ryszard Smarzewski, "Obtaining Evidence Protected by Banking Secrecy through European Investigation Order in Preparatory Proceedings. Remarks from the Polish Perspective," *Review of European and Comparative Law* 54, no. 3 (2023): 195, https://doi.org/10.31743/recl.16210.

In practice, it is therefore necessary, in every process that involves disclosing information about bank clients to other entities, to first assess whether the information is subject to banking secrecy or personal data. Subsequently, it is necessary to apply one or both of the relevant regulations. The Banking Act, which contains primarily a list of legal titles for disclosing protected information, for banking secrecy and the GDPR with its detailed rules for processing personal data.

As for the main differences between French and Czech law, it should be noted that we have the systems where in France the concept refers rather to the professional secrecy of its agents, while in the Czech Republic it is related to professional secrecy of the institution. The liability of employees of Czech banking institutions is then regulated through labor law liability. Despite this conceptual difference, the scope of banking secrecy seems to be very similar and in both cases the legislator is trying to use the technologically neutral language that is adapted to current technological evolution. However, due to the technological progress and changes in legal relations related to it, that are becoming increasingly dynamic and technology-dependent, the intervention of case law in clarifying the indicated regulations seems necessary. In this aspect, French law seems to be better adapted to this process as the jurisprudence plays a very important role in creating and clarifying the legal provisions introduced in France. It also seems that the important role of the jurisprudent can be a factor accelerating the adaptation of current regulations to new challenges, for example related to new legal concepts[37] or to the so-called sustainable development and ESG criteria.[38]

On the contrary, a legitimate common feature is the breach of banking secrecy, for example in the case of criminal proceedings. In both countries, it is possible for bank institutions to disclose the content of banking secrecy to the law enforcement authority in the event of a criminal complaint or criminal proceedings, regardless of the clients' consent.

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37 Michał Mariański, "The Phenomenon of Decausalization as a Challenge for Financial Market Regulation," *Studia Iuridica Lublinensia* 34, no. 1 (2025): 198, http://dx.doi.org/10.17951/sil.2025.34.1.195-211.

38 Magdalena Fedorowicz and Anna Zalcewicz, "Challenges Posed to the EU Financial Market by the Implementation of the Concept of Sustainable Financing," *Białostockie Studia Prawnicze* 29, no. 1 (2024): 48, https://doi.org/10.15290/bsp.2024.29.01.03.

Nevertheless, the method of defining the scope of banking secrecy in France and the Czech Republic is very interesting from the point of view of other European Union countries, like Poland. In this context, the present study may therefore constitute one of the elements of the discussion on the potential amendment of regulations in other countries in this aspect and conducting further extended comparative research.

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Prawo kosmiczne międzynarodowe, europejskie i krajowe, eds. K. Myszona-Kostrzewa, Z. Kulińska-Kępa, Warsaw: Wydawnictwo C.H. Beck 2025, pp. 390

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The entire world has entered the New Space Era. Advances in technology have decreased the costs of entry into the space industry. This has opened the door to outer space exploration and utilization for private entities – including large commercial corporations, innovators, and start-ups. Consequently, in the last decade, the states have effectively lost their previous monopoly on space activities. This robust process of space commercialization and privatization is not limited to space tourism, which has garnered the most media attention. It includes a myriad of other space activities; for example, providing connectivity for the Internet of Things (IoT) and the production of pharmaceuticals in space (space pharmacy). At the same time, extraction of materials from asteroids and other minor planets, including near-Earth objects (space mining), has recently become the subject of intensive discussions. These developments have led to intense legislative activity. Over the last decade, national space acts have been adopted in various European states and beyond. Further, on June 25, 2025, a proposal for a Regulation of the European Parliament and of the Council on the safety, resilience, and sustainability of space activities in the Union (hereinafter EU Space Law)[1] was published. These recent developments have sparked a significant surge in interest in legal scholarship. The book *Prawo kosmiczne międzynarodowe, europejskie i krajowe* [International, European, and National Space Law], published in Warsaw by C.H. Beck in 2025,

[1] Brussels, 25 June 2025 COM(2025) 335 final.

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represents a timely contribution of Polish legal science to the flourishing scholarship of space law.

This book review argues that the newly published *Prawo kosmiczne międzynarodowe, europejskie i krajowe* represents a comprehensive study of all significant aspects of space law, which may serve as a template for similar future publications in Central Europe. In my book review, I would like to first present the content of the reviewed book to the readers of this journal. A few critical observations on the content of the reviewed book will follow this part.

The newly published *Prawo kosmiczne międzynarodowe, europejskie i krajowe* was edited by K. Myszona-Kostrzewa and Z. Kulińska-Kępa from the Faculty of Law and Administration at the University of Warsaw. The book is a result of the joint efforts of nineteen authors from various universities in Poland. The book contains 390 pages, including an introduction and an index. As is usual with books published by C.H. Beck, the reviewed book is carefully divided into chapters and sub-chapters, with each chapter beginning with a summary of existing literature on the selected topic.

The reviewed book is divided into six chapters. The first of them is dedicated to "Kosmos i prawo międzynarodowe" ["Space and International Law"].[2] This first chapter opens with an outline of international space law as an academic discipline, written by K. Myszona-Kostrzewa. Here, the author explores various scholarly approaches to the delimitation of this subject, citing both eminent Polish and foreign scholars. For a reader from the Czech Republic, it is very pleasing to read a reference to the work of Vladimír Mandl, who is being referred to as a "grandfather" of space law. K. Myszona-Kostrzewa also authored the following two sub-chapters, dealing with the legal status of outer space on one hand and with the legal status of space objects (that is, human-made objects in outer space) on the other. With respect to the legal status of space, the author outlines both the delimitation of space vis-à-vis airspace and the basic concepts that currently govern the exploration and utilization of outer space. The author pays considerable attention to the non-appropriation principle, which is significant for the prospective space mining projects. This outline is followed by a sub-chapter dedicated to the environmental protection of outer

[2] At pp. 1–149.

space and celestial bodies. Here, D. Kuźniar first analyses the concept of space environment and identifies the primary sources of its pollution. In this respect, the author addresses the existing legal framework, as adopted to combat space pollution and its most significant gaps. While extensively dealing with international and EU tools to address this issue, the author does not mention that all the national space acts adopted in Europe over the last decade also contain provisions on mitigating space debris. The next sub-chapter is dedicated to the concept of international responsibility of the states in space and is co-authored by K. Myszona-Kostrzewa and M. Matusiak.

The second chapter of the reviewed book is on the institutional form of cooperation in outer space.[3] This chapter is opened by the sub-chapter on space diplomacy from A. Misztal. He also authored the following text, outlining the role of the United Nations in establishing the legal and regulatory framework for outer space. The fact is, however, that international cooperation among the states in outer space is not limited to the United Nations. Therefore, the following sub-chapters deal with the International Telecommunication Union (ITU) (authored by S. Rudnik), the organizations providing satellite communication (INTELSAT, INMARSAT, and EUTELSAT) (written by A. Gubrynowricz), and with the European Space Agency (ESA) (written by K. Myszona-Kostrzewa). The final sub-chapter addresses the role of the European Union in space exploration and utilization. Here, M. Beer and A. Kosińska pay attention firstly to the historical developments of the EU's activities in outer space. Then, he analyzes competences and activities of the Agency for the EU Space Programme (EUSPA) and the components of this Programme. The authors also very briefly deal with the most recently launched component IRIS2 (Infrastructure for Resilience, Interconnectivity, and Security by Satellite), which was commenced in December 2024. The reviewed book was published in May 2025. Consequently, the second chapter does not contain information on the newly proposed EU Space Law, which was disclosed in June 2025.

The third chapter of the reviewed book deals with commercial activities in outer space.[4] This chapter is opened by a sub-chapter, authored by

[3] At pp. 69–148.

[4] At pp. 149–245.

M. Lutek and devoted to the financing of space activities. The next sub-chapter, written by K. Malinowska, deals with the insurance of space activities. Here, the author presents a very concise analysis of the role of insurance in the space industry. Also, she analyses various space activities and the specifics of their insurance. Lastly, K. Malinowska points out some existing national space acts and insurance obligations arising in this respect. While she deals with the content of those national space acts, issued more than a decade ago, she is not paying attention to those issued very recently. Regarding the planned spaceport on the Azores Archipelago, the national space act adopted in Portugal in 2019 may be of significant interest to readers. Neither K. Malinowska is dealing with special provisions in the recently adopted national space acts, which relieve operators from an insurance obligation in the case of space activities being conducted for research and educational purposes. The subsequent chapters address further topical aspects of commercial activities in outer space, including space traffic management (authored by M. Lutek and M. Matusiak), suborbital flights (authored by M. Piotrowski), and satellite technologies (authored by K. Myszona-Kostrzewa). The last sub-chapter is devoted to the very topical issue of space mining. Here, B. Skardzińska firstly outlines prospective space mining projects and explains which minerals could be extracted in outer space in the future. Then, she addresses the two sensitive issues – the relation of space mining to the non-appropriation principle and the issue of ownership of the minerals. It is a matter of fact that there are four states worldwide that have already enacted their own national space mining acts – the USA, the Grand Duchy of Luxembourg, the United Arab Emirates, and Japan. The author briefly analyses the content of this legislation and points out the way forward.

The fourth chapter of the reviewed book is entitled "Kosmos i człowiek" ["Space and the Human Being"] and deals with various aspects of human presence in outer space.[5] The fourth chapter is opened by a sub-chapter, written by Z. Kulińska-Kępa, which deals with the legal status of astronauts and space tourists. Addressing the legal issues arising from the growing popularity of space tourism is particularly timely, given current developments. Z. Kulińska-Kępa also authored the subsequent sub-chapter, which

[5] At pp. 245–81.

deals with the international protection of human rights with respect to new space technologies. Here, the author addresses the protection of human rights in relation to satellite navigation and tele-detection. M. Pietkiewicz writes the last sub-chapter of the fourth chapter. It addresses the issue of criminal jurisdiction over activities in outer space. In the same vein as space tourism, the issue of extraterritorial applicability of criminal law in outer space is also very topical. In this respect, M. Pietkiewicz analyzes the Intergovernmental Agreement of 1998, outlining the framework for handling criminal matters on the International Space Station (ISS), which gives each participating country jurisdiction over its nationals. The fact is that the prospective utilization of outer space will not be limited to the ISS. Projects for lunar human settlements are currently under discussion worldwide – see, for example, the Moon Village, which has been under development by ESA. However, the reviewed sub-chapter does not address the issues of criminal law application *vis-á-vis* future permanent human settlements in outer space. Having said this, I would like to add one remark here. The fourth chapter addresses the issue of human existence in outer space from a purely human perspective. The fact is, however, that current scholarship has already addressed space activities from other perspectives, beyond the human perspective.[6]

In its fifth chapter, the reviewed book examines issues related to military activities in outer space.[7] This chapter is composed of two sub-chapters. The first one, written by M. Polkowska, deals with the outline of existing military (defense) activities in outer space. Here, the author outlines the applicability of existing international control regimes to military activities in outer space. Additionally, the author briefly discusses the space military programs of the USA, China, and Russia. The second sub-chapter addresses the applicability of international humanitarian law in the context of a military conflict in outer space. M. Lutek authors this sub-chapter. Among other issues, he also addresses the highly topical concern of the use of artificial intelligence in space warfare.

6 See, for example, Michael Bohlander, *Contact with Extraterrestrial Intelligence and Human Law* (Leiden: Brill, 2023).

7 At pp. 281–329.

The last chapter of the reviewed book is devoted to the current legal framework for space activities in Poland.[8] In stark contrast to many European countries, Poland had not adopted its own national space act at the time the reviewed book was published. However, a proposal of such national legislation exists and is subject to analysis in the first sub-chapter of this last chapter. Here, Z. Kulińska-Kępa briefly outlines the content of this proposal and perspectives of its future adoption. In the next sub-chapter, M. Lutek addresses the integration of Poland into the existing institutions of international cooperation in space exploration and utilization. Z. Kulińska-Kępa also authored the next sub-chapter of the reviewed book, outlining the Polish Space Agency (POLSA), which was established in 2014 and functions as an executive agency under the Polish Ministry of Economic Development and Technology. The very last sub-chapter was written by A. Okniński. It deals with space research and development under the Łukasiewicz Research Network – Institute of Aviation.

At this point, I would like to highlight the quality of the formal arrangements in the reviewed book, which fully reflects the high standards of publications published by C.H. Beck. I consider the reviewed book a significant contribution to the academic scholarship of space law. Having said this, however, I would like to offer some critical remarks on the reviewed book, which are largely conceptual.

The first remark concerns the EU Space Law. As already outlined above, the reviewed book couldn't cover the content of the newly proposed EU Space Law, which was published in June 2025 – that is, a month after the reviewed book was published. This proposal represents a significant step in EU Space Law, as it marks the first time in history that the European Union has proposed a directly applicable legal framework for space activities. For the time being, EU Space Law is treated in a single sub-chapter of the second chapter, which means that it is one of the forms of international cooperation in space exploration and utilization. However, it is crystal clear that the nature of cooperation within the European Union differs significantly from that of other institutions mentioned in this chapter. For example, in contrast to the European Space Agency (ESA) or the International Telecommunication Union (ITU), the European Union has the competence to

[8] At pp. 329–72.

issue legally binding acts and thus establish a harmonized legal framework for its member states. When analyzing the current available proposals for EU Space Law, we clearly see that the establishment of a robust governance scheme within the EU is being envisaged for the future. Under this governance scheme, competences in the field of space activities will be shared between competent national authorities and EUSPA. This highlights the need to address EU Space Law in a separate and distinct chapter in the next edition of the book under review.

The second remark concerns the work with existing literature. As outlined above, each chapter is introduced by an overview of academic sources relevant to the issues discussed. This is a standard approach in the publications by C.H. Beck. After reviewing the literature, however, I have the impression that while older sources are well-represented, the most current ones are scarce. This remark explicitly concerns the legal issues that have become topically relevant in recent years. The issue of space mining could serve as a good demonstration of my argument. While B. Skardzińska refers to classical scholarly works from the 1960s and 1970s in the literature overview, the current published literature on this topic is not mentioned in the same overview. To be concrete: In 2024, M. Johnson published an outstanding study on property rights in outer space with Routledge.[9] In the same year, Gabrielle Leterre published a monograph on space mining and environmental sustainability in Wolter Kluwer's Aerospace Law and Policy Series.[10] The previous year (2023), another book on space mining was published in the very same series. It focused on the governance of space mining and was authored by Antonino Salmieri.[11] The fact is, however, that neither of these recently published books has been added to the literature overview. Consequently, I would urge the authors to provide a serious update of the literature review and to include more contemporary literature in the next edition.

9 Matthew Johnson, *Property Rights in Outer Space: Mining, Techno-Utopian Imaginaries, and the Privatisation of the Off-World Frontier* (London: Routledge, 2024).

10 Gabrielle Leterre, *Protecting the Last Frontier: Space Mining and Environmental Sustainability* (Alphen aan den Rijn: Wolters Kluwer, 2024).

11 Antonino Salmieri, *The Multi-Level Governance of Space Mining* (Alphen aan den Rijn: Wolters Kluwer, 2023).

My last critical remark concerns the terminology. In 2025, *Elgar Concise Encyclopedia of Space Law*, edited by M. Hofmann and P.J. Blount, was published by Edward Elgar Publishing.[12] In the same year, Routledge published *The Future of Outer Space Law*, edited by Anna Brennan.[13] Lastly, the *Greek Space Law* was published in 2025 by Springer.[14] All these recently published books address international, EU, and national aspects of the law of space exploration and utilization. However, neither of them is entitled *International, European, and National Space Law*. The references to "international," "European," and "national" in the title of the reviewed book are somewhat redundant. It is crystal clear that *space law* represents a multidisciplinary phenomenon, cumulating aspects from both international public law, EU law, and domestic (national) law. Thus, calling the next edition of the book simply *Prawo kosmiczne* (Space Law) will better fit the terminology used recently in international scholarship.

The reviewed book makes a valuable contribution to the current scholarship in space law. It can serve both as a handbook for students and a basic introduction to the field of space law for interested professionals. It contains both theoretical viewpoints and chapters, addressing topical issues such as space mining or the use of artificial intelligence. The overall composition of chapters and sub-chapters covers all the significant problems in contemporary space law. Thus, the book can also serve as an inspiration for similar works, which will be written in other jurisdictions. At the same time, it is clear that a future update of the book will be necessary in the near future, particularly with respect to the prospective EU Space Law.

12 Mahulena Hofmann and P.J. Blount, eds., *Elgar Concise Encyclopedia of Space Law* (Cheltenham: Edward Elgar, 2025).

13 Anna Brennan, ed., *The Future of Outer Space Law* (Abingdon: Routledge, 2025).

14 Anthi Koskina and Manolis Plionis, *Greek Space Law. Collaborating with a Growing Space-Faring Country* (Cham: Springer, 2025).