NATIONAL LEGAL SYSTEMS AND THE EU LAW: REALITY AND FUTURE CHALLENGES IN A COMPARATIVE PERSPECTIVE

6–7 November 2025, Riga

Collection of research papers in conjunction with the 10th International Scientific Conference of the Faculty of Law of the University of Latvia

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FOREWORD

The 10th International Scientific Conference of the Faculty of Law of the University of Latvia provides an appropriate occasion to look back at the development of this conference series, as well as to consider the future. Having had the privilege of attending several of these conferences myself, I have witnessed this advancement at close hand. The number ten marks a transition – one that extends beyond the simple passage from a single-digit to a two-digit number. When it represents the number of successive, mostly biennial conferences, it also stands for continuity, discipline and, eventually, tradition. At the same time, such a milestone invites reflection on change: on the evolution of the conference and its ability to respond to a changing legal and societal environment. Over these years, I have also observed how the crises addressed at successive conferences have affected Latvia and the Baltic states, on the one hand, and Germany, on the other – often in different ways and to different degrees, a divergence that itself illustrates why a comparative perspective matters.

The period covered by these ten conferences coincides with particularly eventful times in recent European history. It has been shaped by a succession of contingencies and challenges, including the migration crisis, growing concerns about climate change, the COVID-19 pandemic and, more recently and dramatically, Russia's full-scale invasion of Ukraine – a war in Europe that, at least in Western Europe, had commonly been regarded as almost unimaginable. These developments have not only affected individuals and societies; they have triggered responses by states, the European Union and the international community and, in doing so, have left their mark on the law. In this sense, an international legal conference provides an important forum for observing how collective responses to societal challenges are translated into legal rules, institutions and policies.

In this context, a forum in Latvia and the Baltic states offers the opportunity to discuss and analyse these developments from their own specific perspective. As a German who has, for more than two decades, maintained close ties with Latvia and Estonia, I have learned that geography, size and historical experience shape the perceptions of a crisis, as well as the legal and political response chosen to address it. Latvia, being a relatively small EU Member State, does not necessarily perceive all European challenges in precisely the same way as the Union's larger Member States. Furthermore, Latvia shares important historical experiences and

contemporary concerns with its Baltic neighbours Estonia and Lithuania, while other European states may approach similar challenges from different perspectives.

Against this background, the theme chosen for the 10th International Scientific Conference, "National Legal Systems and the EU Law: Reality and Future Challenges in a Comparative Perspective" is particularly fitting. Today, national legal systems can no longer be understood in isolation, given that they have become increasingly interconnected within a European legal space. This interaction, however, does not simply lead to uniformity. Questions of constitutional identity, national autonomy and different national responses to common European challenges remain. The comparative perspective is therefore extremely valuable: differences between national approaches may also constitute a source of legal experience, mutual learning and, ideally, improvement.

The conference programme reflects this interaction between continuity and change: it combines questions that have accompanied European integration for decades – concerning constitutional, administrative, civil and commercial law, judicial cooperation and individual rights – with challenges that only recently have moved to the centre of legal attention. Artificial intelligence and digitalisation, the implementation of the EU Artificial Intelligence Act, environmental and energy transformation and hybrid threats are now discussed alongside established fields of European and national law. In this respect, the tenth conference does not break with the tradition of its predecessors, but rather continues it under changing circumstances.

This comparative perspective is also reflected in the contributions: they examine developments in Latvia, Lithuania and Estonia as well as in Germany, Poland, Greece, Italy, France, Belgium, Hungary, Finland and other European jurisdictions, whilst several contributions compare legal responses across borders. Thus, the comparative approach announced in the title is reflected in the composition and content of the volume.

Finally, ten conferences and the participation of scholars from different legal systems show that the conference has become an established international forum at the Faculty of Law of the University of Latvia. Bringing together scholars from across Europe in Riga also demonstrates academic cooperation and, in present times, solidarity – fostered by conference meetings and the discussions that result from them.

Christoph Schewe,
FHVD University of Applied Sciences, Germany,
Visiting Professor at the University of Latvia

SECTION 1

EUROPEAN UNION LAW IN THE CHANGING WORLD

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Irena Kucina, *Dr. iur.*, *Associate Professor*
President, Constitutional Court of the Republic of Latvia

Martin Kuijer, *Dr.*
Vice-president, European Commission for Democracy through Law (Venice Commission), Judge, *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands)

NATIONAL LEGAL SYSTEMS AND THE EU LAW: REALITY AND FUTURE CHALLENGES IN A COMPARATIVE PERSPECTIVE

Key words: Dutch and Latvian perspectives, relationship between the EU legal order and national law, openness to international law, basic principles of EU law, principle of loyal cooperation, General Data Protection Regulation, Court of Justice of the European Union, European Central Bank, Constitutional Court of Latvia, Supreme Court of Netherlands, recent case law, fundamental rights, European Convention on Human Rights, "Self-executing" provisions

Summary

This article examines the interaction between national legal systems and European Union law from a comparative Latvian and Dutch perspective. It argues that, despite different constitutional arrangements, constitutional and supreme courts perform a common function: translating the European legal acquis into the national legal order while ensuring effective protection of fundamental rights.

The Latvian perspective is illustrated through the principle of loyal cooperation, as applied in the case law of the Constitutional Court of Latvia, particularly in cases concerning data protection under the General Data Protection Regulation and the duty to consult the European Central Bank. The Dutch perspective demonstrates how an open constitutional approach to international law, including self-executing treaty provisions and the European Convention on Human Rights, enables courts to address issues of constitutional significance despite the formal prohibition of constitutional review.

Latvian and Dutch perspectives offer a separate yet convergent view on the interaction between national legal systems and EU law. The EU law principle of loyal cooperation has found its application in the recent case law of the Latvian Constitutional Court leading to protection of individual fundamental rights. The constitutional arrangements in the Netherlands offer a neighbouring perspective – Dutch openness towards international law, including EU law, offers practical solutions for safeguarding fundamental rights. The role of constitutional

and supreme courts is best revealed in translating the international acquis for the benefit of the national legal order and offering effective judicial protection to its citizens.

The article concludes that the relationship between EU law and national law is not defined by hierarchy alone, but by cooperation, constitutional dialogue and mutual translation between legal orders. In this context, the Latvian and Dutch experiences show how national institutions of constitutional review may act as a hinge between domestic legal orders and the European legal space, safeguarding both the effectiveness of EU law and the protection of individual fundamental rights.

Introduction

The aim of this study is to address jointly the interaction between national legal systems and EU law from the Latvian and Dutch perspective. This comparative approach is particularly relevant because both the Constitutional Court of the Republic of Latvia and the Supreme Court of the Netherlands have actively contributed to the development of a common European legal space. This shared commitment is reflected in the conference of the Court of Justice of the European Union and the constitutional courts of the Member States, *EUnited in Diversity*, whose first edition was established in Riga and whose second edition was held in The Hague. The conference has become an important forum for exchange on the role of national courts in safeguarding the European Union's founding values, the rule of law and human rights.

First, the article focuses on the principle of loyal cooperation – a crucial principle governing the interaction between national legal systems and EU law. This principle has been elaborated by the Constitutional Court of Latvia both at the national and supranational levels. Constitutionally derived principle of mutual loyalty between state institutions requires respecting each institution's competences, promoting mutual respect, and ensuring good-faith cooperation in the interests of the state.

From the Dutch perspective, a comparative examination of the relationship between the EU legal order and national legal systems is, obviously, a fairly broad, multifaceted and complex undertaking. The relationship between the domestic legal order and the EU legal order obviously depends on the specific constitutional arrangements of the country concerned – and it is superfluous to state that a great diversity in these arrangements exists throughout Europe. Therefore, in the second part a few particularities of the Dutch constitutional order will be explained, which in turn will explain why this legal order can be characterised as having a very 'open' attitude towards European law.

1. Duty of loyalty in EU law

The obligation of sincere or loyal cooperation derives from membership to the Union and not merely from compliance with agreed commitments, it is more

than merely a written treaty provision. It goes beyond the conventional framework set out today in the Article 4 paragraph 3 of the Treaty on European Union.

The Court of Justice of the European Union has pointed out already in 1996, in case Brasserie du pecheur[1] that the principle of loyal cooperation is "inherent" in the EU legal order – perhaps it hinted at the autonomous character[2] of this principle which would apply even in the absence of a written provision.[3] The principle of loyal cooperation characterises the legal order of the European Union, endowing it with its "identity".[4]

This principle functions in three dimensions: First, the European Union must respect the interests and competences of the Member States and may not implement measures that would cause them harm.[5]

Second, the Member States must refrain from any actions that would jeopardise the achievement of the Union's objectives[6] and must ensure the effective implementation of EU law, including through the work of their national courts, which are required to guarantee effective judicial protection of individuals in relation to EU acts.[7]

Third, the Member States must cooperate with each other and avoid taking steps that could hinder another Member State in attaining its aims within the European Union. Cross-border cooperation in judicial matters serves as a clear example of this dimension.[8]

2. Duty of loyalty in the case law of the Latvian Constitutional court

One of the core duties of the Constitutional Court is to uphold the person's fundamental rights.[9] Here are two examples, where compliance with the principle of loyal cooperation was the aspect of the dispute, and where absence of intervention from the Constitutional Court, could breach our EU legal obligations, and equally lead to an infringement on a private person's fundamental rights.

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1 Judgment of 5 March 1996, Brasserie du pecheur and Factortame C-46/93 and C-48/93, para. 39.

2 Klamert M. Article 4 TEU. In: Kellerbauer M., Klamert M., Tomkin J. (eds.). The EU Treaties and the Charter of Fundamental Rights: A Commentary. Oxford: Oxford University Press, 2019, p. 47.

3 Pescatore P. Das Zusammenwirken der Gemeinschaftsrechtsordnung mit den nationalen Rechtsordnungen [The Interaction between the Community Legal Order and the National Legal Orders]. Europarecht, Vol. 5, No. 4, 1970, p. 322.

4 On the "transformative" nature of this principle, see Klamert M. The Principle of Loyalty in EU Law. Oxford: Oxford University Press, 2014.

5 Judgment of 9 July 2020, Czech Republic v. Commission, No. C-575/18 P, para. 73.

6 Judgment of 14 March 2024, Commission v. Latvia (European Electronic Communications Code), No. C454/22.

7 Judgment of 1 April 2004, Commission v. Jego-Quere, No. C-263/02 P, para. 32.

8 Judgment of 29 July 2024, Breian, No. C-318/24 PPU, para. 93.

9 Judgment of the Latvian Constitutional Court of 19 October 2011, No. 2010-71-01, para. 14.

In both cases, the Constitutional Court applied directly[10] the principle of loyal cooperation, recognising it not only as being an obvious part of the European Union law but also as a shining element in the domestic constitutional law constellation.

The first case concerned public disclosure of salaries of employees in State and local government institutions.[11] Every salary paid in the public sector had to be published and accessible on the internet. And here Court was expected to answer the question – may the Parliament adopt a text knowing, that after the national law is voted, there will be a new EU regulation,[12] with higher requirements for data protection?

The Constitutional Court recognised that it was at odds with the basic principles of EU law.[13] The moment when the contested law was being debated in the Parliament coincided with the period when the General Data Protection Regulation was adopted. The law entered into force during the transitory period when the Member States had been given time to take the necessary legislative measures to align the national legal provisions with the provisions of the Data Regulation. Thus, the Constitutional Court observed that the Parliament, abiding by the principle of loyalty had to take into account that the principles laid down in the future General Data Protection Regulation will apply *inevitably*.[14]

The Constitutional Court recognized that, from the moment when the Data Regulation entered into effect, persons had the right to expect that the Data Regulation would become applicable in the set term. The Constitutional Court pointed out that a Member State's obligation to refrain from taking such measures that could seriously hinder attaining the results, envisaged in an EU legal act.

The second case, a recent one,[15] affects many private individuals in the context of fluctuations in Euribor rates. The case is still pending as the Constitutional Court has referred several preliminary questions to the Court of Justice of the European Union.[16] The duty of loyal cooperation in this case relates to the obligation of the legislator to consult with the European Central Bank,[17] before legislating on a matter concerning the competence of this EU institution. Even though, the Latvian legislator had sought advice from the European Central Bank, it was

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[10] Judgment of 5 February 1963, Van Gend & Loos, No. 26/62.

[11] Judgment of the Latvian Constitutional Court of 6 March 2019, No. 2018-11-01.

[12] 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 (OJ 2016 L 119, p. 1).

[13] Judgment of the Latvian Constitutional Court of 6 March 2019, No. 2018-11-01, para. 18.4.1.

[14] Ibid.

[15] Decision of the Latvian Constitutional Court of 31 March 2025 to refer a question to the Court of Justice of the European Union for a preliminary ruling, No. 2024-09-01.

[16] Pending case, SEB Banka, No. C242/25, for the English summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice.

[17] Article 127(4) TFEU.

argued, that it did so at such a late stage of the legislative procedure, that there was no realistic possibility to hold a meaningful debate on the opinion provided by the EU institution.[18]

There is little doubt for the Constitutional Court, that the principle of sincere cooperation may impose also for a negative obligation upon Member State to refrain from taking any actions that might be detrimental for the interests of the European Union. However, the Constitutional Court is in the opinion, that there should be a further clarification whether the conclusions of the general case law of the Court of Justice on notifications to EU institutions, and especially the consequence that a failure to send a notification results in the inapplicability of the national act, should be also applying in the case of consultations with the European Central Bank.[19]

These two examples, indicate that we strive to achieve a fair balance between effectiveness of a national regulation and the highest level of protection for individual fundamental rights. This involves, in authors' opinion, an effective cooperation of different stakeholders on the national and European Union level. It is possible, only if national legal systems and the shared legal space of the European Union are within common and harmonious constellation of loyal cooperation.

3. The Netherlands: Constitutional arrangements and its open approach to international law

The Netherlands is the only Council of Europe Member State in which the Constitution prohibits constitutional review of acts of parliament.[20] Article 120 of the Dutch Constitution states that "[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts". Such a prohibition of constitutional review by the courts can already be found in the 1848 version of the Netherlands Constitution. The rationale behind this provision is (a strict interpretation of) the doctrine of supremacy of Parliament and the need to guarantee democratic legitimacy of norms having impact on citizens. It was not considered acceptable that courts – allegedly lacking democratic legitimacy[21] – would be competent to set aside legislation because of its incompatibility with the Constitution. No

[18] Opinion of the European Central Bank of 11 December 2023, on a temporary mortgage loan borrower protection fee payable by credit institutions, (CON/2023/42).

[19] Judgment of 6 June 2002, Sapod Audic, No. C-159/00, EU:C:2002:343, para. 49 and 50.

[20] Council of Europe, European Commission for Democracy through Law (Venice Commission), Netherlands – Opinion on the Legal Protection of Citizens, 15–16 October 2021, No. CDL-AD(2021)031-e, para. 125.

[21] The authors of the current article have always found that argument unconvincing given the involvement of the House of Representatives in the appointment procedure of justices of the Supreme Court, but also because of the principle of a public administration of justice and the requirement to give reasoned judgments. The argument that the judiciary "lacks" democratic legitimacy is, therefore, in their opinion, a misrepresentation of reality (although the argument is – again – rather popular in some political quarters).

constitutional court was established in the Netherlands. The Constitution is considered by many commentators as a document of little practical value.[22]

Although this constitutional set-up was maintained in 1983 when a major revision of the Constitution took place, the prohibition of constitutional review has been the subject of a lively debate in the Netherlands for decades.[23] In 2002, a member of Parliament (Femke Halsema, GroenLinks) presented a private member's bill to the Lower House proposing that all Dutch courts should be competent to review the compatibility of Acts of Parliament with the fundamental rights provisions included in the Constitution. The proposal was accepted in 2004 by the Lower House and in 2008 by the Senate in its first reading. However, in order to amend the Dutch constitution a second reading by parliament after a general election is required. As the proposal did not receive sufficient support it was withdrawn in 2018.[24] The most recent development is that the previous government in the Netherlands proposed to abolish the prohibition of constitutional review (and to establish a separate constitutional court).[25] However, that government has fallen and none of the main political parties expressed a similar policy aim in the electoral campaign.

So, at present Dutch courts (including the Supreme Court) do not explicitly check the constitutionality of laws. This means that even if a court reaches the conclusion that the law that it has to apply is (flagrantly) unconstitutional, it still will be obliged to apply that law.

In practice, the situation is considerably more nuanced. The Advisory Division of the Council of State provides *a priori* advice on the constitutionality of draft legislation (although it will not be systematically asked for advice on later amendments in Parliament).

More importantly, Articles 93 and 94 of the Netherlands Constitution provide for direct applicability of international legal norms. Rules of international law are part of the law of the land as soon as they become binding on the Kingdom of the Netherlands. Self-executing provisions of treaties have priority – in the event of conflict – over national legislation, including Acts of Parliament and even our Constitution.

In respect of matters relating to fundamental rights, it is important to note that the provisions of the European Convention on Human Rights are considered to be such "self-executing" provisions. As a result, Convention standards may be

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[22] See, for example, Gerards J. H. The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It. Revue interdisciplinaire d'etudes juridiques, Vol. 77, No. 2, 2016, pp. 207–233.

[23] In 1966, a working group of experts in constitutional law proposed the abolition of this provision Proeve van een nieuwe grondwet (Suggestion for a New Constitution). Similar proposals were made by various advisory committees established by the government (so-called Staatscommissies): Staatscommissie-Cals/Donner (1971), Commissie-Franken (2000), the Nationale Conventie (2006) and Staatscommissie-Thomassen (2010).

[24] See Kamerstukken II, 2001/02, 28331, No. 2 (introduction of the proposal) and Kamerstukken II, 2018/19, 32334, No. 13 (withdrawal).

[25] Letter of 21 February 2025 by the Minister of the Interior and Kingdom Relations and the Minister for Justice and Security (Contourennota constitutionele toetsing).

invoked by a party before any domestic court and every Dutch court is empowered to disapply a legal provision or declare such a provision nonbinding if it is in conflict with higher law, such as the Convention. In doing so, the Dutch judge applies the so-called 'incorporation doctrine', meaning that the norm (i.e. a provision of the Convention) is interpreted as it has been interpreted by the Strasbourg Court. It is therefore not decisive whether the Court judgment was against the Netherlands or against a third country (*de facto erga omnes* effect).

This openness to international law has allowed the courts – despite the existing prohibition of constitutional review – to address major (constitutional) issues and perform constitutional tasks. To name just a few examples, in 2010 the Supreme Court gave a ruling which effectively ended the possibility for a political party to ban women from representative functions.[26] In 2016, the Supreme Court ruled that the manner of imposing life sentences in the Netherlands at the time was in violation with the prohibition of inhuman or degrading treatment or punishment.[27] In 2019 the Supreme Court gave a ruling on the reduction of greenhouse gas emissions in the Netherlands on account of the risk of climate change that could also have a serious impact on the rights to life and well-being of residents of the Netherlands.[28]

In conclusion, many issues which would be considered as constitutional issues in other countries, are solved in the Netherlands via the application of international standards. And this is obviously – and increasingly – also true for EU law.

4. The need for constitutional and supreme courts to act as a hinge between both legal orders

Despite the diversity in the arrangements we've just described, the task of all constitutional and supreme court judges throughout Europe is a common one: 'translating' the international acquis for the benefit of the national legal order and thereby offering effective judicial protection to its citizens.

Such a "translation" can sometimes be very difficult – it is not always easy to ensure that the international standard "fits" into the national legal culture. However, in the authors' experience, it is rarely a head-on collision – it just takes careful navigation.

In a more general sense, for the authors of the current article, that is the role of the highest courts in a national legal order. They are, as it were, a Google Translate: they try to translate the (not always easily understandable) European acquis into the national legal order, while providing guidelines to the other stakeholders in

[26] HR 9 April 2010, ECLI:NL:HR:2010:BK4549, NJ 2010/388 (Staat en SGP v. Clara Wichmann et al.).

[27] HR 5 July 2016, ECLI:NL:HR:2016:1325, NJ 2016/348, m.nt. T. Kooijmans.

[28] HR 20 December 2019, ECLI:NL:HR:2019:2007 (The State of the Netherlands v. Stichting Urgenda).

the national legal order on how that international standard should be "translated" into everyday practice. Moreover, at the same time they try to convey messages to the European courts as to the complications that national courts encounter in the loyal application of the European acquis. In this way, they are the "hinge" in that layered legal order.

In most cases, a solution may be found by choosing a treaty-compliant interpretation of a given domestic provision. Sometimes, the Netherlands Supreme Court opts for a "temporal" solution. Here is a brief example. Dutch criminal law allows the judge to impose a life sentence. Unlike other jurisdictions, that really means for *life*. Clearly, there is case law of the ECtHR in this regard. In 2016, the Dutch Supreme Court dealt with a case in which the court of appeal had imposed a life sentence. It noticed that – contrary to European case law – Dutch law at the time did not provide for a possibility to review the life sentence after it had been imposed. *If* the law would introduce such a review mechanism, Dutch law would no longer be incompatible with the requirements of Article 3 of the Convention. Introducing such a mechanism was, however, not for the judiciary, but the legislator. The Supreme Court decided to adjourn the case for fourteen months in order to enable the government and the political decision-makers to make the necessary adjustments, and this is what happened. Subsequently, the Supreme Court held that the *imposition* of a life sentence would no longer be considered incompatible with Convention standards. However, it also warned the authorities: if future cases would demonstrate that – despite the new review mechanism – life sentences *de facto* were never reduced, the Supreme Court might reconsider its position as regards the imposition of life sentences.

In the context of the current study, the example demonstrates how a constitutional jurisdiction may play its role: (a) carefully examining what *exactly* the international standard requires, (b) identifying how to best fit that in into the domestic legal order, while (c) respecting the constitutional relations between the various institutional actors.

Conclusions

- The relationship between the domestic legal order and the EU legal order depends significantly on the specific constitutional arrangements of the country concerned – and a great diversity in these arrangements exists throughout Europe.
- Despite the diversity in these arrangements – the task of all constitutional and supreme court judges throughout Europe is a common one: "translating" the international acquis for the benefit of the national legal order and thereby offering effective judicial protection to its citizens.
- Offering such a "translation" can sometimes be very difficult, also in light of the need to respect the constitutional relations between the various institutional actors.

- The overarching principle when making this translation is the duty of (inter-institutional) loyalty towards EU law in the constellation of the protection of individual fundamental rights.

As it was argued here, this task is not always an easy one. And therefore, it is so important for European courts to learn from each other's experiences and to exchange views on how to overcome these difficulties. In that regard, it is worthwhile mentioning that the Latvian Constitutional Court and the Supreme Court of the Netherlands have regular bilateral meetings to discuss issues of common interest. In addition, there are various multilateral initiatives such as the *EUnited in Diversity* conferences providing an opportunity to have a dialogue between representatives of the European courts with representatives of the constitutional courts of the EU Member States with a view to guaranteeing a harmonious relationship between the EU legal order and those of its Member States. The first conference took place in 2021 in Riga; the second one was hosted by the Supreme Court in The Hague.

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Gaabriel Tavits, *Dr. iur., Professor*
University of Tartu, Estonia

THE LEGAL FRAMEWORK FOR EMPLOYING THIRD-COUNTRY NATIONALS IN ESTONIA: BALANCING LABOUR MARKET NEEDS AND PUBLIC INTEREST

Key words: third-country nationals, labour migration, Aliens Act, immigration quota, residence permit, Estonia

Summary

This article offers the analysis of the Estonian legal framework governing the employment of third-country nationals (TCNs) and evaluation whether the current regulatory model facilitates or restricts access to the labour market while safeguarding public interests. Doctrinal legal analysis is applied to the Estonian Aliens Act, relevant EU directives, case law, and constitutional principles, examining short-term employment registration, temporary residence permits for employment, the immigration quota system, and obligations of employer.

Estonia has developed a differentiated migration regime favouring highly qualified labour while incorporating strict labour market protection mechanisms. Although the framework does not fundamentally obstruct employment of TCNs, instruments such as the immigration quota and employer-specific residence permits may reduce labour mobility and administrative flexibility.

Introduction

Better job opportunities, higher wages, a higher standard of living and educational opportunities are pull factors that motivate migration to countries with better economic prospects. The European Union has declared the free movement of citizens of Member States as one of the economic freedoms, also referred to as the free movement of workers or labour. The free movement of workers is provided for in Article 45 of the TFEU and constitutes the fundamental right of workers to move and reside freely within the territory of the Member States. One of the objectives of EU migration policy is to enable the free movement of labour

within the EU; however, in order to alleviate labour shortages and shortages of skilled workers and to stimulate economic growth, the EU also supports the lawful movement of labour from outside the Member States.

The arrival, temporary stay, employment and liability of persons from third countries in Estonia are regulated by the Aliens Act (hereinafter VMS).[1] Within the meaning of § 3 of the VMS, an alien is a person who is not an Estonian citizen. Pursuant to § 2(1) of the VMS, the Aliens Act does not apply to citizens of European Union Member States, European Economic Area Member States, and the Swiss Confederation, nor to their family members who have the right of residence or permanent residence in Estonia within the meaning of the Citizen of the European Union Act. The aforementioned persons have the right to move and reside freely within the territory of the Member States. When citizens of Member States exercise their right to free movement and residence, their fundamental status should be that of Union citizenship.

Estonian migration policy has always been based on encouraging the arrival of those aliens whose settlement in Estonia is in line with public interests and preventing the arrival of those who may pose a threat to public order or national security.[2] In addition, the Estonian legislator follows the generally recognised principle of international law according to which every state has the sovereign right to control the entry, stay and departure of persons who are not its citizens, taking into account its international obligations, including the obligation to grant international protection. Therefore, a person who is not a citizen of a state does not have a human right to enter and stay in a foreign state.

The purpose of this article is to analyse the employment opportunities of persons from third countries in Estonia and the obligations of such workers while working in the territory of the Republic of Estonia.

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1 Aliens Act. Passed 9 December 2009. RT I 2010, 3, 4. Available: https://www.riigiteataja.ee/en/eli/506012026003/consolide [last viewed 14.02.2026].

2 Tammaru T., Eamets R., Pedaste M., Jarve J., Tamm M., Klaas-Lang B., Uibu M. Randesoltuvus ja loimumise valjakutsed Eesti riigile, tooandjatele, kogukondadele ja haridusele [Migration dependence and integration challenges for the Estonian state, employers, communities and the education system]. 2021, p. 3. Available: https://www.etag.ee/wp-content/uploads/2021/03/L%C3%B5pparuanne.pdf [last viewed 14.02.2026]; Vollmer M., Luik E., Murov A., Orloff B. Rande-ja kodakondsuspoliitika aastaraport 2022 [Migration and Citizenship Policy Annual Report 2022]. EMN Estonia, p. 17. Available: https://www.emn.ee/wp-content/uploads/2022/11/rande-raport-2022-veeb-1.pdf [last viewed 14.02.2026].

1. Employment opportunities in Estonia

1.1. Short-term employment in Estonia

Third-country nationals have several lawful options for working in Estonia, each with different conditions.[3]

An alien temporarily staying in Estonia may work in Estonia if the employer has registered their short-term employment with the Police and Border Guard Board (hereinafter – PPA) or if their right to work in Estonia arises directly from law or from an international agreement ratified by the Riigikogu (VMS § 104 (1)). For temporary stay and short-term employment in Estonia, a residence permit is not required; however, a lawful basis for entry into and temporary stay in Estonia is necessary. An alien staying in Estonia without a lawful basis, including a person who has been ordered to leave Estonia by an administrative act or court decision, is prohibited from working in Estonia (VMS § 104 (3)). Likewise, an alien temporarily staying in Estonia is prohibited from working if the employer has not registered their short-term employment with the PPA, except in cases provided by a law or an international agreement ratified by the Riigikogu (VMS § 104 (2)).

Within the meaning of the Aliens Act, employment in Estonia means any activity in Estonia on the basis of an employment contract or other contract, as well as any other activity for the benefit of another person from which income or other pecuniary benefit may be presumed, regardless of the type or form of the contract or the location or residence of the other contracting party, unless otherwise provided by an international agreement or law (VMS § 8).

Pursuant to VMS § 43 (1), an alien must have a lawful basis to enter and temporarily stay in Estonia. Lawful grounds for temporary stay include, inter alia: a visa; visa-free travel; a visa or residence permit issued by another Member State; an EU Blue Card; a right to stay in Estonia arising directly from an international agreement; a diplomatic identity card; or a right or obligation to stay arising directly from law, a court decision or an administrative act.

Under VMS § 44(1), an alien may stay in Estonia under the conditions specified in the visa. A visa is an authorisation granted to an alien for entry into the territory of the Schengen Convention Member States, Estonia or an airport transit zone and for temporary stay therein under the conditions specified in the visa, unless otherwise provided by law (VMS § 56). A visa for short-term employment in Estonia is issued either as a short-stay or long-stay visa (VMS § 110(2)). On the basis of a short-stay visa, an alien may stay in Estonia for up to 90 calendar days within a six-month period. A long-stay visa may be issued for up to 365 days within twelve consecutive months. If an alien applies for a visa for short-term employment, the short-term employment must be registered in advance with the PPA (VMS § 62^1(1)).

[3] Tammaru T. et al. 2021, p. 25.

Importantly, the period of employment in Estonia is linked to the validity of the lawful basis for stay. No later than upon expiry of the visa, the alien must leave the territory of the Schengen Convention Member States, Estonia or the airport transit zone (VMS § 74).

In summary, short-term employment in Estonia does not require the acquisition of a residence permit; rather, for the purposes of entry and stay, a foreign national is issued either a shortterm or a longterm visa. In addition to a visa, the lawful bases for temporary stay in Estonia include visa-free movement, a visa or residence permit issued by another Member State, the EU Blue Card, a right of stay arising directly from an international agreement, a diplomatic identity card, as well as a right or obligation to remain in Estonia deriving directly from statute, a judicial decision, or an administrative act. The mere possession of a visa or the enjoyment of visa-free movement does not confer the right to work in Estonia. A foreign national may engage in short-term employment provided that they have a lawful basis for temporary stay and that their employment has been registered with the PPA prior to commencement of work. Where a thirdcountry national is exempt from the visa requirement, registration of shortterm employment alone is sufficient. A foreign national temporarily staying in Estonia is prohibited from working if their employer has not registered the shortterm employment with the PPA, except in cases expressly provided for by law or an international agreement.

1.2. Registration of short-term employment

Registration of short-term employment allows an alien to work temporarily in Estonia without a residence permit. It is intended for situations where the alien wishes to work in Estonia temporarily, usually for up to 365 days. Short-term employment is permitted only if the alien has a lawful basis for staying in the country and the employment has been registered with the PPA prior to commencing work. For longer-term residence and employment in the country, a residence permit is required.

Short-term employment may be registered by the employer or an authorised representative by submitting an application for registration of short-term employment to the PPA. Registration does not constitute a lawful basis for stay in the country. Nevertheless, registration is linked to the alien's lawful basis of stay. The registration of short-term employment expires if the alien's temporary basis of stay expires, if a residence permit is granted, if a visa is refused and there is no other lawful basis for stay and employment, or if the employer registers the termination of employment in the employment register (VMS § 109^1(1)).

In general terms, it may be observed that shortterm employment in Estonia is permitted for a foreign national who meets the qualification, educational, health and professional experience requirements established for the specific position, and who possesses the specialised skills and knowledge necessary for the performance of the relevant duties. In order to obtain the right of temporary

stay, the foreign national must have a lawful basis for residing in Estonia, and prior to the commencement of employment the employer is obliged to register the foreign national's short-term employment with the PPA. As a rule, short-term employment is permitted for a period of up to 365 days. Moreover, shortterm employment is subject to a fulltime work requirement, and the employer must ensure remuneration that is not lower than the average annual gross monthly wage in Estonia.

The regulation of short-term employment set out in the VMS may be characterised as relatively flexible, supplemented by several specific derogations aimed at facilitating opportunities for temporary employment in the Estonian labour market. Distinct regulatory arrangements and more favourable conditions have been established for seasonal workers, highly skilled specialists, as well as temporary agency and posted workers, reflecting the legislator's intention to balance labour market needs with the objectives of migration policy.

1.3. Seasonal work

Seasonal work can be conceptualised as a distinct modality within the broader framework of temporary labour mobility, characterised by its structural embeddedness in cyclical economic processes and by its alignment with sectorspecific fluctuations in labour demand.[4] From the perspective of labour market segmentation theory, seasonal work occupies a peripheral yet functionally indispensable position within the secondary segment of the labour market, where employment is typically marked by temporality, lower employment security and heightened sensitivity to economic cycles. The sectors most reliant on seasonal labour – agriculture and forestry, fisheries, manufacturing, construction and tourism – exemplify this segmentation through recurrent peaks in labour demand that cannot be met by the resident workforce alone.

Within the European Union, seasonal work is undertaken by both EU citizens and thirdcountry nationals, reflecting broader patterns of circular migration in which workers engage in repeated, timebound mobility between their country of origin and the host state. Such mobility patterns are often institutionalised through seasonal labour regimes, which constitute regulatory frameworks designed to channel temporary labour inflows in a manner that reconciles economic imperatives with migration governance objectives. In both Estonia and other EU Member States, seasonal workers thus serve as a critical supplementary workforce, enabling employers to respond to shortterm labour shortages while simultaneously

[4] Orloff B. Attracting and Protecting Seasonal Workers from third countries in the EU – Estonian National report. Tallinn: EMN Study, 2020, p. 3. Available: https://www.emn.ee/wp-content/uploads/2020/12/seasonal-workers-estonia-final.pdf [last viewed 14.02.2026]; European Migration Network. Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom. – Synthesis Report. Brussels: European Migration Network, 2020, p. 5. Available: https://www.emn.ee/wp-content/uploads/2020/12/00-eu-seasonal-workers-study-synthesis-report-en.pdf [last viewed 14.02.2026].

illustrating how migration policy, labour market needs and regulatory design interact within contemporary mobility regimes.

Seasonal work is a type of temporary work linked to specific periods of the year and particular economic sectors in which demand for labour is significantly higher than at other times. The main sectors employing seasonal workers include agriculture and forestry, fishing, manufacturing, construction, and tourism.

Within the meaning of the VMS, a seasonal worker is an alien whose permanent or principal residence is in a third country and who stays in Estonia on the basis of a visa or visa-free travel and performs seasonal work under a fixed-term employment contract concluded with an employer registered in Estonia (VMS § 106(11)).

As a general rule, short-term employment may be registered if the alien has a lawful basis for temporary stay and employment is registered before starting work. There is no restriction as to which lawful basis allows registration.

Normally, the employer must pay the alien remuneration at least equal to the annual average gross monthly salary in Estonia. However, no salary threshold applies to seasonal workers (VMS § 107(12) 11). The employer is required to conclude a fixed-term employment contract with the alien.

1.4. Temporary agency work and posted workers

In a temporary agency work relationship, the employer (the agency) concludes an employment contract with the agency worker, who is then assigned temporarily to perform work for a third party (the user undertaking), under whose supervision and direction the worker operates. A service contract is concluded between the agency and the user undertaking.

Intra-EU labour leasing means that the agency worker is also considered a posted worker. Posted workers are subject to special EU regulation, including the right to receive the minimum wage of the host country. Posting occurs in the context of cross-border provision of services. Under VMS § 106(7), short-term employment may also be registered in cases of temporary agency work within the meaning of § 6(5) of the Employment Contracts Act (TLS).[5] TLS § 6(5) defines temporary agency work as work performed under the direction and control of a third party.

Short-term agency work may be registered if the employer is a company registered in Estonia or another EEA Member State engaged in labour leasing and has provided a guarantee equal to one month's salary of the alien, at least equal to the annual average gross monthly salary in Estonia (VMS § 106(8)). The guarantee may be provided as a guarantee or deposit (VMS § 106(8^1)) and must remain valid throughout the period of short-term employment (VMS § 106(9)).

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[5] Employment Contracts Act. Passed 17 December 2008. RT I 2009, 5, 35. Available: https://www.riigiteataja.ee/en/eli/511022026002/consolide [last viewed 14.02.2026].

Employers must also register posted workers from another EU Member State with the Labour Inspectorate (ELTTS § 5[1]).[6]

1.5. Residence permit for employment

1.5.1 General requirements

To live and work in Estonia for longer than one year, it is possible to apply for a temporary residence permit for employment, which may be issued for up to five years. A temporary residence permit is an authorisation granted to a foreign national for settling in Estonia and residing in Estonia under the conditions established in the Aliens Act and specified in the residence permit (VMS § 112).

Under Aliens Act § 118(1) p. 4, a temporary residence permit may be issued to a foreign national for employment. The purpose and additional conditions for issuing a temporary residence permit for employment are set out in Aliens Act § 176. The purpose of issuing a temporary residence permit for employment is to promote the development of Estonia's economy, science, education or culture by enabling the recruitment of foreign nationals with the necessary skills and knowledge (VMS § 176 (1)).

A temporary residence permit for employment grants a foreign national the right to stay in Estonia and work for an employer registered in Estonia under the conditions specified in the residence permit (VMS § 176 (2)).

A residence permit for employment is suitable for: a skilled worker; a temporary agency worker; a top specialist; a member of a company's management body; an expert; a clergyperson; a startup employee; a researcher; a lecturer; an athlete; a creative worker; an EU Blue Card holder; a graduate of an Estonian higher education institution; an employee posted from the EU; an employee of an international company; or in other exceptional cases.[7]

1.5.2 Validity period

A temporary residence permit may be issued for up to five years (VMS § 119(1)). When determining the period of validity, account is taken of the proven circumstances forming the basis for issuing the residence permit or other relevant circumstances, as well as the possibility that these circumstances may change during the validity period (VMS § 119(2)).

A temporary residence permit may be extended for up to ten years at a time if the conditions for extension are met and none of the grounds for refusal apply (VMS § 128 and 132). If it becomes evident that the foreign national is not using the residence permit for its intended purpose or the conditions for issuing it are not met, the permit may be annulled (VMS § 135).

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[6] Working Conditions of Employees Posted to Estonia Act. Passed 17 March 2004. RT I 2004, 19, 134. Available: https://www.riigiteataja.ee/en/eli/522122025003/consolide [last viewed 14.02.2026].

[7] Ibid.

1.5.3 Immigration quota and labour market considerations

When applying for a temporary residence permit for employment, both the employer and the foreign national must consider that the number of foreign nationals permitted to settle in Estonia is limited by the annual immigration quota (VMS § 113(1)). If the quota is full, the issuance of a temporary residence permit is refused (VMS § 123(1) 4)).

In addition, foreign labour arriving in Estonia must meet the country's economic and labour market needs. At the employer's request, the Estonian Unemployment Insurance Fund assesses whether filling the position with a foreign national is permissible, taking into account labour shortages and the availability of local labour.

A temporary residence permit for employment may be applied for only if the position cannot be filled by an Estonian citizen, an EU citizen, or a foreign national already residing in Estonia with a residence permit, who meets the qualification and professional requirements, and if filling the position with a foreign national is justified based on the labour market situation and the data of the Unemployment Insurance Fund (VMS § 177(1)).

The administrative court has further articulated its position in terms that underscore the normative centrality of public interest within Estonia's migration governance framework. According to the court, a foreign national's stay in Estonia must conform to public interests as defined in § 13 of the VMS. The statutory purpose of granting a temporary residence permit for employment – set out in § 176(1) of the VMS – is explicitly developmental: it seeks to advance the Estonian economy, science, education, and culture by enabling the recruitment of foreign nationals whose knowledge and skills are deemed necessary for these domains.

Within this regulatory architecture, the immigration quota established in § 113 of the VMS functions as a key instrument for operationalising public interest in the context of labour migration. The quota mechanism is designed, inter alia, to ensure labour market prioritisation for Estonian citizens and persons with long-term residence rights. At the same time, it serves a broader socio-cultural function by safeguarding the capacity of Estonian society to accommodate foreign nationals without jeopardising the preservation and protection of the Estonian nation, language, and culture. In this sense, the quota reflects a balancing exercise between economic demand for foreign labour and the constitutional imperative to maintain the continuity of the Estonian cultural and linguistic community.

1.5.4 Requirements for the foreign national

Aliens Act § 179 sets out the requirements for foreign nationals. To be issued a temporary residence permit for employment, the foreign national must have the qualification, education, state of health, work experience, and necessary professional skills and knowledge required for the position (VMS § 179(1)).

When assessing an employer, the PPA also considers the employer's trustworthiness. If there is reason to doubt the employer's reliability, the PPA may refuse to issue a temporary residence permit for employment (VMS § 180).

A temporary residence permit for employment grants the foreign national the right to stay in Estonia and work for the employer registered in Estonia under the conditions specified in the permit. Under VMS § 185(1), the conditions for working in Estonia must be established in the permit, including at least the employer, place of work, and the work position. Under the permit, the foreign national may work only under the conditions specified (VMS § 185(3)).

If the foreign national wishes to change jobs with the same employer or start working for another employer, they must generally apply for a new temporary residence permit for employment. Under VMS § 189(1) p 2, a temporary residence permit for employment is annulled if a condition specified in the permit has changed.

The Administrative Court has explained that a temporary residence permit for employment is linked to a specific employer and position. Because the validity of the permit depends on employment with a specific employer and in a specific position, a change in these conditions constitutes grounds for annulment.[8]

However, a foreign national may work for multiple employers simultaneously, provided the conditions specified in the residence permit are followed (VMS § 181^2(1) and 189(2) p. 2). A change of position with the same employer is not considered a change of a condition of the residence permit, provided all other conditions remain unchanged and the new position requires the same qualification and professional requirements (VMS § 189(2) p. 4 and 185(4)).

2. Obligations of a worker coming from a foreign country

2.1. Obligations arising from a right of stay

The Aliens Act defines the obligations of an alien temporarily staying in Estonia or residing in Estonia. Specifically, an alien is required to comply with the constitutional order and legal acts of Estonia, to respect constitutional values and principles, a state based on liberty, justice and law, as well as the organisation of Estonian society, the Estonian language and culture (VMS § 11).

For temporary stay and shortterm employment in Estonia, an alien must comply with the conditions established by the visa (VMS (1)). If Estonia has concluded a visa-free agreement with a foreign country or if the visa requirement has been waived for citizens of that foreign country, the citizen of that foreign country may stay in the Schengen Convention Member States, including Estonia, for up to 90 days within any 180-day period, unless an international agreement provides otherwise (VMS § 44(2)).

The general conditions for issuing short-term and long-term visas are similar, and in reviewing the visa application, the following conditions are checked:

- The alien has a valid travel document;

[8] Judgment of Tallinn Administrative Court, 21 December 2023, case No. 3231588, section 10.

- The justification for the purpose and conditions of applying for the visa and stay;
- Sufficient financial means to cover accommodation and other costs during the stay in Estonia and to return to their country of origin or transit country;
- The admissibility of the alien's entry into the country, including any threat the alien may pose to public order, internal security or public health;
- If required, the alien must have valid travel and health insurance that covers medical expenses arising from illness or injury during the validity of the visa.[9]

The visa specifies, among other things, the period of stay^S– the number of days during which an alien may stay in the Schengen Convention Member States, including Estonia, during the validity of the visa. As a rule, the period of stay specified in the visa is not extended, and the alien must comply with it (VMS § 74).

The general conditions for issuing a temporary residence permit are provided in VMS § 117(1), and the following requirements must be met by the alien applying for a temporary residence permit:

- The purpose for applying for a temporary residence permit in Estonia is justified;
- Actual place of residence in Estonia;
- Sufficient legal income enabling the alien and their family members to cope in Estonia; and
- A health-insurance contract that complies with the requirements set out in VMS § 120.

The general conditions for issuing a visa and a temporary residence permit must be continuously met during the validity period. If it becomes evident that the conditions required for issuing a visa or residence permit are not fulfilled, the basis for stay may be annulled. Upon expiry of the basis for stay, the alien must return to their country of citizenship.

When processing applications for registration of shortterm employment and temporary residence permits for employment, the Police and Border Guard Board (PPA) assesses whether there are grounds to refuse short-term employment registration or the issuance of a temporary residence permit. If the conditions are fulfilled and there is no reason to doubt that the alien will take up residence and employment in Estonia, then there is no basis for refusal.

Whether the alien has actually settled in Estonia and fulfilled their obligations becomes clear mostly during postcontrol carried out within the validity period of the residence permit. During post-control, the PPA checks whether the person has settled in Estonia and whether their activities comply with the conditions of

[9] A shortterm visa may be issued to an alien under the conditions established in the Visa Code (Regulation (EC) No. 810/2009 Article 21(3)), and a longterm visa may be issued under the conditions specified in VMS § 62 (2).

the residence permit. If it appears that the person does not reside in Estonia or does not use the residence permit for its intended purpose, the residence permit will be annulled.[10]

Estonia's residence permit regulation is largely built on post-control: the law often sets only simple, factually measurable conditions for issuing a permit, while relying on the possibility of annulment during post-control.[11] Consequently, it is important for the alien both to meet the conditions for obtaining the basis of stay and, upon arrival in Estonia, to ensure that their obligations remain fulfilled throughout the entire period of stay.

2.2. The primary purpose of stay in Estonia

Employment, within the meaning of the Aliens Act, means any activity in Estonia on the basis of an employment contract or other contract, as well as any other activity for another person from which income or other economic benefit may be expected. The purpose of registering short-term employment and of issuing a temporary residence permit for employment is to enable aliens who contribute to Estonia's economic development to stay and work in Estonia. Thus, the essence and purpose of both bases of stay is the alien's employment.

The Aliens Act establishes the conditions an alien must comply with to fulfil the purpose of the basis of stay.

A temporary residence permit for employment grants an alien the right to stay in Estonia and work for an employer registered in Estonia, under the conditions specified in the residence permit (VMS § 176(2)). The conditions of employment in Estonia are set out in the temporary residence permit. Aliens Act § 185(1) clarifies that the residence permit must specify at least the employer, the place of work and the work position. An alien holding a temporary residence permit for employment is allowed to work in Estonia only under the conditions specified in the residence permit (VMS § 185(3)). Thus, a temporary residence permit for employment is tied to a specific employer.

Additionally, under VMS § 181^2(1), an alien may work for multiple employers at the same time, provided the conditions laid down in the residence permit are followed. Moreover, an alien with a temporary residence permit for employment may take up another position with the same employer, provided the other conditions of the residence permit do not change and the new position requires the same professional and qualification requirements (VMS § 185(4)).

An alien whose employment relationship with the employer specified in the residence permit ends must apply for a new temporary residence permit for employment in order to work for a different employer. The Administrative Court has clarified that a temporary residence permit for employment is employerbased,

[10] Explanatory memorandum to the Act Amending the Aliens Act and the State Fees Act 212 SE, 2012, p. 3.

[11] Ibid., pp. 3–4.

and the employer, the place of employment and the work position are essential conditions for the permit (VMS § 185(1)). Under VMS § 189(1) 2), a temporary residence permit for employment is annulled if a condition specified in the residence permit has changed.[12]

Therefore, an alien must comply with the requirement that the purpose of settling and working in Estonia be justified. The purpose is to come to Estonia to work for a specific company, and this purpose must remain fulfilled until the end of the period of stay – the alien is required to work for that company.

An exception applies to work as a temporary agency worker. An alien who has obtained a residence permit to work as a temporary agency worker may work for a different user undertaking than the one specified in the residence permit, or simultaneously for both the specified user undertaking and another user undertaking, provided that the conditions of the residence permit are followed (VMS § 181^3).

2.3. Qualification requirements

A foreign national coming to work in Estonia must have the qualification, education, state of health, and work experience required for the position, as well as the necessary professional skills and knowledge. This is required both for registering short-term employment in Estonia and for issuing a temporary residence permit for employment (VMS § 106(11) 1) and § 179(1)). The employer assesses the foreign national's suitability for the position and must ensure that the foreign national meets the job requirements. The foreign national is required to prove the circumstances that form the basis for registering short-term employment, issuing a temporary residence permit, and other circumstances relevant to their temporary stay, residence, and employment in Estonia (VMS § 293(1)).

When hiring a foreign national, the employer must also consider that certain positions have mandatory language requirements. The use of Estonian and foreign languages in spoken and written communication, public information, and services is regulated by the Language Act.[13] The requirements for Estonian language proficiency and use for officials, employees, and sole proprietors are established by a regulation of the Government of the Republic. Generally, language requirements apply to positions where the employee provides public services or where Estonian language skills are necessary in the public interest – for example, customer service and sales staff, teachers, and healthcare providers. The employer must ensure that employees who are required to know Estonian at a certain level possess the necessary proficiency. This means the employer must verify that the employee's language skills are sufficient for the relevant job. A foreign national applying for a temporary residence permit for employment who has previously lived in Estonia

[12] Judgment of Tallinn Administrative Court, 13 March 2024, case No. 3231687, section 20.

[13] Language Act. Passed 23 February 2011. RT I, 18.03.2011, 1. Available: https://www.riigiteataja.ee/en/eli/518032025011/consolide [last viewed 14.02.2026].

under a temporary residence permit for at least five years must know Estonian at least at A2 level (VMS § 179(3)).

2.4. Contractual relationship

Different types of contracts may be concluded for performing work. The Employment Contracts Act or the Law of Obligations Act and their conditions apply to employment. An employment contract provides the best protection for the employee, as it grants greater rights than other types of contracts. The presumptions established in the Employment Contracts Act ensure protection for the employees where the parties have not agreed otherwise, and the Act also sets minimum conditions that cannot be made less favourable for the employee.[14]

The VMS does not require an employment contract or binding job offer when applying for a temporary residence permit for employment. Only the employer's confirmation of hiring the foreign national is required (VMS § 179(2)). An exception applies when issuing an EU Blue Card: in this case, the employer must conclude an employment contract valid for at least six months prior to applying for the permit, or make a job offer expressing the intention to be legally bound and to employ the foreign national for at least six months in a position requiring high qualifications (VMS § 190[6]).

In the regulation for registering short-term employment, special rules apply to seasonal workers and temporary agency workers. To register the short-term employment of a seasonal worker, the employer must first conclude a fixed-term employment contract with the foreign national or make a job offer indicating the intention to be legally bound and to employ the foreign national under the conditions specified in the agreement (VMS § 106(10) 2)).

The primary purpose of a foreign national's stay in Estonia is employment, and if their employment contract or other contract or activity that generates income ends, their stay must also end (VMS § 52(1) 9)). Registration of short-term employment ends, among other reasons, if the employer registers the termination of employment in the employment register (VMS § 1091(1)). Additional grounds for revoking a temporary residence permit for employment include: 1) failure to fulfil obligations arising from the Aliens Act or other legislation concerning temporary stay, residence, or employment in Estonia; or 2) a change in conditions specified in the residence permit.

2.5. Sufficient financial means

According to the general conditions for issuing a visa, a visa may be issued if the foreign national has sufficient financial means to cover accommodation and living costs during the stay in Estonia and to return to their country of

[14] Employment Contracts Act. Passed 17 December 2008. RT I 2009, 5, 35. Available: https://www.riigiteataja.ee/en/eli/511022026002/consolide [last viewed 14.02.2026].

origin or transit country (VMS Act § 62(2) 3)). The general condition for issuing a temporary residence permit is sufficient legal income to ensure the subsistence of the foreign national and their family members in Estonia (VMS § 117(1) 3)). Legal income under VMS § 9(1) includes lawfully earned wages, parental benefits, unemployment insurance benefits, income from legal business activity or property, pensions, scholarships, maintenance support, foreign state benefits, and maintenance provided by legally earning family members. The Administrative Court has explained that the purpose of the legal income requirement is to ensure that a foreign national without a fundamental right to reside in Estonia is staying here in line with public interest (VMS § 13(1)). Public interest includes ensuring that a foreign national's stay benefits local people, business, and the broader economic and social system, and that they can support themselves without burdening Estonia's social system.[15] The court has also found that if the foreign national has received subsistence benefits for most of their stay, they burden Estonia's social system.[16]

A foreign national must have sufficient legal income for the entire duration of the residence permit to ensure their and their family members' subsistence. State and local government support payments cannot be considered legal income under VMS § 9. If the foreign national lacks sufficient income during the validity of the residence permit, the purpose of issuing the temporary residence permit is not justified.

2.6. Place of residence in Estonia

Under the Aliens Act, temporary stay means staying in Estonia without a residence permit or right of residence (VMS § 7). Permanent residence means staying in Estonia with a residence permit or right of residence, with Estonia as the main place of residence (VMS § 6). A temporary residence permit is issued for settling in Estonia and residing under the conditions set out in the Act and the residence permit (VMS § 112). A general condition for issuing a temporary residence permit is having an actual place of residence in Estonia (VMS § 117(1) 2)). A temporary residence permit may be revoked if the foreign national has not registered their place of residence in the population register by the deadline (VMS § 135(1) 1)) or lacks an actual place of residence in Estonia (VMS § 135(1) 2)). A prerequisite for issuing a temporary residence permit is the foreign national's intention to settle in Estonia, and the permit is unjustified if the foreign national does not need to live in Estonia or only wishes to visit temporarily.

Seasonal workers from third countries must have a permanent or main place of residence in a third country (VMS § 106(11)). Under VMS § 106(10) 3), short-term employment as a seasonal worker may be registered only if the foreign

[15] Judgment of Tallinn Administrative Court, 13 March 2024, case No. 3231687, section 22.

[16] Ibid., section 20.

national's accommodation during their stay in Estonia is ensured in suitable housing or accommodation facilities.

Accommodation for a seasonal worker may be arranged by or through the employer, in which case stricter requirements apply. The cost of accommodation must not be excessive or disproportionate compared to the worker's monthly wage, and it cannot be deducted from the employee's wages (VMS § 106(12)).

If the foreign national's short-term employment as a seasonal worker is registered and accommodation is arranged by or through the employer, the employer must notify the PPA of any changes to the accommodation location and conditions (VMS § 285(11)). If accommodation is not provided by the employer, the foreign national must notify the PPA of any changes. Seasonal workers must provide proof that they have accommodation ensuring adequate living conditions according to national rules and/or practices.

Conclusions

Estonia's migration policy focuses primarily on recruiting highly qualified labour to address labour shortages. Lower-qualified workers are generally offered temporary employment opportunities followed by return migration. Third-country nationals have several legal pathways to work in Estonia, each with different conditions.

The regulation of short-term employment is relatively flexible and includes exceptions that facilitate temporary work, such as for seasonal workers, top specialists, agency workers, and posted workers. No permission from the Estonian Unemployment Insurance Fund is required, and the immigration quota does not apply. The regulation is an effective way to meet short-term labour needs, especially for skilled labour.

In contrast, temporary residence permits for employment are intended for longer-term employment and residence. Applicants have broader social rights than short-term workers. The number of foreign nationals settling in Estonia with residence permits is limited by the immigration quota, and the Unemployment Insurance Fund evaluates the necessity based on labour market conditions.

Estonia's regulations aim to ensure that foreign nationals' arrival, stay, residence, and departure are consistent with public interest and security. Foreign nationals must comply with Estonian laws, values, and the constitutional order. Their rights are equal to those of Estonian citizens unless otherwise provided by law.

The conditions set for foreign workers do not hinder employment but support a structured and controlled labour market. The legal framework is flexible and offers multiple avenues for employment, without imposing unreasonable burdens on employers.

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Maarja Torga, *Dr. iur.*
The Estonian Supreme Court, Counsel to the Civil Chamber, Estonia

Inga Kacevska, *Dr. iur., Associate Professor*
University of Latvia, Latvia

Aleksandrs Fillers, *Dr. iur., Associate Professor,*
Riga Graduate School of Law, Latvia

CHALLENGES IN APPLYING THE BRUSSELS I BIS REGULATION IN ESTONIA AND LATVIA

Key words: Brussels I bis regulation, prorogation of jurisdiction, domicile, substantive validity of the agreement conferring jurisdiction

Summary

The article examines how the Brussels I bis regulation[1] has been interpreted and applied in Estonian and Latvian courts during the last ten years, offering a comparative overview of the most significant judgments from both jurisdictions dealing with the interplay between the Brussels I bis regulation and national procedural rules complementing the application of this regulation. Through analysing the challenges that the application of the Brussels I bis regulation has brought about in the two Member States for both the national legislators who have to ensure the smooth performance of the ensemble of different private international law instruments and for the courts, the article aims to draw attention to the benefits of a closer academic and judicial cooperation between the two Baltic countries.

Introduction

The year 2025 marked the 10th year anniversary of the application of the Brussels I bis regulation in the European Union.[2] The Brussels I bis regulation serves as a cornerstone of the European system of private international law and is

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). OJ L 351, 20.12.2012, pp. 1–32.

[2] See Art. 81 of the Brussels I bis regulation.

one of the most commonly applied private international law regulations in Latvian and Estonian courts,[3] however, its practical implementation still poses challenges in these two Baltic countries. As the number of international cases continues to rise and the world becomes more complicated with each new societal trend, innovation, and smart device, the cases involving the Brussels I bis regulation become more numerous and complicated. In order to avoid making the same mistakes when interpreting and applying the Brussels I bis regulation in two relatively similar Member States, it is worth looking at how similar problems have been dealt with in Estonia and Latvia.

As the total case law on the Brussels I bis regulation has continued to rise in Estonia and Latvia, both countries' Supreme Courts have given their opinions on how to interpret the Brussels I regulation and its references to national law scattered throughout its various provisions. The two Baltic states have traditionally not been at the forefront of asking the CJEU for preliminary rulings, but it is clear from looking at the case law on the Brussels I bis regulation that there is a trend of the Baltic Supreme Courts facing more complicated disputes, and this complicity might necessitate more frequent requests to the CJEU in the future. So far, the Estonian Supreme Court has asked the CJEU to give a preliminary ruling on the Brussels I instruments twice,[4] while the Latvian Supreme Court has asked for four preliminary rulings about the older Brussels I regulation,[5] but has yet to have an opportunity to ask anything about the Brussels I bis regulation.[6] The authors intend to give an overview of the cases concerning the Brussels I bis regulation that have reached the two countries' Supreme Courts with the focus on those dealing with the interplay between the regulation and national law. These cases are categorized into three thematic clusters: the Estonian and Latvian Supreme Courts' case law (1) on the agreements conferring jurisdiction; (2) on determining natural person's domicile; and (3) on the court's general obligation to determine jurisdiction.

By examining the challenges that different natural rules, procedural traditions and interpretative approaches pose when applying the Brussels I bis

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[3] It is difficult to estimate the exact number of cases in which the Brussels I bis regulation has been applied in the Baltic courts, but a simple search in the public case law databases demonstrates that the number of judgments where the regulation has been at least mentioned easily reaches hundreds. This is a significant number of judgments considering that both Estonia and Latvia are relatively small jurisdictions. The Estonian courts' case law is publicly available at: www.riigiteataja.ee (Kohtuteave – Kohtulahendite otsing). The Latvian courts' case law is publicly available at: https://www.elieta.lv/web/#/pakalpojumi/anonimizetie-nolemumi [last viewed 01.02.2026].

[4] See the Judgment of the Estonian Supreme Court's case No 2-23-14994 of 5 June 2024. Available in Estonian: https://rikos.rik.ee/LahendiOtsingEriVaade?asjaNr=2-23-14994/20 [last viewed 01.02.2026] and the Judgment of the Estonian Supreme Court's case No 3-2-1-2-16 of 23 March 2016. Available in Estonian: https://www.riigikohus.ee/et/lahendid/?asjaNr=3-2-1-2-16 [last viewed 01.02.2026].

[5] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.01.2001, pp. 1–23.

[6] A list of preliminary rulings asked by Latvian courts. Available: https://www.at.gov.lv/lv/tiesu-prakse/dialogs-ar-eiropas-savienibas-tiesu/pec-tiesibu-jomas [last viewed 01.02.2026].

regulation by Estonian and Latvian Supreme Courts, the article aims to contribute to a better understanding of the operation of the European private international law regulations in the Baltic region. The authors also seek to identify areas where further clarification of a dialogue between the national legislator and courts on one hand and the national courts and the CJEU on the other would be necessary to enhance the uniform application of the Brussels I bis regulation in the Baltic region.

1. The agreements conferring jurisdiction and their substantive validity within the meaning of Brussels I bis regulation Art. 25

There is no better case to start the discussion about the interplay between Estonian and Latvian national rules and the Brussels I bis regulation than the Pome case,[7] which includes the most recent request for a preliminary ruling from the Estonian Supreme Court.

In the Pome case two natural persons, a woman and a man, had brought an apartment as co-owners in Portugal. The parties had agreed that the woman would transfer her half of the apartment to the man and the man would in turn acknowledge a debt to the woman for receiving half of the apartment, including that the woman had contributed 150 000 euro to the acquisition and renovation of the apartment. The parties had concluded a choice of court agreement submitting all possible disputes between them and related to their agreement to the Harju County Court (Estonia). The woman later decided to sue the man in Harju County Court for the sums she thought were owed to her under the agreement.

The Harju County Court and later the Tallinn Circuit Court refused to proceed with the woman's claim due to the lack of jurisdiction pursuant to Art. 25(1) of the Brussels I bis regulation in conjunction with sections 104(1) and 106(1)(1) of the Estonian Code of Civil Procedure (Estonian CCP).[8] According to the first sentence of Art. 25(1) of the Brussels I bis regulation:

> *if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State.*

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[7] See: CJEU judgment of 30 October 2025 in case No. C-398/24 Pome. See also the Judgment of the Estonian Supreme Court's case No. 2-23-14994 of 5 June 2024 requesting the preliminary ruling. Available in Estonian: https://rikos.rik.ee/LahendiOtsingEriVaade?asjaNr=2-23-14994/20 [last viewed 01.02.2026].

[8] Tsiviilkohtumenetluse seadustik [Estonian Code of Civil Procedure]. RT I 2005, 26, 197; RT I, 03.04.2025, 1. Available in Estonian: https://www.riigiteataja.ee/akt/103042025002 [last viewed 01.02.2026].

According to sections 104(1) and 106(1)(1) of the Estonian CCP the agreements conferring jurisdiction are considered invalid, unless the dispute relates to the economic or professional activities of both parties or unless the contract relates to the economic or professional activities of one party and the other party to such jurisdiction agreement is the state, local government unit or another public legal person, or if both parties are public legal persons, such as a public university or the National Library of Estonia. In the Pome case the parties to a jurisdiction agreement were two natural persons who did not act in their professional capacity, which led the Estonian lower courts to decline jurisdiction under the abovementioned national procedural rules.

The case reached the Estonian Supreme Court, which decided to ask for a preliminary ruling from the CJEU. The Estonian Supreme wanted to know if the Estonian national rules, according to which an agreement conferring jurisdiction entered into by two natural persons was valid only if the dispute at issue was connected with the economic or professional activities of those parties, amounted to a ground for the agreement being "null and void as to its substantive validity", within the meaning of Art. 25(1) of the Brussels I bis regulation.

The CJEU in the Pome case found that the concept of "null and void as to its substantive validity" as used in Art. 25(1) of the Brussels I bis regulation in so far as the concept refers to conditions of validity, covers the general grounds for an agreement being null and void that may have an impact on a contractual relationship, in particular, those which vitiate consent, such as error, deceit, violence or fraud, and incapacity to contract, grounds which are laid down by the law of the Member State whose courts are designated.[9]

This marks the beginning of a change in Estonian case law on the interaction between Estonian national civil procedure rules and Art. 25(1) of the Brussels I bis regulation.[10] Before the Pome case, the previous case law of the Supreme Court had not seen a problem in applying national law, sections 104(1) and 106(1)(1) of the Estonian CCP, in the context of jurisdiction agreements concluded in the framework of the Brussels I instruments.[11] Even though the previous Supreme Court's case law concerned the application of the earlier Brussels instruments' articles on jurisdiction agreements concluded with consumers which equivalence in the Brussels I bis regulation is Art. 19(3) and which explicitly makes a reference to the "law of the Member State" when assessing the requirements for such jurisdiction agreements, the presumption was that national rules could

[9] Pome case, para. 32.

[10] For an earlier view on the same problem, see: Veeret A. Euroopa Liikmesriigi kohtu padevus rahvusvaheliste kohtualluvuse kokkulepete tunnustamisel Brusseli I maaruse 44/2001 kontekstis [The jurisdiction of the EU courts when giving force to international juridiction agreements in the context of the Brussels I 44/2001 regulation]. Tartu Ulikool 2009, p. 55.

[11] Judgment of the Estonian Supreme Court No 3-2-1-40-14 of 11 June 2014, paras. 11–12. Available in Estonian: https://www.riigikohus.ee/et/lahendid/marksonastik?asjaNr=3-2-1-40-14 [last viewed 01.02.2026], Judgment of the Estonian Supreme Court No 3-2-1-123-12 of 21 November 2012. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-2-1-123-12 [last viewed 01.02.2026].

also be used when determining the validity of other jurisdiction agreements, not just the ones concluded with consumers. This presumption explains why, in the national proceedings preceding the Pome judgment by the CJEU, Estonian courts of first and second instances declined jurisdiction with reference to sections 104(1) and 106(1)(1) of the Estonian CCP.

After Pome case Estonian courts cannot have any doubt that national procedural rules limiting the validity of jurisdiction agreements are not applicable in the framework of the Brussels I bis regulation. Such national rules, namely sections 104(1) and 106(1)(1), as well as sections 106(1)(2)–(5) of the Estonian CCOP, provide a wide range of grounds for the invalidity of jurisdiction agreements. For example, section § 106(1)(5) of the CCP states that a jurisdiction agreement is invalid, if it deprives someone in bad faith of the protection of Estonian courts. These national limitations are irrelevant when the jurisdiction agreement falls under the scheme of Brussels I bis regulation. The Estonian legislator will have to decide how relevant these provisions remain for cases where the regulation is not applicable and for determining domestic jurisdiction. It can be presumed that two starkly different, concurrently applicable regimes in one Member State bring no benefits to the Member State itself or the parties to the jurisdiction agreements.

In Latvia, section 30(1) of the Civil Procedure Law (Latvian CPL) provides:

> *[u]pon entering into a contract, the contracting parties may determine the court of first instance where potential disputes regarding such a contract or its performance shall be decided.*[12]

The section 30(2) of the Latvian CPL adds:

> *[e]xclusive jurisdiction specified in law may not be altered by a mutual agreement between the parties.*

These provisions are narrower than the Brussels I bis regulation as they permit a choice of court only in contractual disputes, while the Brussels I bis regulation allows such agreements in all types of disputes that are subject to the Regulation[13] unless they are subject to exclusive jurisdiction or provisions protecting the weaker parties.[14] Indirectly, the Pome case shows that Art. 25 of the Brussels I bis regulation prevails over the Latvian CPL; hence, a Latvian court cannot refuse to hear the case if the parties to a cross-border dispute have chosen Latvia in a dispute arising from, for example, a tort. Even though section 30(1) does not authorize a choice of court in tort cases.

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[12] Latvian Civil Procedure Law. Latvijas Vestnesis, 326/330, 03.11.1998; 14.10.1998. Available in English: https://likumi.lv/ta/en/en/id/50500-civil-procedure-law [last viewed 01.02.2026].

[13] Cf. Magnus U. Article 25. In: Magnus U., Mankowski P. (eds.). European Commentaries on Private International Law: Commentary. Volume I: Brussels Ibis Regulation. Koeln: Otto Schmidt, 2023, p. 595; Garcimartin F. Prorogation of Jurisdiction. In: Dickinson A., Lein E. (eds.). The Brussels I Regulation Recast. Oxford: Oxford University Press, 2015, pp. 302–303.

[14] See: Art. 25(4) of the Brussels I bis regulation.

The narrower scope of section 30(1) of the Latvian CPL remains relevant only when the Brussels I bis regulation is not applicable. For instance, when, in a purely domestic case, Latvian parties choose a venue among Latvian courts without specifying a single court. International contractual disputes that would escape the substantive scope of the Brussels I bis regulation, are harder to imagine. For instance, two Estonian parties, in a purely Estonian dispute, choose a Latvian court to resolve the dispute, such an agreement will be subject to Art. 25(1) of the Brussels I bis regulation and not to section 30 of the CPL in Latvian courts. This principle derives from what the CJEU explained in the Inkreal case.[15]

Unlike its Estonian counterpart, Section 30 of the Latvian CPL does not restrict the right to conclude a choice of court agreement to specific groups of persons. Hence, the Pome has no direct effect on Latvian legislation. However, the Estonian experience should warn the Latvian legislator to carefully consider the scope and aim of the rules of the Brussels I bis regulation before enacting domestic, complementary rules in the areas that fall under the scope of the regulation. This applies not only to jurisdiction agreements, but also to other areas of civil procedure law, as illustrated by the following cases concerning determination of the domicile of natural persons under the Brussels I bis regulation.

2. Determining national person's domicile under the Brussels I bis regulation

On 10 July 2024, the Senate of the Latvian Supreme Court delivered a judgment addressing several key issues concerning the relationship between the Brussels I bis Regulation and Latvian national law.[16]

In this case, the claimant, a Latvian company GelvoraSergel, had acquired a claim via assignment that it later sought to enforce against a natural person A in Latvian courts via simplified procedure. The Latvian courts of first and second instances declined jurisdiction because, while the claimant had indicated in his claim form of 8 February 2024 that the defendant's place of residence was in Latvia, the Personal Data Browser[17] showed that the defendant's declared address had been abroad since 10 March 2024. The first instance court had previously left the statement of claim without further consideration until 11 March 2024 to allow for the deficiencies to be remedied, which the claimant did by 8 March (that is, two days before the defendant's declared address changed in the Personal Data Browser).

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[15] For the CJEU judgment of 8 February 2024 in case No. C-566/22 Inkreal, para. 39.

[16] Judgment of the Civil Law Department of the Senate of the Supreme Court of Latvia of 10 July 2024 in case No. SKC-704/2024. Available in Latvian: https://www.at.gov.lv/downloadlawfile/10399 [last viewed 01.02.2026].

[17] The Personal Data Browser is the electronic tool that the Latvian courts use to check a person's registered address in the Latvian population registry.

The case reached the Supreme Court and presented various questions that the Supreme Court had to consider in its ruling. The first of these was the question how to determine the defendant's domicile in the context of the Brussels I bis regulation. The claimant indicated that the defendant's place of residence was in Latvia, but the Personal Data Browser showed that the defendant's declared address was abroad. In order to answer that question, the Supreme Court referred to national law, the Declaration of Place of Residence Law (Latvian DPRL),[18] since Art. 62(1) of the Brussels I bis regulation provides that:

> *In order to determine whether a party is domiciled in the Member State whose courts are seized of a matter, the court shall apply its internal law.*

The Supreme Court's position can be criticised. The purpose of the Latvian DPRL is to ensure that every person is reachable for official communication with the state or local government (Art. 1); therefore, each person has an obligation to declare his or her place of residence (Art. 2). Latvian legal literature has stressed that even though the Latvian DPRL defines the notion of "place of residence", this concept, by its legal nature and purpose, is more fitted to the internal situations in Latvia and should thus not be applied [solely] in the context of European international civil procedure.[19] Instead, the general rule contained in Art. 7 of the Civil Law (Latvian CL)[20] would be a more appropriate reference in cases involving the determination of the "domicile" of a natural person within the meaning of the Brussels I bis regulation. According to Art. 7 of the Latvian CL:

> *Place of residence (domicile) is that place where a person is voluntarily dwelling with the express or implied intent to permanently live or work there. A person may also have more than one place of residence. Temporary residence does not create legal consequences of a place of residence and shall be adjudged not on the basis of duration, but in accordance with intent.*

Therefore, a court that needs to determine, if a person's domicile is in Latvia within the meaning of the Brussels I bis regulation and Art. 7 of the Latvian CL should interpret the intent of the person and the declared (registered) address does not always show that intent. Legal literature suggests that to prove the relevant intent, many criteria should be considered, including the extensive range of evidentiary elements, which should be considered as a whole. For example, visas or permanent residence permits in the country, tax residence status, and the existence

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[18] Declaration of Place of Residence Law. Available: https://likumi.lv/ta/en/en/id/64328-declaration-of-place-of-residence-law [last viewed 01.02.2026].

[19] Kacevska I., Rudevska B., Buka A., Dambergs M., Fillers A. Recommendations and Guidelines: Effective adoption, transposition, implementation and application of European Union legislation in the area of civil justice (Latvia, Hungary, Germany, Sweden and the United Kingdom). EU, Ministry of Justice of Republic of Latvia, Law office of Inga Kacevska, 2015, p. 26. Available: https://ppdb.mk.gov.lv/wp-content/uploads/2023/05/TM_Effective_adoption_transpos_implement_and_application_of_EU_legislat_in_the_area_of_civil_justice_Guidelines.pdf [last viewed 01.02.2026].

[20] Civil Law. Available: https://likumi.lv/ta/en/en/id/225418-civil-law [last viewed 01.02.2026].

or absence of registrable assets in the country should be considered to determine a person's intent to reside in a country.[21]

The GelvoraSergel case is yet another illustration of the interplay between national and European rules. While the Estonian legislator has similarly to the Latvian one enacted special rules on determining a person's residence,[22] there has been a long-standing understanding in Estonian legal literature that national law can be used in this context only as complementary to the Brussels I bis regulation Art. 62(1) and therefore only for determining a natural person's domicile in Estonia.[23] The rules themselves are similar to the solution proposed in this article for Latvia. For example, under Estonian national rules, it is not possible to rely solely on data from the Population Registry when determining a person's residence ("domicile" pursuant to the terminology of the Brussels I bis regulation), as the registry has only informative and statistical significance.[24] However, according to the Estonian Supreme Court, a change of address in the registry, initiated by a natural person, can serve as proof of intent to change one's domicile.[25]

3. Determining jurisdiction *ex officio*

The *GelvoraSergel* case is remarkable also for another reason. Although the Brussels I bis regulation did not apply in this case, as the court found the lack of a cross-border element since the defendant was not domiciled abroad, the Latvian Supreme Court considered it necessary to explain the operation of Latvian procedural rules when dealing with the examination of jurisdiction under the Brussels I bis regulation.

The Latvian Supreme Court explained that in the context of the Brussels I bis regulation, the court must first determine whether the rules on exclusive jurisdiction of Art. 24 of the Brussels I bis regulation apply; if so, the court declares

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[21] See: Zaula S., Aljens M., Liepa L. Labirinta izeju meklejot – pastavigas dzivesvietas noteiksana Mantosanas regulas izpratne [Finding the way out of the maze – determining habitual residence for the purposes of the Succession Regulation]. Jurista Vards, No. 17 (1335), 23.04.2024, pp. 27–32.

[22] See sections 14–15 of the General Part of the Civil Code Act: Tsiviilseadustiku uldosa seadus. RT I, 31.12.2024, 48; RT I, 31.12.2024, 5. Available in Estonian: https://www.riigiteataja.ee/akt/131122024048 [last viewed 01.02.2026].

[23] Torga M. Elukoht tsiviilseadustiku uldosa seaduses: tähendus rahvusvahelises tsiviilkohtumenetluses [Place of residence in the general part of the civil code: its relevance in international civil procedure]. Juridica, No. 7, 2010, pp. 473–480. Available in Estonian: https://www.juridica.ee/article.php?uri=2010_7_elukoht_tsiviilseadustiku_ldosa_seaduses_t_hendus_rahvusvahelises_tsiviilkohtumenetluses [last viewed 01.02.2026].

[24] This can be derived from the fact that the rules determining residence, Arts. 14–15 of the General Part of the Civil Code, do not make a reference to the population registry. This is the prevailing view also in Estonian legal literature: Varul P. et al. Tsiviilseadustiku uldosa seadus [The general part of the civil code act]. Juura, 2023, § 14, para. 3.2.1.

[25] See para. 9 of the Judgment of the Estonian Supreme Court No. 3-2-1-123-12 of 21 November 2012. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-2-1-123-12 [last viewed 01.02.2026].

of its own motion that it has no jurisdiction. In turn, it follows from Art. 28 of the Brussels I bis regulation in conjunction with Art. 26 Brussels I bis that in other cases (where the rules on exclusive jurisdiction do not apply), the court must initiate the proceedings and send the statement of claim to the defendant. If the defendant is domiciled in another EU Member State, the court must ensure that the defendant has received the documents and that they are sent in sufficient time so that he or she can defend himself or herself. It follows from Art. 26 of the regulation that the defendant (also a consumer) may choose to accept the jurisdiction chosen by the claimant or to object to it. If the defendant is a consumer within the meaning of Art. 17 of the Brussels I bis regulation, then, in accordance with Art. 26(2), the court shall also ensure, before accepting jurisdiction, that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of appearing or not appearing in court.

Similarly, the Estonian Supreme Court has drawn attention to the court's obligation, when applying the Brussels I bis regulation, to inform certain defendants of the proceedings and ask if they have any opinion as to the court's jurisdiction.[26] This *ex officio* obligation can be derived from Art. 26(2) of the Brussels I bis regulation for defendants who are policyholders, insured, beneficiaries of the insurance contract, injured parties, consumers, or employees. In all other cases, the general provisions contained in the national law on determining jurisdiction should be applied. In the case of Estonia, these rules are contained in Art. 75(1) of the Estonian CCP, which states:

> *Estonian courts that receive the claim must verify whether, under the rules of international jurisdiction, the application can be submitted to the Estonian court.*

While this rule, contrary to Art. 26(2) of the Brussels I bis regulation does not require the court to ask the opinion of the defendant, it still provides an *ex officio* obligation for the court to determine jurisdiction. However, if the jurisdiction is to be determined only under national rules, the Estonian court would not have the obligation to ask what the defendant thinks of jurisdiction, although the court can do so, if it deems it necessary (CCP arts 75(3) and 372(3)). The Supreme Court's clarification that in the case of defendant's referred to in Art. 26(2) of the Brussels I bis regulation, informing such defendants before declining jurisdiction is welcome, as it helps to clarify the interplay between the regulation and national rules.

[26] See para. 11 of the Judgment of the Estonian Supreme Court No. 3-2-1-123-12 of 21 November 2012. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-2-1-123-12 [last viewed 01.02.2026].

Conclusions

As illustrated by the case law of the Estonian and Latvian Supreme Courts, the interplay between the Brussels I bis regulation and national rules of procedure and substantive law remains a dynamic, and at times challenging, area for both jurisdictions. While the supremacy of EU law, including the Brussels I bis regulation, cannot be doubted, there remain areas where the reference to national law has posed various questions for Baltic courts.

Simultaneously, the case law of the Estonian and Latvian Supreme Courts illustrates the convergence of the two legal systems in areas that have implications for EU regulations. This is further supported by the CJEU in cases where the reference has been made to the CJEU by the Estonian or Latvian Supreme Courts. In order to secure further uniformity in the application of the Brussels I bis regulation in the two neighbouring countries in the future, it is worth keeping up to date on the challenges that each Supreme Court faces when determining the limits of national law as a complement to the regulation.

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Carri Ginter, *Associate Professor*
University of Tartu, Estonia[1]

Katrine Plavina-Mika, *LL.M. (Georgetown),*
University of Latvia, Latvia

APPLYING EU LAW IN PRE-ACCESSION JUDGMENTS IN ESTONIA AND LATVIA

Key words: accession to the European Union, Europe Agreement, constitutional courts, Estonia, Latvia

Summary

This article examines whether, and in what ways, the highest Latvian and Estonian courts applied European Union (EU) law prior to their states' accession on 1 May 2004. Three questions are explored here: (i) did the courts apply EU law before accession; (ii) what reasoning and legal methods enabled application; and (iii) do the relevant judgments reveal judicial activism.

Methodologically, the contribution compares all judgments of the national courts of final instance adopted between 1994 and 1 May 2004. For Latvia, this includes the Civil Law Department of the Supreme Court and the Constitutional Court (established in 1996). For Estonia, the analysis focuses on the Supreme Court (*Riigikohus*) which combines final appellate jurisdiction (since 1919) and constitutional review (since 1993).

The authors of the current article find that the Estonian material demonstrates an unusually early and constitutionally anchored openness to EU law. In 1994, the Supreme Court's Constitutional Review Panel (case No. III-4/A-5/94) interpreted Article 10 of the Estonian Constitution – an "open clause" recognising rights and principles deriving from the spirit of the Constitution and international law – to encompass general principles developed within European legal orders. This reasoning allowed the Court to discover general principles of EU law such as proportionality, legitimate expectations, and legal certainty in the Estonian legal system a decade before accession.

By 2003, the Estonian Supreme Court treated the Europe Agreement as functionally equivalent to EU Treaty obligations regarding the internal market. In case No. 3-3-1-68-03, it mirrored the freedom of establishment to criticise lower courts for excluding a branch of a company registered in the EU from public procurement. The Estonian Supreme Court also used the EU Charter of Fundamental Rights as persuasive authority in several 2003–2004 cases, drawing

[1] At the time of preparation of this article.

upon its codification of EU general principles of law to secure fair administrative procedure, the *lex mitior* principle, and minimum living standards, notwithstanding the Charter's non-binding status at the time.

The authors find that Latvia followed a different trajectory shaped by constitutional continuity and the later creation of a specialised constitutional court. The reinstated *Satversme* (1922) and the delayed establishment of the Latvian Constitutional Court meant that a debate on EU-law methods emerged later. Early case law tried using comparative reasoning but a dissent in case No. 2000-03-01 urged fuller effect to Europe Agreement obligations. A clearer shift occurred by 2003, when the Latvian Constitutional Court began to treat EU-related norms as part of Latvia's applicable legal framework via the Europe Agreement. In case No. 2003-08-01, it interpreted national rules on legal representation in light of EU law and free movement obligations, effectively identifying a de facto incompatibility with integration commitments and annulling the contested rules. In case No. 2002-18-01, the Court articulated its methodology, invoking association obligations and EU standards to critique and blanket ban on prisoner voting.

Thus, by 2003, both the Estonian Supreme Court and the Latvian Constitutional Court employed a monistic approach towards EU law, treating relevant EU norms and principles as part of the applicable legal framework. The categorical refusal to apply EU law to cases, where facts occurred before accession, by the Latvian Supreme Court is a contrasting example. That shines a light on the importance of institutional culture and constitutional jurisdiction in shaping judicial openness to EU law to help the new Member States succeed at EU integration.

Introduction

Latvia and Estonia joined the European Union (EU) only 23 years after renewing their independence. That meant transforming their national legal orders from soviet to European ones. Researchers have focused on the mechanics of these transformations, e.g. the constitutional clauses and referenda, which enabled delegation of state powers to the EU. However, the transformation of the legal method required for alignment of the national legal systems with the EU legal order has not been studied enough.

The objective of this contribution is to verify, whether the Latvian and Estonian courts applied EU law before accession. If such instances can be recognised, the authors aim to describe the courts' reasoning and legal methods for doing so and determine, whether the legal methods in Latvia and Estonia aligned or whether a differentiated approaches bring faster integration.

The authors of the current article reach these objectives by comparing all judgments from the national courts of final instance, which refer to sources of European Union law. In Latvia these are the Civil Law Department of the Latvian Supreme Court (*Latvijas Augstakas tiesas Senata Civillietu departaments*) and the Constitutional Court (*Satversmes tiesa*). In Estonian that is the Supreme Court (*Riigikohus*). The authors here compare the judgments adopted between 1994 and 1 May 2004 irrespective of the time the facts of the case heard took place.

For the sake of clarity, let us explain that the Latvian Supreme Court has the departments – Civil, Criminal and Administrative, since 2004 and they

each act as the last instance for appeals on points of law from the corresponding branches of the judiciary. The Supreme Court was established in The Latvian Constitutional Court was established in 1918 and its operations renewed in 1991 shortly after Latvia regained its independence. The Latvian Constitutional Court was established only in 1996 and there were options for constitutional review in Latvia before that.

The Supreme Court of Estonia was established in 1919 and its operations renewed in 1992. It houses several chambers – Civil, Administrative, Criminal and Constitutional Review Chambers. So, the Supreme Court of Estonia comprises all final instances of judicial review in Estonia.

1. Application of EU law by the Estonian Supreme Court

This comparative study was inspired by the PhD thesis of one of the authors – Assoc. Prof. Ginter, studied how the Supreme Court of Estonia applied EU law even before Estonia acceded to the EU in 2004. His goal was to see if the Supreme Court of Estonia already acted like a European court. In the thesis, he concluded that long before accession, Estonia's Supreme Court thought in EU law terms.[2]

The Estonian Constitution currently in force was adopted in 1992. As it naturally did not contain any provisions regarding the EU, a separate Amendment Act was approved by a referendum in 2003 to facilitate accession into the EU. The authors are of the view that the purpose of the Amendment act was not defensive but a requirement to interpret Estonian law in harmony with EU obligations.

1.1. 1994: Early use of principles of EU law

In 1994, the Constitutional Review Panel of the Supreme Court of Estonia announced the judgment in case No. III-4/A-5/94.[3] The case was referred to it by the Tallinn Administrative Court in a case, where a farmer claimed a tax exemption for a loan. The Constitutional Review Panel of the Estonian Supreme Court interpreted Article 10 of the Estonian Constitution to include general principles of EU law.

Article 10 of the Estonian Constitution states that it also protects the rights, freedoms and principles not listed in the Constitution but deriving from the spirit of the Constitution and from international law. Therefore, there is no *numerus clausus* for fundamental rights. Such an open clause is unique in Central and Eastern Europe and is not written in the Latvian Constitution (*Satversme*).

[2] Ginter C. Application of Principles of European Law in the Supreme Court of Estonia. Tartu: Dissertationes iuridicae Universitatis Tartuensis, 2008.

[3] Judgment of the Constitutional Review Panel of the Estonian Supreme Court of 30 September 1994 in case No. III-4/A-5/94. Available: https://www.riigikohus.ee/en/constitutional-judgment-iii-4a-594 [last viewed 12.08.2026].

The interpretation of Article 10 of the Estonian Constitution in this case allowed the Supreme Court to import general principles of EU law – like proportionality, legitimate expectations, and legal certainty – into the Estonian legal order even before accession. Article 10 became the bridge between Estonia's national identity and the European legal order.

In our view, the problem the Constitutional Review Chamber of the Supreme Court tried to solve was the clarification of the general principles of law the renewed Estonian state was based on. Estonia needed to define the legal values to align with the European legal culture. Therefore, using the open door in the Article 10 of the Estonian Constitution, the Court declared that general principles of law developed within the Council of Europe and the EU were part of Estonia's constitutional order. This showed voluntary alignment with European law a decade before EU membership.[4]

1.2. 2003: The Europe Agreement works like an EU Treaty

In 2003, almost 10 years after the first ruling on EU law, the Supreme Court of Estonia passed a judgment in case No. 3-3-1-68-03[5] dissenting from the lower ranking courts. A branch of a British company in Estonian (Oracle East Central Europe Ltd) was denied access to public procurement because a branch was not a "legal entity" under the Estonian Commercial Law.

The Supreme Court held that many legislative acts provide for the independent right of transactions and operating for the branches, consequently, the judgment of the circuit court was precipitate and contrary to the EU principles. The Supreme Court of Estonia invoked Article 43(2) of the Europe Agreement[6] to guarantee equal treatment of EU companies, mirroring Article 43 of the Treaty establishing the European Community[7] (freedom of establishment). The Supreme Court returned the matter back to the circuit court for review.

Here, the Estonian Supreme Court treated the Europe Agreement as if it were the EU Treaty itself – achieving functional equivalence with EU internal market law.[8]

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4 Ginter C. Application of Principles of European Law in the Supreme Court of Estonia. Tartu: Dissertationes iuridicae Universitatis Tartuensis, 2008.

5 Judgment of the Supreme Court of Estonia of 30 October 2003 in case No. 3-3-1-68-03.

6 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part, OJ L 68, 09.03.1998, p. 3.

7 Treaty establishing the European Community, OJ C 325, 24.12.2002, p. 33.

8 Ginter C. Application of Principles of European Law in the Supreme Court of Estonia. Tartu: Dissertationes iuridicae Universitatis Tartuensis, 2008, p. 14.

1.3. 2003 and 2004: The EU Charter used before it was binding

With accession to the EU imminent, the Supreme Court of Estonia became part of the integration process. In cases No. 3-4-1-1-03[9], No. 3-1-3-10-02[10] and No. 3-4-1-7-03[11] in 2003 and 2004 it had to deal with several issues of human rights that had been previously solved in the European courts. The methodological problem here was that Estonia lacked a clear fundamental rights doctrine during the legal transition towards the EU.

In these cases, the Supreme Court cited the Charter of Fundamental Rights of the European Union[12] as moral and legal guidance, even though it was not binding yet. It used the general principles of EU law codified in the Charter to uphold the applicant's right to a fair administrative procedure, enforced *lex mitior* principle and upheld basic living standards. It used a comparative approach to identify and concretise general principles of Estonian law, which were identical to those codified in the Charter, to solve a case in the circumstance where a stable content and method for concertising general principles of law was lacking. So, the authors of the current article conclude that the Court gave the Charter real legal influence six years before it was finally adopted.

2. Application of EU law by the Latvian Constitutional Court

As opposed to Estonia, Latvia did not draft a new constitution after regaining independence and reinstated the Satversme adopted in 1922 to ensure state continuity. That lead to a long debate on how to effectively safeguard contemporary human rights, a need for a Constitutional Court and respective amendments to the Satversme until 1996. Latvia also chose to amend the Constitution to accommodate accession to the EU in 2003 via a referendum. However, even at the time the debate about the place of EU law in the Latvian legal order or methods of interpreting it only began to take shape.

The first Minister of Defence of Latvia after regaining independence, Talavs Jundzis, explained that accession to the European Union was one of the paths to guarantee independence and security of Latvia.[13] The first judge appointed by Latvia to the Court of Justice of the EU, Egils Levits, Ph.D., observed that

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[9] Judgment of the Plenary (en banc) of the Estonian Supreme Court of 17 February 2003 in No. 3-4-1-1-03.

[10] Judgment of the Plenary (en banc) of the Estonian Supreme Court of 17 March 2003 in No. 3-1-3-10-02.

[11] Judgment of the Plenary (en banc) of the Estonian Supreme Court of 21 January 2004 in No. 3-4-1-7-03.

[12] Charter of Fundamental Rights of the European Union, OJ C 202, 07.06.2016, p. 389.

[13] Jundzis T. (ed.). The Baltic States at Historical Crossroads. Political, economical, and legal problems and opportunities in the context of international co-operation at the beginning of 21st century. A collection of articles. Second revisited and expanded version. Riga: Latvian Academy of Science, 1998/2001, p. 124.

the process of Latvia's legal transformation coincided with integration into the EU. Therefore, the legal order had to make a leap from a socialist system to a democratic order based on a rule of law and even further to a legal order of a Member State of the European Union.[14] Before the accession, the first Chairperson of the Latvian Constitutional Court, Dr. iur. Aivars Endzins, was the first to note that accession to the EU is more than aligning the texts of applicable laws with those of the EU. It entailed embracing Western legal theory and legal reasoning to facilitate a single European legal culture.[15] So, the Latvian Constitutional eventually led the way to European integration of the legal order but by taking a different path than the Estonian Supreme Court.

2.1. 1999–2002: Warming up

During the first years of the Constitutional Court's operations, European integration was not an issue. Its first task was to review simple cases and contribute to implementing human rights in Latvia. Even though there was a human rights catalogue before, its widespread application commenced with Latvia joining the European Convention on Human Rights and adding a human rights catalogue or Section VIII to the Latvian Constitution in 1997. However, it is possible glimpse the first attempts to integrate EU law into the Constitutional Court's deliberations.

First, in case No. 2000-03-01 a dissenting opinion by Dr. iur. Aivars Endzins and several other judges[16] argued that the Constitutional Court forewent application of Latvia's obligations under the Europe Agreement. They argued for a broad interpretation of Articles 69 and 70 of the Europe Agreement[17] to include Western legal theory to give effect to EU law transposed in the future. Second, in

[14] Levits E. Latvijas tiesibu attistiba kops 1990. gada – no padomju sistemas uz modernu Eiropas Savienibas dalibvalsts tiesibu sistemu [Developing the Latvian legal system from 1990 – from a soviet system to a modern legal system of a Member State of the European Union]. Augstakas Tiesas Biletens, No. 17, 57.

[15] Endzins et al. Satversmes tiesas tiesnesu 2000. gada 4. septembra atseviskas domas lieta Nr. 200003-01 "Par Saeimas velesanu likuma 5. panta 5. un 6. punkta un Pilsetas domes un pagasta padomes velesanu likuma 9. panta 5. un 6. punkta atbilstibu Latvijas Republikas Satversmes 89. un 101. pantam, Eiropas Cilveka tiesibu un pamatbrivibu aizsardzibas konvencijas 14. pantam un Starptautiska pakta par pilsoņu un politiskajam tiesibam 25. pantam" ["On the compliance of Sections 5(5) and 5(6) of the Law on Elections to the Saeima and Sections 9(5) and 9(6) of the Law on Elections of City Councils and Parish Councils with Articles 89 and 101 of the Constitution of the Republic of Latvia, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 25 of the International Covenant on Civil and Political Rights."] Available (in Latvian): http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2000-03-01_Atseviskas_domas.pdf [last viewed 24.01.2026].

[16] Ibid.

[17] Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, OJ L 26, 02.02.1998, p. 3.

the judgment in case No. 2001-12-01,[18] the Latvian Constitutional Court invoked the Charter in a comparative study of rights to social security. The Constitutional Court concluded that limits on social welfare pensions do not attain the aim of involving seniors into the social life of society. So, by 2002 the first steps were made.

2.2. 2002–2003: Shift from a comparative approach to applying EU law

The first time the Constitutional Court applied EU law was in case No. 2001-09-01.[19] Through a general reference to the EU rules for the market of sugar, the Constitutional Court concluded that the Minister of Agriculture was not entitled to set individual quotas for sugar farms. The Constitutional Court ruled that the rules on permitting for sugar beet farming had to ben harmonised with EU law. Even though methodologically the judgment is quite poor, the authors find it well on point with the content and the purpose of the acquis of the time. In other cases of 2002, the Constitutional Court continued to use various EU legal acts as a source for a comparative analysis for formulating legal norms based on the principles codified in the Latvian Constitution.[20]

In 2003, the Constitutional Court applied EU law in a clear and methodically sound manner in the case No. 2003-08-01.[21] Fitting for this article, the case

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[18] Judgment of the Constitutional Court of the Republic of Latvia of 19 March 2002 in case No. 2001-12-01. Available in Latvian: https://likumi.lv/ta/id/60427-par-likuma-par-valsts-pensijam-parejas-noteikumu-26-punkta-atbilstibu-satversmes-91-un-109-pantam [last viewed 24.01.2026].

[19] Judgment of the Constitutional Court of the Republic of Latvia of 21 January 2002 in case No. 2001-09-01. Available in Latvian: https://likumi.lv/ta/id/57989-par-ministru-kabineta-2001-gada-27-februara-noteikumu-nr-92-cukurbiesu-piegades-apjomu-noteiksanas-kartiba-cukurbiesu-audzetajiem-21-punkta-dala-par-cukurbiesu-piegades-apjoma-noteiksanu-pamatojoties-uz-cukurbiesu-audzetajam-2000-gada-noteikto-cukurbiesu-piegades-apjomu-atbilstibu-satversmes-91-pantam [last viewed 24.01.2026].

[20] See Judgment of the Constitutional Court of the Republic of Latvia of 24 December 2002 in case No. 2002-16-03 Available in Latvian: https://likumi.lv/ta/id/69863-par-energoapgades-regulesanas-padomes-dabas-gazes-tarifu-aprekinasanas-metodikas-28-punkta-1-un-2-apakspunkta-redakcija-kada-tie-izteikti-ar-energoapgades-regulesanas-padomes-2000-gada-19-decembra-rikojuma-nr-192-1-punktu-atbilstibu-latvijas-republikas-satversmes-91-pantam-likuma-par-s-abiedrisko-pakalpojumu-regulatoriem-5-pantam-un-energetikas-likuma-84-panta-pirmas-dalas-5-punktam-un-85-panta-pirmas-dalas-2-punktam-redakcija-kas-bija-speka-lidz-2001-gada-1-oktobrim [last viewed 24.01.2026]; Judgment of the Constitutional Court of the Republic of Latvia of 19 March 2002 in case No. 2001-12-01 Available in Latvian: https://likumi.lv/ta/id/60427-par-likuma-par-valsts-pensijam-parejas-noteikumu-26-punkta-atbilstibu-satversmes-91-un-109-pantam [last viewed 24.01.2026]; Judgment of the Constitutional Court of the Republic of Latvia of 22 February 2002 in case No. 2001-06-03 Available in Latvian: https://likumi.lv/ta/id/59207-par-saeimas-prezidija-2000-gada-28-februara-noteikumu-par-kartibu-kada-no-saeimas-budzeta-kompensejami-izdevumi-kas-deputatam-radusies-realizejot-savas-pilnvaras-4-5-6-7-8-punkta-un-9-punkta-pirma-teikuma-atbilstibu-latvijas-republikas-satversmes-91-pantam [last viewed 24.01.2026].

[21] Judgment of the Constitutional Court of the Republic of Latvia of 6 October 2003 in case No. 2003-08-01. Available in Latvian: https://likumi.lv/ta/id/79612-par-latvijas-kriminalprocesa-kodeksa-96panta-otras-dalas-1teikuma-atbilstibu-latvijas-republikas-satversmes-89-un-92pantam [last viewed 24.01.2026].

dealt with restrictions for foreign attorneys to provide legal aid in criminal procedure. The Constitutional Court first used EU law to interpret the term "attorney" in the national laws to align with EU law and other European sources. It then invoked Section II of the Europe Agreement[22] and Latvia's obligation to ensure the freedom of movement for persons in the legal profession. Moreover, the barriers to exercising the freedom of movement for the legal profession had already been addressed in parallel proceedings in the Parliament, which rushed to amend the Law on the Legal Profession. Therefore, the Latvian Constitutional Court in this case found a de facto violation of EU law and the free movement of persons.

Finally, in case No. 2002-18-01[23] the Constitutional Court set out its theoretical approach to EU law. The case dealt with a prohibition for prisoners to vote in national and municipal elections. Here, the Constitutional Court invoked the Association Agreement[24] as a source of its Latvia's legal obligation to integrate into the EU and align with its general principles of law. After citing the rules on electing the European Parliament in the Treaty, the Constitutional Court criticised the Latvian Parliament for failing to substantiate the legitimate aim for prohibiting prisoners to vote. The main argument for the Constitutional Court to annul the ban was that such a prohibition was nowhere to be found in EU law or in the general principles of law of the Member States of the EU.

Therefore, the Constitutional Court found its role to align the Latvian legal system with the principles of EU law, including *effet utile*. The authors of the current article determine that in 2023 the Constitutional Court finally began to ask the question "How would it work in the EU?" when reviewing the cases before it. The Constitutional Court transitioned from a comparative approach in 2002 to a monistic application of relevant EU rules at end of 2002 as part of the norms in the 1998 Europe Agreement. That has led it to become one of the most pro-European Constitutional Court in the EU.[25] So, the Latvian Constitutional Court also did not assume a law-making role but nudged the legislator to stay on the course of European integration.

Sadly, same cannot be said of the Latvian Supreme Court. Despite the President of the Department of Civil Cases introducing the annual case law compendium with thesis on the Court's role in Latvia's path towards the EU,

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[22] Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, OJ L 26, 02.02.1998, p. 3.

[23] Judgment of the Constitutional Court of the Republic of Latvia of 5 March 2003 in case No. 2002-18-01 Available in Latvian: https://likumi.lv/ta/id/72099-par-saeimas-velesanu-likuma-2panta-2punkta-atbilstibu-latvijas-republikas-satversmes-6-8-un-91pantam [last viewed 24.01.2026].

[24] Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, OJ L 26, 02.02.1998, p. 3.

[25] Pleps J. Satversme, Satversmes tiesa un Eiropas Savieniba [Satversme, the Constitutional Court and European Union]. In: Auers D. (ed.). Latvija. Parskats par tautas attistibu 2019/2020. Latvijas eiropeizacija. Riga: LU Socialo un politisko petijumu instituts, 2020, p. 55.

the Supreme Court refused to apply EU law to any events before May 2004.[26] So, the Latvian Supreme Court did not apply EU law before accession.

Conclusions

The authors hereby have established that in both countries alignment of national legal systems with EU law started in 2002 and used a monistic approach to derive obligations to implement EU law from the Europe agreements. So, since 2002 EU law has had legal effect in the legal systems of Estonia and Latvia.

Estonia demonstrated early integration of EU law, because the Estonian Supreme Court began integrating general principles of EU law as early as 1994, relying on Article 10 of the Estonian Constitution. This open constitutional clause enabled the Court to treat EU and its general principles of law as part of Estonia's constitutional order long before accession. Therefore, the Estonian Supreme Court aligned national constitutional reasoning with EU law in a gradual fashion finding a new purpose for the Article 10 of the Estonian Constitution.

Latvia followed a concurrent path through constitutional adjudication. It first used EU law as a source of comparative human rights law and then quickly shifted to aligning with EU law through the Europe Agreement and constitutional interpretation in 2002. The Court increasingly asked, how national law would operate within the EU legal order.

So, by 2003, both the Estonian Supreme Court and the Latvian Constitutional Court employed a monistic approach towards EU law, treating relevant EU norms and principles as part of the applicable legal framework. The categorical refusal to apply EU law to cases, where facts occurred before accession, by the Latvian Supreme Court is a contrasting example. That shines a light on the importance of institutional culture and constitutional jurisdiction in shaping judicial openness to EU law.

Two findings particularly stand out from this comparative study. First, the Charter influenced the judicial reasoning of both courts before becoming binding. By the time the Charter entered into force, the constitutional courts were methodologically ready to apply it and ask preliminary questions to the Court of Justice of the European Union. In our view, that supports the view of the Charter as a codification of general principles of EU law. Second, judicial engagement with EU law was based on constitutional provisions and international obligations assumed by the state.

The lessons for the new candidate countries to the EU is that to accelerate accession, reception of EU law and transition rules should be solved on the level

[26] Zukova G. Eiropas Savienibas tiesibu piemerosana Latvija [Applying European Union law in Latvia]. Jurista Vards, No. 17 (522), 19 April 2008, pp. 1–10; Zukova G. Eiropas Savienibas tiesibu piemerosana Latvija [Applying European Union law in Latvia]. Jurista Vards, No. 18 (523), 13 May 2008, pp. 21–26.

of legal methods. The constitutional courts and preferably the cassation instance of the general court system are the key institutions to bring this shift into life. Signing an accession agreement and complying with the accession criteria is not enough – an optimal result is ensured by aligning the national legal system with the general principles of EU law.

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5. Zukova G. Eiropas Savienibas tiesibu piemerosana Latvija [Applying European Union law in Latvia]. Jurista Vards, No. 17 (522), 29 April 2008, pp. 1–10.
6. Zukova G. Eiropas Savienibas tiesibu piemerosana Latvija [Applying European Union law in Latvia]. Jurista Vards, No. 18 (523), 13 May 2008, pp. 21–26.

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13. Judgment of the Constitutional Court of the Republic of Latvia of 22 February 2002 in case No. 2001-06-03. Available in Latvian: https://likumi.lv/ta/id/59207-par-saeimas-prezidija-2000-gada-28-februara-noteikumu-par-kartibu-kada-no-saeimas-budzeta-kompensejami-izdevumi-kas-deputatam-radusies-realizejot-savas-pilnvaras-4-5-6-7-8-punkta-un-9-punkta-pirma-teikuma-atbilstibu-latvijas-republikas-satversmes-91-pantam [last viewed 24.01.2026].
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Ramunas Birstonas, *Dr. iur., Professor*
Vilnius University, Lithuania

Vadim Mantrov, *Associate Professor*
University of Latvia, Latvia

Aleksei Kelli, *Dr. iur., Professor*
Tartu University, Estonia

THE PRINCIPLE OF APPROPRIATE AND PROPORTIONATE REMUNERATION UNDER THE DSM DIRECTIVE: IMPACT IN THE BALTICS

Key words: authors, performers, copyright, remuneration, contract, EU law

Summary

This article examines the implementation and practical impact of the rules regarding the appropriate and proportionate remuneration introduced by Articles 18–23 of the DSM Directive in the three Baltic states – Lithuania, Latvia and Estonia. The study combines comparative doctrinal analysis of national transposition measures with empirical findings.

The analysis demonstrates that all three jurisdictions formally transposed the Directive's requirements, albeit with slight differences. Lithuania incorporated the remuneration rules largely verbatim into existing provisions and strengthened the position of authors and performers within collective management structures. Estonia introduced separate corrective mechanisms while maintaining a strong emphasis on contractual freedom. Latvia adopted the most elaborate statutory model, including a definition of fair remuneration and explicit evaluative criteria.

Despite these structural differences, empirical findings reveal a limited practical impact of the new rules on contractual practice across the region. Lump-sum remuneration and buyout models remain dominant, contractual adjustment mechanisms are rarely invoked, and no significant case law has emerged. The study concludes that the transformative potential of the remuneration rules is constrained not by regulatory design alone, but by structural market characteristics, bargaining asymmetries and limited mobilisation by authors and performers.

Introduction

The question of fair remuneration for authors and performers has re-emerged as a central issue in contemporary copyright policy. The current debate echoes foundational justifications of authors' and performers' rights, as the legislators, groups of rightsholders and academia are rising the same basic issue which was raised in the eve of births of these rights – that is, authors and performers deserve to receive a reward for the result of their work, in which they invested their time, efforts and, above all, creativity. This renewed interest culminated in the mandatory provisions of the Directive on copyright and related rights in the Digital Single Market (hereinafter – DSM directive or Directive), in particular, its Art. 18–23. This legislative process was accompanied by interest from academia.[1] A similar process can be noted in other jurisdictions as well. For example, in the UK, the Creator Remuneration Working Group was established in 2021 with a view to adapting the remuneration conditions to the digital era. Fair remuneration issues were raised in Australia, as well.[2]

The reasons for this renewed focus are manifold. First, new digital uses of copyrighted works, in particular, streaming, are eroding the long-established principles at an increasing pace. Therefore, authors and performers who had never lived up to their expectations in terms of monetary remuneration[3] are under increasing pressure. This tendency is tied to changing contractual practices, with a higher prevalence of buyouts.[4] As if that was not enough, the new blow came from the artificial intelligence boom. The rapid expansion of generative AI raises concerns about revenue displacement and value reallocation within creative markets, potentially affecting the economic position of authors and performers. For example, recent announcements reveal that on the music platform *Deezer*, over 28% of daily uploads are fully AI-generated.[5]

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1 Xalabarder R. The Principle of Appropriate and Proportionate Remuneration of Art. 18 Digital Single Market Directive: Some Thoughts for Its National Implementation. Available: https://ssrn.com/abstract=3684375 [last viewed 17.02.2026]; Geiger C., Scalzini S., Bossi L. Time to (Finally) Reinstall the Author in EU Copyright Law: From Contractual Protection to Remuneration Rights. Innovation Law and Ethics Observatory Research Paper Series, No. 25–05, 2025.

2 Matulionyte R. Empowering Authors via Fairer Copyright Contract Law. UNSW Law Journal, Vol. 42, No. 2, 2019, pp. 681–718.

3 For example, an assessment of the economic environment of Lithuanian artists in 2024 shows that the median monthly income is approximately 78% of the national average monthly salary. Kregzdaite R., Mazeikaite K., Sulskute K. Assessment of the creative and economic environment of artists. Summary 2024. Available: https://www.ltkt.lt/docs/kulturos-tyrimai/2025/06/SUMMARY_2024_R.%20Kregždaitė_K.%20Mažeikaitė_K.%20Šulskutė_ENG%20FINAL%2007.03.pdf [last viewed 18.02.2026].

4 Senftleben M., Izyumenko E. Author Remuneration in the Streaming Age – Exploitation Rights and Fair Remuneration Rules in the EU. Journal of Intellectual Property Law & Practice, Vol. 20, Issue 12, 2025, p. 13.

5 Deezer: 28% of all music delivered to streaming is now fully AI-generated. 11.09.2025. Available: https://newsroom-deezer.com/2025/09/28-fully-ai-generated-music/ [last viewed 17.02.2026].

Law can address the issue of fair remuneration in various ways. One of them is to include protective legal provisions, regulating contractual arrangements. That is exactly what was done in the DSM directive, introducing the principle of appropriate and proportionate remuneration (hereinafter – APR principle) (Art. 18) and accompanying norms on transparency obligation (Art. 19), adjustment mechanism (20), alternative dispute resolution (ADR) mechanism (Art. 21) and the right of revocation (Art. 22).

This paper examines how the above-mentioned APR principle and complementary provisions were implemented into the national laws of three Baltic states – Lithuania, Latvia and Estonia. and is the continuation of the research conducted by the same authors and published in 2022.[6] The previous article was prepared before the final legislative implementation of the DSM directive into national laws and could only discuss the early Lithuanian and Estonian drafts, which, in the end, took slightly different forms, and the Latvian draft law was not even submitted by that time. Therefore, in the first part of this article, the actual regulatory framework in all three states is discussed. As some time has elapsed since the implementation, this article evaluates not only the regulatory scheme governing the implementation of the ADM principle, but also its practical impact. In particular, this contribution seeks to examine whether the new rules have altered contractual practice in the Baltic states and, if so, in what ways.

The analysis combines a comparative examination of national legal implementation and an evaluation of empirical findings. For this purpose, semi-structured interviews with respondents from various creative sectors (in particular, book publishing, music, and audiovisual) were conducted in their respective jurisdictions, and publicly available written and online sources were consulted to elucidate contractual practices in the creative industries.

1. Current regulatory framework

As the pre-implementation situation, both on the EU and national level, and the preparation for implementation were already described in the previous article,[7] the task of this part is to present the current legislative framework in the Baltics and court practice (if any), implementing the DSM provisions on appropriate and proportionate remuneration.

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[6] Birstonas R., Mantrov V., Kelli A. The Principle of Appropriate and Proportionate Remuneration in Copyright Contracts and its Implementation in the Baltic States. In: New Legal Reality: Challenges and Perspectives II. The 8th International Scientific Conference of the Faculty of Law of the University of Latvia. Collection of Research Papers. Riga: University of Latvia Press, 2022, pp. 435–444.

[7] Ibid.

1.1. Lithuania

The law implementing the DSM directive was enacted on 24 March 2022 and entered into force on 1 May 2022.[8] Firstly, the APR principle was reflected, quite literally, in Art. 11 of the Lithuanian Copyright Act with respect to audiovisual authors, Art. 15 with respect to all authors, and Art. 53 with respect to performers. That is, the change was simply adding that remuneration, which was foreseen in these articles before the implementation, should be "appropriate and proportionate". Lithuanian legislator did not attempt to explain these expressions, nor provided any procedural or material mechanisms (except those provided by the DSM directive). Yet one additional legal mechanism was introduced. Art. 15.3 and Art. 48.4, which applies generally to all authors, were supplemented with the new clause, indicating that where copyright or the right to remuneration is administered by a collective management organisation, the right to remuneration for the use of such rights is irrevocable (contracts waiving it by the author are invalid) and non-transferable (the author may not transfer it to any other party, except in cases of inheritance of the right). This provision is not expressly required by the DSM Directive, which primarily addresses individual contractual remuneration. Nevertheless, it indeed changes the author's position vis-à-vis publishers in exploitation contracts, as now authors cannot contract out certain pecuniary rights even if they wished to. Having said that, this provision is limited only to these rights which are administered by a collective management organisation.

Art. 53(8) provided the same clause with respect to performers, thereby ensuring the equality of the legal position between these two groups.

Secondly, the transparency obligation (Art. 19 of the DSM directive) was implemented in Art. 40^1 the Lithuanian Copyright Act and mostly follows the wording of the Directive. While the Directive itself specifies only the maximum term to provide the information under this provision, the Lithuanian Act stick to this maximum term of one year. With regard to the discretion foreseen in the Art. 19.3 directive to limit the scope of obligation, no limitations were provided. As regards the alternative dispute resolution (ADR), the Lithuanian Copyright Commission is entrusted to hear disagreements with regard to the enforcement of the transparency obligation. Alternatively, the interested party could apply directly to the court.

Contract adjustment mechanism (Art. 20 of the DSM) is found in a new Art. 40(2) of the Lithuanian Act. While again mostly following the literal wording of the DSM directive, this provision excludes the possibility of contract adjustment for contracts where the remuneration is directly linked to the profits or revenues generated by the use of the work. Such exclusion is not present in

[8] Act Amending the Lithuanian Copyright Act. Passed 24 March 2022. Entry into force 1 May 202. Available: https://www.e-tar.lt/portal/lt/legalAct/5b445220b02711ec8d9390588bf2de65?csrt=13949768156458116884 [last viewed 17.02.2026].

either the Directive or the other Baltic states. The interested party seeking contract adjustment, in the case of disagreement, can initiate the procedure either before the Lithuanian Copyright Commission or before the court.

Finally, the right of revocation was implemented in Art. 40(3) of the Lithuanian Act**.** The right of revocation can only be exercised within three years after the conclusion of the agreement (the DSM Directive itself does not prescribe a fixed period but leaves Member States discretion to determine appropriate conditions for exercising the right). Also, Lithuanian Copyright Act provided several exceptions, when the right of revocation is not applicable: 1) when the author's contribution to the work as a whole is insignificant; 2) when there is another contractual restriction prohibiting the use of the work; 3) when the work is not used mainly due to circumstances that the author or performer can remedy; 4) when the work involves the contribution of more than one author of audiovisual or musical works, except where the request is submitted by all authors who have contributed to the audiovisual or musical work; 5) where the author has granted or transferred the economic rights to a previous work for the production of an audiovisual work; 6) where the author is the creator of a computer program. At the same time, the parties to the contract are permitted to agree not to apply the above-mentioned restrictions.

According to Art. 60.4 of the Lithuanian Act, the provisions concerning the transparency obligation, the contractual adjustment mechanism and the right of revocation are extended to performers.

Currently, there is no Lithuanian case law, nor cases reported from other bodies, in particular, the Lithuanian Copyright Commission, which deals with the practical application of the above-mentioned provisions.

1.2. Latvia

The DSM directive was implemented in Latvia through amendments to the Latvian Author Law Act adopted on 23 March 2023 and entered into force on 5 April 2023. Unlike Lithuania and Estonia, Latvia introduced an explicit statutory definition of the APR principle and supplemented it with detailed evaluative criteria. Before these amendments, the principle of fair remuneration was familiar to Latvian author law but was applied in certain situations on a fragmentary basis, as noted in the legal literature.[9]

[9] Gulbis R. Sagaidamie Latvijas autortiesibu regulejuma grozijumi un to ietekme uz autortiesibu stridu izskatisanu tiesa [Expected Amendments to the Latvian Author Law Regulation and Their Impact on the Reviewing of Author Law Disputes in Court]. Augstakas Tiesas Biletens [Bulletin of the Supreme Court], No. 21, 2020, p. 74. Available: https://www.at.gov.lv/bulletin-publication-files/AT_biletens21_web.pdf#page=73 [last viewed 17.02.2026]; see also: Liberte V., Kaprane S. Autortiesibu regulejuma izmainas saistiba ar digitala vienota tirgus direktivam [Changes in Author Law Regulation in Connection with the Digital Single Market Directives]. Jurista Vards, No. 9, 02.03.2021.

The principle is expressly established in Art. 45[1](1) of the Latvian Act and applies to authors; it is extended to performers mutatis mutandis (Art. 47(10) of the Act). This principle enshrines the statutory, unwaivable right to fair remuneration for both subjects. The Article further clarifies that remuneration is considered fair if it corresponds to the economic value of the economic rights transferred or licensed and constitutes a proportionate part of the economic benefit derived from exploitation.

The law further lists criteria to be taken into account when assessing fairness (Art. 45[1](3) of the Latvian Act), including:

- the commercial and non-commercial benefit obtained by the assignee or user;
- the purpose, scope and significance of the use;
- the author's contribution to the creation of the work;
- the financial contribution of the assignee or user.

In contrast to Lithuania and Estonia, Latvia thus codifies substantive benchmarks for assessing the fairness of the remuneration. While this may enhance doctrinal clarity, it also shifts interpretative responsibility to courts, which must balance multiple cumulative criteria without quantitative guidance. The provision does not introduce presumptions or evidentiary facilitation mechanisms for authors or performers. Though the amount of the author's remuneration has not actually been regulated in the Latvian Act before, as is the opinion in Latvian legal literature[10], a similar conclusion could also be drawn for the current regulation, which does provide criteria without facilitation mechanisms to assist in establishing that amount.

The principle does not apply to authors of computer programs and to licence contracts concluded with collective management organisations, provided that they strictly follow the Directive's approach (Art. 45[1](9)–(10) of the Latvian Act). This Directive's exclusion concerning authors of computer programs was justly criticised in Latvian legal literature before the amendments to the Latvian Act were even drafted.[11] However, the Latvian legislator did not remedy this situation during the implementation of the Directive by exercising its national competence to regulate excluded issues outside the Directive's scope. Furthermore, in employment relationships, salary is considered fair remuneration (Art. 45[1](5) of the Latvian Act), although this provision contains a rebuttable presumption.[12]

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[10] Petersone I. Izmainas Autortiesibu likuma: butiskakie jaunumi un nakotnes izaicinajumi [Changes to the Author Law Act: Significant News and Future Challenges]. Jurista Vards, No. 21, 23.05.2023.

[11] Gulbis R. 2020, p. 76.

[12] Tiesibu akta projekta "Grozijumi Autortiesibu likuma" sākotnejas ietekmes (ex-ante) novertejuma zinojums (anotacija) [Ex-ante Impact Assessment Report (Annotation) of the Draft Legal Act "Amendments to the Author Law Act"], pp. 14–16. Available: https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/109B9D11585B52FFC2258903003E4387?OpenDocument [last viewed 17.02.2026].

In addition, Art. $45^{1}(6)$ of the Latvian Act provides for a contract adjustment mechanism. The author is entitled to request an amendment of the contract regarding remuneration and to claim additional remuneration if the originally agreed remuneration proves to be disproportionately small in comparison with the total income derived from exploitation after conclusion of the contract.

Furthermore, Art. 45^{2} of the Latvian Act implements the transparency obligation corresponding to Art. 19 of the DSM Directive. The successor in title or licensee must provide the author with up-to-date and comprehensive information at least once a year regarding the use of rights or works, including modes of exploitation, income generated, and remuneration due. The information must be adapted to sectoral circumstances and may be specified contractually.

Limitations are also provided. Where the provision of information would impose a disproportionate administrative burden compared to the revenue generated, the user may provide information only to a reasonable extent. The obligation does not apply where the author's contribution to a joint work is insignificant, unless information is necessary to exercise the right to additional remuneration. These limitations may in some way address the concern expressed by the Foreign Investors Council which stated that "[i]t is unreasonable (and goes beyond the DSM requirements) to require all companies to provide all authors (employees) with comprehensive information on the use of their works, the company's profits, and additional remuneration due to the author on an annual basis".[13]

The transparency obligation provision does not apply to computer programs or to licence contracts concluded with collective management organisations, similarly to the case of the principle of fair remuneration discussed above. Contractual clauses waiving transparency rights are declared invalid, demonstrating that the right to claim provision of information is a statutory, unwaivable right.

The right of revocation is implemented in Art. 45^{3} of the Latvian Act. The author may unilaterally withdraw from an exclusive licence agreement or revoke rights if exploitation has not commenced within two years (the Directive itself does not state an exact term) from the conclusion of the contract or transfer of the work. Before exercising this right, the author must notify the counterparty and grant a reasonable additional period of at least 12 months to commence use. If exploitation still does not commence, the author may withdraw from the contract or convert it into a non-exclusive licence. The provision contains specific rules for joint authorship, requiring joint exercise where individual contributions cannot be separated.

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[13] Arvalstu investoru padome Latvija [Foreign Investors Council in Latvia]. Arvalstu investoru padomes Latvija nostaja attieciba uz intelektuala ipasuma tiesibu veicinasanu un aizsardzibu [Position of the Foreign Investors Council in Latvia regarding the promotion and protection of intellectual property rights]. Nostaja Nr. 9 [Position No. 9]. 16 September 2021, p. 8. Available: https://www.ficil.lv/wp-content/uploads/2021/09/FICIL_IP_Protection_LV_2021.pdf [last viewed 17.02.2026].

Derogation from the right of withdrawal is permitted only where provided in a sectoral collective agreement. The provision does not apply to computer programs or to licence contracts concluded with collective management organisations.

Compared to Estonia, Latvia provides a similar two-year non-use threshold but specifies a mandatory 12-month additional period prior to withdrawal. Unlike Lithuania, the Latvian law does not enumerate extensive categorical exceptions but rather structures the mechanism procedurally.

The ADR procedure was implemented by extending the existing mechanism regarding intermediaries to include a dispute over the right to claim additional remuneration within the contract adjustment mechanism or the right to information (Art. 67^1(8) of the Latvian Act).

Latvian law also expressly regulates temporal application: the principle applies to uses occurring after 25 April 2023, including contracts concluded before that date. In this way, the authors and performers could rely on the provisions discussed above not only in contracts concluded after that date, but also in those concluded before that date, provided that the contract is valid and its term has not expired. For instance, it is possible to request fair remuneration, invoke the contract adjustment mechanism, or rely on the right to provide information. This clarifies the *ratione temporis* scope more explicitly than in Lithuania or Estonia.

Summing up, Latvia has adopted the most conceptually explicit transposition among the Baltic states. Unlike Lithuania and Estonia, which merely inserted the Directive's wording into existing provisions, Latvia introduced a statutory definition and evaluative criteria for fair remuneration. But again, the ultimate effectiveness of its approach will depend on judicial practice.

So far, no judicial rulings dealing with the above-mentioned provisions have been reported (as far as the anonymised database of Latvian court rulings is concerned). This situation could not be perceived as a surprise, as there is limited court practice in Latvia concerning disputes arising from the author law, as noted in the Latvian legal literature.[14]

1.3. Estonia

Estonia implemented Art. 18–23 DSM Directive by introducing a distinct set of provisions into its Copyright Act (§ 49^1–49^4), which entered into force in January 2022.[15] Similarly to Lithuania, Art. 18 of the DSM directive was introduced by simply indicating in the general clause, concerning author's right to remuneration (Art. 14.1 of Estonian Copyright Act[16]), that authors' remuneration should be appropriate and proportionate. An analogous provision was included

[14] Gulbis R. 2020, p. 73.

[15] Act Amending the Estonian Copyright Act (Transposition of Copyright Directives). Passed 8 December 2021. Entry into force 7 January 2022. Available: https://www.riigiteataja.ee/akt/128122021001 [last viewed 17.02.2026].

[16] Estonian Copyright Act. Passed 11 November 1992. English translation available: https://www.riigiteataja.ee/en/eli/520102025003/consolide [last viewed 17.02.2026].

for the benefit of performers (Art. 68.1). However, this clause is not supported by any specific provisions, except those that transpose Arts. 19–21 of the Directive. The latter were transposed through separate and relatively detailed provisions governing notification (transparency), contract amendment, and cancellation (revocation), combined with general rules on their application, as well as the ADR clause.

The analysis of the author's right to remuneration in the Explanatory Memorandum to the Draft Act Amending the Copyright Act (Explanatory Memorandum) suggests that "certain groups of rightholders (natural person authors and performers) will gain the opportunity to improve their income"[17]. In practice, the clause of appropriate and proportionate remuneration appears to operate primarily as an interpretative standard rather than as a self-standing corrective mechanism, given that the general rule continues to emphasise freedom of contract and no sector-specific benchmarks have been established (Art. 14.2 and $48^{1}2$ of the Estonian Act).

The transparency obligation is implemented in Art. 49^{1} of the Estonian Act. The provision closely reflects the text of the Directive but contains proportionality limitations, which reflect Art. 19(3) DSM Directive and demonstrate the legislator's attempt to balance transparency with administrative feasibility. In particular, if the performance of the obligation would become unreasonably burdensome or expensive in comparison to the revenue derived from the exploitation, the obligation is limited to information that can reasonably be expected. Furthermore, the obligation does not apply where the author's or performer's contribution is insignificant in relation to the work or performance as a whole.

The contract adjustment mechanism is implemented in Art. 49^{2} of the Estonian Act under the heading "Amendment of author's contract". The provision entitles authors and performers (or their representatives) to request amendment of the contract to obtain additional, relevant and fair remuneration if the initially agreed remuneration turns out to be disproportionately small compared to the direct or indirect total revenue derived from exploitation. The Estonian law, in line with the DSM directive, does not further define what constitutes "unproportionally small" remuneration, leaving interpretation to judicial practice.

The right of revocation is regulated in Art. 49^{3} under the title "Cancellation of or withdrawal from author's contract". This Article enables the author or performer to cancel or withdraw from an exclusive licence agreement or transfer of economic rights if the work or performance is not used within two years after the transfer or grant of authorisation. The parties may agree on a different commencement term, but it may not exceed five years. Where a longer period is agreed, the contract is deemed to contain a five-year term. Prior to exercising the right, the author

[17] Explanatory Memorandum to the Draft Act Amending the Estonian Copyright Act (Transposition of Copyright Directives), p. 134. Available: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68/ [last viewed 17.02.2026].

or performer must grant a reasonable additional period for commencement of exploitation. This procedural requirement reinforces the ultima ratio nature of revocation.

Art. 49^4 makes clear that Arts. 49^1–49^3 are mandatory and do not apply to authors of computer programs. The Copyright Committee is responsible for the ADR proceedings for disputes arising from the notification obligation and amendment of the author's contract (Art. 87(1) clause 4).

As in Lithuania and Latvia, no significant Estonian case law has yet developed concerning the practical application of the newly introduced rules.

2. Impact of the APR principle: Empirical findings

2.1. Lithuania

The main Lithuanian finding can be generalised that the impact of the APR principle on copyright contracts was minimal or non-existent. Mostly, what was done was the formal changes in the wording in the standard contracts, which had no practical significance. That is, neither the amount of remuneration nor the scope of transferred or licensed rights under these contracts was affected in any meaningful way. It is important to stress that the predominant mode of dealing with authors' and performers' rights is the buyout, that is, full transfer of rights for a fixed payment. Lithuanian practice, in this respect, did not show any changes. Certainly, certain publishers do not require the transfer of all rights, but this behaviour is caused by their inner decisions and has no ties with the DSM directive requirements. On the other hand, respondents stated that authors and performers themselves usually see buyouts as working in their interests.

Recital 72 of the DSM Directive accepts that lump sums may constitute proportionate remuneration, but cautions that they should not be the rule. As regards the choice between the lump sum and a percentage of profit, the first option remains dominant in Lithuanian copyright contracts. Part of the publisher's income is certainly used in fewer cases, usually from subsequent editions. Again, the implementation of the directive had no real impact. This can be explained by well-established practices and inertia in the market. Importantly, the respondent indicated, the up-front lump sum payment is a preferable mode of remuneration from the authors' and performers' perspective, as the introduction of part-from-profit clause results in the deduction from the upfront payment, which is normally against the interest of authors and performers. This finding complicates the normative assumption that proportional remuneration is considered superior to lump-sum payment.

Also, the gathered data reveals that authors and performers can sometimes negotiate contractual clauses, including remuneration, but to a limited extent, as this capacity is limited by the market realities of how much a publisher can or wishes to pay.

One more important finding concerns the possibility of choosing the law applicable to the contract. In the legal doctrine, there was a concern that the newly established European principle and rules could be circumvented by choosing more liberal foreign law, for example, that of the UK. The empirical data show that this concern has no basis as far as Lithuania is concerned. All respondents indicated that Lithuanian law typically governs contracts between domestic authors and publishers, meaning that avoidance through choice of foreign law is rare or almost non-existent. Only in case a contract is concluded with a foreign publisher, other laws are normally invoked. Thus, jurisdictional circumvention is not a challenge to the application of remuneration rules in Lithuania.

The contract adjustment mechanism under Art.e 40(2) (implementing Art. 20 DSM Directive), sometimes referred to as a "best-seller clause", is relevant only in exceptional cases, of which there are few in the Republic of Lithuania.

As was already stated, ADR mechanisms are yet to show their effects (if any). While the Lithuanian Copyright Commission was entrusted to hear the cases, when parties disagree on the issue of remuneration, including the transparency obligation and contract adjustment, this procedure remains voluntary, and no cases so far have been initiated. This is in line with a quite passive mediation practice in recent years. While earlier interested parties were quite active in choosing the mediation possibility under the Ministry of Culture, during the last five years, only one mediation procedure took place, but it was not connected with the APR principle.

The above-described inertia in Lithuanian legal practice in terms of remuneration can be explained by multiple interacting factors:

- Lack of collective efforts – collective bargaining in the creative sector remains underdeveloped. Individual authors negotiate separately, reducing leverage and increasing vulnerability.
- Established market situation, habits and imbalances. Even in the absence of explicit "take it or leave it" clauses, authors and performers often adapt their proposals to perceived market acceptability. This situation often results in "submit-what-is-acceptable or be rejected" strategy.
- Risk allocation preferences: authors and performers often prefer higher upfront certainty over uncertain future revenue shares.
- A somewhat passive role of Lithuanian CMOs who have not actively leveraged the new principle to reshape sectoral standards.

2.2. Latvia

As stated above, there is limited court practice in Latvian courts dealing with disputes involving copyright law. The same situation also applies to performers. It is therefore not surprising that there has been no court case in the last two years involving the new regulation on fair remuneration.

Although the discussed amendments, including the APR principle, were addressed in different articles, mainly published by practitioners of leading

Latvian law offices,[18] it was not possible to establish any evidence that the new regulation led to the review of existing transfer or licence contracts with authors and performers. Nor is there any publicly available information indicating that the relevant subjects, i.e. authors or performers, or their collective organisations, would raise their alarm of unconformity of the existing practices with the new regulation, or users, for instance, publishers or employers, would be worried about the influence of the new regulation on their practices. It should be noted that an existing study demonstrates that the majority of performers had a negative view towards streaming remuneration in general, and thought that the distribution of revenues was unfair, including Latvian (and Estonian) performers.[19] Also, empirical evidence from practice indicates no actual interest in changing existing contracts regarding fair remuneration. For instance, there is no evidence at all that companies change the terms of any concluded labour or other contracts they have, which might involve author works or performers' fixations.

Therefore, it could be expected that there will be little interest in challenging the amount of remuneration fixed in contracts by authors and performers. The obvious explanation could be their weaker bargaining position compared with users, especially large companies, with little resources to fight against users, vague and broad regulation on the fair remuneration principle, which would be difficult to rely upon in court,[20] and a relatively low amount of remuneration is usually paid, which means that litigation would not be economically justifiable. Even in the case of a contract adjustment mechanism applied when remuneration is disproportionately low (the so-called "best-selling clause"), such a situation would be rare in Latvia due to the small market size and low book publishing numbers. Thus, it is not surprising that there was expressed scepticism that authors and performers will not attempt to protect their interests in court under the new Act.[21]

It remains to be seen whether the new regulation on fair remuneration will lead to any actual changes in practice or to disputes brought to court; however, this possibility is considered rather low, given the reasons discussed above.

It could be an interesting situation in relation to the transparency obligation, which is based on a statutory, unalienable right to request each year information on the exploration of works and performances and on generated revenues (Art. 19 of the DSM Directive, Art. 45^2 of the Latvian Act). A request to grant this information

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[18] For instance, Strauta L. Pienaciga un sameriga atlidziba autortiesibu ligumos [Proper and Proportionate Remuneration in Author Law Contracts]. Bilances juridiskie padomi [Legal Advices of the Balance]. Available: https://www.sorainen.com/wp-content/uploads/2023/05/taisniga-autoratlidziba.pdf [last viewed 17.02.2026]; Fjodorova L. Latvija jauns autortiesibu regulejums [New Author Law Regulation in Latvia]. Available: https://www.cobalt.legal/lv/news-cases/latvija-jauns-autortiesibu-regulejums [last viewed 17.02.2026]; Petersone I. 2023.

[19] Streams & Dreams. The Impact of the DSM Directive on EU Artists and Musicians. Part 2, 2024, p. 17. Available: https://www.aepo-artis.org/wp-content/uploads/2024/06/STREAMS_AND_DREAMS_PART_2.pdf [last viewed 17.02.2026].

[20] This aspect was also noted in legal literature even before the implementation of the DSM Directive into Latvian law (Liberte V., Kaprane S. 2021).

[21] Petersone I. 2023.

would be relatively easy to file by any author or performer, as it does not require any burdensome procedure, documents to be submitted, or justification for a legal standing to request that information. Currently, there is little interest in exercising such a right, which could be explained by limited knowledge of the new regulation and psychological deterrence from unfamiliar regulations. However, such a situation may change gradually if more publicly available information becomes available about the regulation governing this duty.

2.3. Estonia

As regards awareness of the new regulation, it is difficult to determine whether all authors and performers are informed about the changes introduced as of 1 May 2022. Nevertheless, a certain level of awareness can be assumed. Professional organisations, such as the Estonian Actors Association, have publicly addressed the notification obligation and related matters on their webpages. This indicates that, at least at the level of organised professional communities, the regulatory developments have not gone unnoticed.

However, awareness does not automatically translate into individual enforcement. Respondents noted that individual authors and performers often hesitate to rely on the notification obligation and the APR principle in their personal contractual relations. Instead, attention has increasingly shifted toward collective arrangements. A notable example is the 2024 framework agreement between the Estonian Actors Association and the Film Industry Cluster, which establishes standards of good practice and expressly addresses the notification obligation.[22] This development suggests that, in Estonia, the practical operationalisation of Article 19 DSM Directive (transparency obligation) is being pursued more actively through collective self-regulation than through individual contractual disputes.

Concerning remuneration models, Estonian practice does not differ fundamentally from that observed in Lithuania and Latvia. Various contractual structures are used: lump-sum payments, royalty-based remuneration, or a combination of both. Nevertheless, lump-sum arrangements remain common in practice.

With regard to the transfer of economic rights, contracts very often provide for broad transfers of rights. This means that all economic rights are transferred, which sometimes also includes unknown uses. Licensing models (non-exclusive licenses) appear more frequently where collective management organisations (CMOs) are involved. However, in individual contractual settings, the transfer of rights is typically comprehensive. Remuneration is usually not specified separately for each transferred right; instead, rights are bundled together for a single agreed payment. While isolated deviations may exist, this remains the predominant contractual technique.

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[22] Agreement on good practice of the Estonian Film Industry Cluster and the Estonian Actors' Union (2024). Available: https://www.enliit.ee/et/klaster [last viewed 17.02.2026].

The issue of bargaining power appears particularly pronounced in Estonia. Respondents consistently indicated that authors are frequently in a weaker contractual position, facing a *de facto* "take it or leave it" choice. The imbalance affects not only the negotiation of remuneration but also the practical enforceability of the notification obligation and potential claims for adjustment of remuneration. Authors reportedly fear that excessive demands or insistence on transparency might jeopardise future cooperation. This chilling effect is significant: legal rights exist formally, yet their invocation may entail reputational or economic risks in relatively small creative markets.

Jurisdictional circumvention in Estonia, as in Lithuania, does not appear to constitute a systemic problem. Contracts concluded between Estonian residents are typically governed by Estonian law. However, contracts involving a foreign element may designate foreign law, including United States law. No evidence suggests systematic avoidance of remuneration rules through deliberate choice of foreign law.

As in the other Baltic states, in Estonia, alternative dispute resolution mechanisms have not yet generated visible case practice. The abstract character of the fair remuneration principle, combined with power asymmetries and reluctance to litigate, appears to limit the activation of formal corrective mechanisms.

Overall, while the normative framework of the DSM Directive has been transposed, its practical impact remains mediated by market realities. The shift toward collective framework agreements may signal a more promising avenue for strengthening remuneration standards than reliance on individual enforcement.

Conclusions

On the one hand, all three Baltic states have mostly precisely implemented the APR principle and specific obligations arising from the DSM directive. In some respects, Latvia even went beyond minimum harmonisation by codifying evaluative criteria for determining fairness of the remuneration, while Lithuania introduced additional protection for authors and performers by establishing the non-transferable and irrevocable rights which are collectively administered. On the other hand, empirical findings regarding contractual practice reveal that, despite formal compliance with the DSM Directive, the principle of appropriate and proportionate remuneration has produced limited material change on contractual practices in all three jurisdictions. The persistence of lump-sum models, structural bargaining asymmetries, and avoidance of legal enforcement constrain its transformative potential. The limited impact of the APR principle appears to result not from deliberate avoidance but from structural inertia.

Additionally, no clear avoidance mechanisms, such as systematic choice of foreign law, have been identified. But this aspect is explained by the fact that the APR principle has not materially altered behaviour of contractual parties in the first place.

The comparative analysis suggests that the effectiveness of the APR principle is closely linked to mechanisms for collective representation. In cases where authors and performers act collectively – through collective management organizations in Lithuania or collective bargaining initiatives in Estonia – they experience a noticeable strengthening of their position. In contrast, individual contracts leave authors and performers at a disadvantage, regardless of existing legal norms.

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Andrzej Jackiewicz, *Associate Professor*
University of Bialystok, Poland

CONSTITUTIONAL IDENTITY AS A "TRAP CARD": THE INSTRUMENTALISATION OF ARTICLE 4(2) TEU IN THE JURISPRUDENCE OF THE POLISH CONSTITUTIONAL TRIBUNAL

Key words: constitutional identity, primacy of EU law, Polish Constitutional Tribunal, Article 4(2) TEU, rule of law, judicial independence, CJEU, legal dualism, sincere cooperation

Summary

This article analyses the evolution of the concept of "constitutional identity" in the Polish legal order in the context of the ongoing constitutional crisis. The main research objective is to demonstrate how the Constitutional Tribunal, through its judgments in cases K 3/21 and P 7/20, redefined this concept, transforming it from a shield protecting constitutional foundations into a tool for questioning the jurisdiction of the Court of Justice of the European Union (CJEU). The author advances the thesis that the Polish interpretation of constitutional identity deviates from the standards developed by constitutional courts of other Member States, notably the German Federal Constitutional Court (BVerfG), insofar as it serves not primarily to protect immutable constitutional values, but rather to legitimise politically motivated changes to the judicial system. The article discusses the consequences of this approach, including the emergence of legal dualism and the erosion of the principle of sincere cooperation enshrined in Article 4(3) TEU. The analysis leads to the conclusion that the instrumentalisation of constitutional identity poses a real threat to the coherence of the European legal space and requires the development of new mechanisms for judicial dialogue between national constitutional courts and the CJEU.

Introduction

The principle that the European Union shall respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional, has been enshrined in Article 4(2) of the Treaty on European

Union.[1] This provision, which emerged from lengthy debates on the relationship between European integration and Member State sovereignty, was originally conceived as a mechanism to preserve the constitutional core of Member States while enabling the process of ever closer union. As Giuseppe Martinico observes, the introduction of this clause into the treaties was the culmination of a process aimed at establishing order (*táxis*) in the relations between the Court of Justice and the governments and courts of the Member States, representing a kind of "constitutional crescendo" in the construction of the EU legal order.[2] However, recent developments in Poland have demonstrated that this protective concept can be weaponised against the very legal order it was designed to complement.

The conflict between Warsaw and Luxembourg, which escalated dramatically in 2021, represents more than a mere disagreement over the boundaries of EU competences. It constitutes a fundamental challenge to the architecture of the European legal system, as the Polish Constitutional Tribunal has deployed the concept of constitutional identity not as an exceptional safeguard but as a systematic barrier against EU judicial oversight.[3] Furthermore, the procedural validity of this judgment is heavily contested due to the participation of unauthorized persons in the judicial panel. As Monika Florczak-Wator notes, the presence of judges appointed to already occupied seats means the Tribunal, in light of the ECHR jurisprudence, failed to meet the requirement of a "court established by law".[4] This strategy is part of a broader phenomenon described as "rule of law backsliding" – a deliberate process whereby public authorities

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1 Treaty on European Union. Signed in Maastricht on 07.02.1992. [in the wording of 01.12.2009].

2 Martinico G. What Lies Behind Article 4(2) TEU? In: A. Saiz Arnaiz, C. Alcoberro Llivina (eds.). National Constitutional Identity and European Integration. Cambridge: Intersentia, 2013, pp. 93–108. This "friendly interpretation" (przychylnosc) was rooted in Article 9 of the Polish Constitution, which the Tribunal traditionally interpreted as a constitutional basis for the internationalization of the entire Polish legal system. Such an approach allowed for a "judicial dialogue" that reconciled national constitutional norms with European standards without triggering frontal collisions. Garlicki L. Umiedzynarodowienie Konstytucji [Internationalization of the Constitution]. Panstwo i Prawo, No. 10, 2022, p. 159.

3 Indeed, Gliszczynska-Grabias and Sadurski describe the decision as an unprecedented negation of the principle of sincere cooperation and effective judicial protection, the likes of which can hardly be found in the jurisprudence of any other Member State. They argue that the decision lacks legal validity entirely, as it was handed down by a panel including persons unlawfully appointed to already filled judicial seats. See Gliszczynska-Grabias A., Sadurski W. Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland. European Constitutional Law Review, 19(1), 2023, pp. 164–165.

4 Florczak-Wator M. (Nie)skutecznosc wyroku Trybunalu Konstytucyjnego z 7.10.2021 r., K 3/21. Ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego [(In)effectiveness of the judgment of the Constitutional Tribunal of 7 October 2021, K 3/21. Assessment of the significance of the judgment from the perspective of constitutional law]. Europejski Przeglad Sadowy No. 12, 2021, s. 10. These procedural flaws lead scholars to describe such rulings as judgments non existens – decisions merely masquerading as judicial acts, handed down by a panel containing "quasi-judges" appointed to already occupied seats. The participation of the judge-rapporteur, who was himself elected in a faulty procedure, further taints these proceedings with absolute invalidity. Gliszczynska-Grabias A., Sadurski W. The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K1/20. European Constitutional Law Review, Vol. 17, No. 1, 2021, pp. 2, 6–8.

implement governmental blueprints aimed at systematically weakening or capturing internal checks on power. In this framework, the "capture" of the Constitutional Tribunal serves as a prerequisite for achieving authoritarian goals, enabling the ruling majority to bypass constitutional norms at will while parading such actions as legitimate judicial acts.[5]

As Laurianne Allezard points out, constitutional identity often serves an "argumentative function". By determining the interpretation of constitutional norms and the meaning of constitutional concepts, it can give birth to different, often conflicting, forms of constitutionalism in Europe.[6] This article examines whether constitutional identity has been transformed from a legitimate legal concept into what might be termed a "trap card" – a mechanism that enables a Member State to selectively reject EU law obligations while ostensibly remaining within the Union's legal framework. In this perspective, the Polish interpretation deviates from perceiving national identity as a "trump card" that is subject to negotiation within the framework of judicial dialogue, moving instead towards its instrumental use to block EU oversight mechanisms.[7] This creates a constitutional "deadlock" where the simultaneous obedience to both constitutional and international provisions becomes impossible. In this perspective, the invocation of Article 8 of the Constitution against EU law acts as a mechanism that deprives valid international agreements of their binding force within the domestic legal system.[8]

The research methodology employed in this article combines doctrinal analysis of key judgments with comparative assessment of constitutional identity jurisprudence across EU Member States. Particular attention is paid to the contrast between the German Federal Constitutional Court's approach, which has traditionally been viewed as the benchmark for constitutional identity claims, and the novel interpretation advanced by the Polish Tribunal after 2021.

1. Constitutional identity in European legal doctrine: A comparative perspective

The concept of constitutional identity emerged as a response to the deepening of European integration and the concomitant concerns about the preservation

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[5] Pech L., Scheppele K. L. Illiberalism Within: Rule of Law Backsliding in the EU. Cambridge Yearbook of European Legal Studies, Vol. 19, 2017, pp. 7–9.

[6] Allezard L. Constitutional identity, identities and constitutionalism in Europe. Hungarian Journal of Legal Studies, Vol. 63, No. 1, 2022, p. 59.

[7] See Claes M. National Identity: Trump Card or Up for Negotiation? In: A. Saiz Arnaiz, C. Alcoberro Llivina (eds.). National Constitutional Identity and European Integration. Cambridge: Intersentia, 2013, pp. 109–140.

[8] Dabrowski M. The judgment of the Constitutional Tribunal of 7th October 2021, K 3/21. The case study on declaring the unconstitutionality of UE Treaties. European Studies, Vol. 10, No. 2, 2023, p. 272.

of Member State sovereignty. Literature on the subject points to a duality of this concept, distinguishing between the identity of the constitution itself (conceived as a set of norms and principles) and the identity of the people, which refers to a broader political and cultural context.[9] In the German constitutional tradition, the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) developed a sophisticated doctrine that sought to balance European integration with the protection of fundamental constitutional principles. The famous *Solange* jurisprudence established that the BVerfG would defer to European institutions on fundamental rights protection "as long as" the EU provided equivalent protection to that guaranteed by the German Basic Law.[10]

The *Solange II* judgment of 1986 marked a turning point, as the BVerfG determined that the CJEU's interpretation of EU law was authoritative and final, thereby binding all German courts.[11] This approach reflected a cooperative understanding of the relationship between national and European legal orders, built on mutual trust and recognition of the complementary roles played by different judicial institutions.

The Lisbon judgment of 2009 represented a significant further development in this doctrine.[12] The BVerfG introduced the concept of "identity review" (*Identitatskontrolle*), which reserved to the German court the power to review EU acts that might violate Germany's constitutional identity as protected by the eternity clause of the Basic Law (Article 79(3)). Crucially, however, this power was conceived as an instrument of last resort, to be exercised only in exceptional circumstances and within the framework of judicial dialogue with the CJEU.

The key distinction between the German approach and subsequent developments in Poland lies in the nature of the constitutional values being protected. The BVerfG's identity doctrine focuses on truly fundamental principles: democracy, human dignity, the rule of law, the basic structure of the federal state, and the core guarantees of human rights. These are elements that could not be transferred to a supranational entity without fundamentally altering the character of the German constitutional order. The organisation of the ordinary judiciary, while certainly important, was never conceived as belonging to this irreducible constitutional core that is protected from any modification. A similar, though more dialogue-oriented, development can be observed in France. In a landmark decision of October 2021, the French Constitutional Council expressly referred to "Constitutional Identity" to specify its content, for instance by establishing the prohibition of delegating public power to private persons as an inherent

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[9] Marti J. L. Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People. In: Saiz Arnaiz A., Alcoberro Llivina C. (eds.). National Constitutional Identity and European Integration. Cambridge: Intersentia, 2013, pp. 17–36.

[10] German Federal Constitutional Court, BVerfGE 37, 271 (Solange I), Judgment of 29 May 1974.

[11] German Federal Constitutional Court, BVerfGE 73, 339 (Solange II), Judgment of 22 October 1986.

[12] German Federal Constitutional Court, BVerfGE 123, 267 (Lisbon), Judgment of 30 June 2009.

principle of the French constitutional order.[13] This strategy often follows a well-organized script of "constitutional capture", where the independent judiciary is one of the first offices to be shut down or captured to resist the consolidation of power. Such a process results in a systemic undermining of the key components of the rule of law, including the requirement for independent and impartial courts.[14]

2. The Polish Constitutional Tribunal's approach before the crisis

Prior to the constitutional crisis that began in 2015, the Polish Constitutional Tribunal had developed a nuanced and balanced approach to the relationship between EU law and the Polish Constitution. In its landmark judgment on the Accession Treaty (K 18/04), the Tribunal acknowledged the primacy of the Constitution as the supreme law of Poland while simultaneously recognising the binding force of international law and the principle of pro-European interpretation.[15] The Tribunal held that the different legal orders existing in Poland should "coexist based on the principle of friendly interpretation and cooperative coexistence."

This balanced approach was maintained in the Lisbon Treaty judgment (K 32/09), where the Tribunal reaffirmed that potential conflicts between EU law and the Constitution should be resolved through pro-European interpretation whenever possible.[16] The Tribunal recognised that membership in the European Union implied certain constraints on the exercise of state sovereignty, which Poland had voluntarily accepted through democratic ratification procedures. This jurisprudence reflected the understanding that Poland's constitutional identity was not threatened but rather enriched by participation in the European legal community.[17]

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[13] Allezard L. 2022, p. 59; see also French Constitutional Council, Decision No. 2021-940 QPC of 15 October 2021, Societe Air France.

[14] Pech L., Scheppele K. L. 2017, p. 6.

[15] Judgment of the Constitutional Tribunal of the Republic of Poland of 11 May 2005 in case No. K 18/04.

[16] Judgment of the Constitutional Tribunal of the Republic of Poland of 24 November 2010 in case No. K 32/09.

[17] It is worth noting that during this period, the Polish line of jurisprudence was cited in the doctrine as a model example of a successful adaptation of the "German pattern" by new Member States, based on the search for harmony between the Constitution and EU law. See Rideau J. The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German Model'. In: Saiz Arnaiz A., Alcoberro Llivina C. (eds.). National Constitutional Identity and European Integration. Cambridge: Intersentia, 2013, pp. 243–261. See also Allezard L. 2022, p. 63.

3. The turning point: Judgments No. K 3/21 and P 7/20

The judgment of 7 October 2021 in case No. K 3/21 marked a radical and unprecedented departure from the Tribunal's previous jurisprudence.[18] Initiated by a request from the Prime Minister, the proceedings asked the Tribunal to assess whether certain provisions of the TEU, as interpreted by the CJEU, were compatible with the Polish Constitution. The Tribunal's response was extraordinary in scope and confrontational in nature, going far beyond any previous national court challenge to EU law primacy.

The Tribunal declared that Articles 1 and 19(1) TEU, in conjunction with Article 4(3) TEU, were incompatible with the Polish Constitution insofar as they enabled or required national courts to apply provisions inconsistent with the Constitution or to disregard Constitutional Tribunal judgments. This ruling effectively denied the binding force of CJEU jurisprudence on judicial independence within Poland, claiming that the organisation of the judiciary constitutes an element of Polish "constitutional identity" that is entirely beyond EU competence. Crucially, the Tribunal did not verify whether the interpreted norms actually followed from EU law, effectively ruling on its own perception of the "new stage" of European integration rather than on the normative content of the treaties. This has led scholars to characterize the case as a "simulated constitutional problem" designed solely to block the implementation of unfavourable CJEU rulings.[19] In this context, retired judges of the Constitutional Tribunal pointed out that the K 3/21 proceedings did not aim to resolve any real, irremovable contradiction between legal orders. Instead, the "illusion of a contradiction" was artificially created to provide legal cover for ordinary legislation intended to lower judicial independence standards below the thresholds required by both the Polish Constitution and EU law.[20]

The earlier judgment in case No. P 7/20, delivered on 14 July 2021, had already prepared the ground for this confrontation.[21] In this case, brought by the Disciplinary Chamber of the Supreme Court itself – the very body whose independence had been questioned by the CJEU – the Tribunal ruled that EU treaty provisions requiring Poland to implement CJEU interim measures concerning the judiciary were unconstitutional. The Tribunal characterised

[18] Judgment of the Constitutional Tribunal of the Republic of Poland of 7 October 2021 in case No. K 3/21. Available: https://trybunal.gov.pl/en/hearings/judgments/art/11662 [last viewed 15.01.2026].

[19] Florczak-Wator M. 2021, pp. 7, 9.

[20] Biernat S., Letowska E. This Was Not Just Another Ultra Vires Judgment! Verfassungsblog, 27 October 2021. https://doi.org/10.17176/20211027-182911-0

[21] Judgment of the Constitutional Tribunal of the Republic of Poland of 14 July 2021 in case No. P 7/20. Available: https://trybunal.gov.pl/en/hearings/judgments/art/11589 [last viewed 15.01.2026].

the CJEU's orders as *ultra vires* acts that exceeded the competences transferred to the Union and violated Polish constitutional identity.[22]

These rulings must be understood in the context of the CJEU's own jurisprudence. In case No. C-791/19, the Grand Chamber found that Poland's disciplinary regime for judges was incompatible with EU law, as the Disciplinary Chamber failed to meet the requirements of independence and impartiality under Article 19(1) TEU.[23] The Court emphasised that while Member States retain competence over the organisation of their judiciaries, this competence must be exercised in compliance with EU law obligations, particularly the guarantee of effective judicial protection under Article 47 of the Charter of Fundamental Rights. The Polish authorities have been described as "eager students" of the Hungarian model, realizing that the EU institutions often act slowly and that a "discursive approach" or "constructive dialogue" remains ineffective when a government is bent on deliberately undermining constitutional checks. Consequently, the Rule of Law Framework may inadvertently provide a "rogue government" with the time necessary to consolidate power in plain sight while the Union dithers over its response.[24]

4. The problem of instrumentalisation

The critical question raised by the Polish Tribunal's judgments is whether constitutional identity is being invoked to protect genuinely fundamental constitutional values or merely to shield politically motivated changes to the judicial system from European scrutiny.[25] The K 3/21 judgment should not be viewed in isolation but as part of a new "anti-EU line of jurisprudence" initiated in 2020. This line is characterized by a confrontational stance towards the CJEU, a rejection of the duty of "EU-friendly" interpretation, and the assumption of

[22] It is important to note that until 2021, the Tribunal traditionally avoided declaring the unconstitutionality of binding international agreements, often seeking interpretations that maintained harmony between legal orders. The shift began with the precedent-setting case regarding the European Convention on Human Rights, which paved the way for the direct challenge to EU Treaties in case No. K 3/21. Dabrowski M. 2023, pp. 275–276. The groundwork for this confrontational use of constitutional identity was laid in the 2020 abortion ruling (K 1/20). In his separate opinion, Judge Muszynski explicitly deployed the concept of "constitutional identity" to ward off what he termed "judicial imperialism", arguing that the Tribunal must act as a defender of national standards against international human rights protection systems. This marked the definitive transition of the concept from a defensive shield to an offensive weapon against supranational oversight. Gliszczynska-Grabias A., Sadurski W. 2021, p. 23.

[23] CJEU judgment of 15 July 2021 in case No. C-791/19 European Commission v. Republic of Poland, EU:C:2021:596.

[24] Pech L., Scheppele K. L. 2017, p. 22.

[25] Florczak-Wator M. 2021, p. 5.

a fundamental divergence between national and European standards.[26] Several considerations strongly suggest the latter interpretation.

First, judicial independence is not a uniquely Polish constitutional value but a universal principle enshrined in Article 2 TEU, to which Poland committed upon accession.[27] The values of democracy, rule of law, and human rights are shared by all Member States and form part of what the CJEU has termed the "very identity of the European Union as a common legal order". A Member State cannot legitimately invoke its national identity to escape obligations flowing from these shared values, which it voluntarily accepted when joining the European project.

Second, the specific judicial "reforms" being protected bear the hallmarks of political interference rather than constitutional necessity.[28] The creation of a Disciplinary Chamber staffed exclusively by judges appointed through a procedure controlled by the ruling majority, combined with the broad definition of disciplinary offences that could encompass the application of EU law, suggests a system designed for political control rather than constitutional protection. These are not time-honoured features of the Polish legal tradition but innovations introduced after 2015 for evident political purposes. This phenomenon aligns with the concept of "abusive constitutionalism", where the ruling majority utilizes the "new" Constitutional Tribunal to create a legal basis for delegitimizing European norms perceived as obstacles to political goals. Under such conditions, judicial interpretation is reduced to a "service activity" for political authorities, stripped of genuine constitutional authority and distance from current political interests.[29]

Third, the manner in which constitutional identity has been invoked differs fundamentally from the German model. Where the BVerfG conceived its identity review as an exceptional safeguard to be exercised with restraint and in dialogue with the CJEU, the Polish Tribunal has deployed constitutional identity as a blanket shield against any EU judicial oversight of the judiciary.[30] This is not a defensive mechanism protecting a constitutional core but an offensive weapon aimed at negating EU law primacy in an entire policy domain.[31] A key element of this instrumentalisation is the misuse of the "organisation of the judiciary" argument.

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[26] Florczak-Wator M. 2021, pp. 5–6.

[27] Von Bogdandy A., Bogdanowicz P., Canor I., Taborowski M., Schmidt M. A potential constitutional moment for the European rule of law. Common Market Law Review, Vol. 55, 2018, pp. 983–1028.

[28] Pech L., Scheppele K. L. 2017, pp. 3–47.

[29] Garlicki L. 2022, pp. 158, 160.

[30] In this light, constitutional identity becomes a "trump card" used by nationalist politicians to protect any government action from scrutiny, regardless of international obligations. It is no longer a concept aimed at celebrating the richness of national traditions, but a weaponized tool used against European integration itself. See Gliszczynska-Grabias A., Sadurski W. 2023, p. 178.

[31] Furthermore, it is argued that the 2021–2022 jurisprudence of the Polish Tribunal was based on "exceptionally weak legal arguments" that ignored the objective reality of the internationalization of contemporary constitutions. These decisions represent a deliberate move away from "normal" constitutionalism towards a model where external legal influences are treated as threats to be combated. Garlicki L. 2022, pp. 164, 166–167.

While Member States remain competent in structuring their court systems, this competence does not extend to the core principle of judicial independence, which is a common denominator for all Member States and a prerequisite for effective legal protection. By blurring this distinction, the Tribunal attempts to shield political interference from European judicial review under the guise of constitutional identity.

5. Consequences: Legal dualism and erosion of sincere cooperation

The practical consequences of the Tribunal's judgments have been severe and far-reaching. Polish judges now face an impossible choice between applying EU law, as required by their obligations under the Treaties and their duty to provide effective judicial protection, and following the Constitutional Tribunal's rulings that characterise such application as unconstitutional.[32] This legal dualism fundamentally undermines legal certainty and places individual judges at risk of disciplinary proceedings for fulfilling their EU law obligations.[33] However, from a strictly constitutional perspective, it is argued that the judgment remains legally ineffective. Since the Tribunal exceeded its powers under Article 188 of the Constitution by ruling on non-normative reality, the contested TEU provisions remain binding, and national courts are still obligated to provide effective judicial protection and bypass conflicting national law.[34]

The European Parliament has condemned the K 3/21 judgment as "an attack on the European community of values and laws as a whole," noting that the Constitutional Tribunal "not only lacks legal validity and independence but is also unqualified to interpret the Constitution in Poland."[35] While this political characterisation may be contested, the legal implications are clear: the judgment creates a fundamental incompatibility between Poland's claimed constitutional position and its obligations under EU law.

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[32] Jaraczewski J. Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal. Verfassungsblog, 12 October 2021. Available: https://verfassungsblog.de/gazing-into-the-abyss/ [last viewed 15.01.2026].

[33] The decision has devastating consequences for individuals, as it effectively deprives Polish and EU citizens of the guarantee of a fair trial and access to an impartial tribunal as defined in Article 47 of the Charter of Fundamental Rights. By blocking the application of CJEU case law, the Tribunal denies parties the right to an effective remedy, which is the "very essence" of EU law. Gliszczynska-Grabias A., Sadurski W. 2023, pp. 164, 179.

[34] Florczak-Wator M. 2021, p. 11.

[35] European Parliament resolution of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law (2021/2935(RSP)). Despite its severe rhetoric, the K 3/21 judgment is widely perceived by the legal community as a political statement rather than a functional legal act. Consequently, many domestic courts continue to apply EU law as if the jurisdiction had never been issued, further deepening the state of legal dualism where the Tribunal's authority is increasingly ignored by the judiciary. Dabrowski M. 2023, pp. 271, 279.

The principle of sincere cooperation, enshrined in Article 4(3) TEU, requires Member States to facilitate the achievement of the Union's tasks and refrain from measures that could jeopardise EU objectives.[36] A systematic refusal to implement CJEU judgments, justified by an expansive interpretation of constitutional identity, clearly violates this foundational principle. It transforms a mechanism intended to preserve legitimate constitutional diversity into a tool for legal isolationism that threatens the coherence of the entire European legal order.

Conclusions

The analysis presented in this article leads to several fundamental conclusions regarding the instrumentalisation of constitutional identity in the jurisprudence of the Polish Constitutional Tribunal.

First, the concept of constitutional identity, as developed in European legal doctrine and reflected in Article 4(2) TEU, was designed to protect the genuine constitutional core of Member States: their fundamental political structures, basic values, and irreducible elements of statehood. It was never intended as a mechanism for evading shared commitments to rule of law values that Member States accepted upon joining the Union.

Second, the Polish Constitutional Tribunal's deployment of constitutional identity to shield judicial reforms from EU scrutiny represents a fundamental misuse of this concept. Judicial independence is not a national peculiarity but a universal value that Poland committed to upholding under Article 2 TEU. The organisation of disciplinary proceedings against judges cannot constitute an element of constitutional identity that is beyond EU competence.

Third, the consequences of this instrumentalisation extend far beyond Poland. The emergence of a legal dualism that forces judges to choose between EU law and constitutional tribunal rulings undermines the coherence of the European legal order. If other Member States were to adopt similar approaches, the uniform application of EU law – a fundamental condition for the functioning of the internal market and the protection of citizens' rights – would be fatally compromised.

Fourth, addressing this challenge requires a renewed commitment to judicial dialogue. The German model, despite its imperfections, demonstrates that constitutional identity claims can be accommodated within a framework of mutual respect and cooperation between national and European courts. Furthermore, the Polish case differs fundamentally from the jurisprudence of other national constitutional courts (such as the BVerfG). In other Member States, such judgments were exceptional, concerned specific substantive issues, and generally aimed to raise the level of protection for citizens, whereas the Polish Tribunal's approach systematically challenges the foundations of the Union and effectively

[36] Biernat S., Letowska E. This Was Not Just Another Ultra Vires Judgment! Verfassungsblog, 27 October 2021. https://doi.org/10.17176/20211027-182911-0

lowers the standard of rights protection.[37] The confrontational approach adopted by the Polish Tribunal forecloses such dialogue and ultimately harms Polish citizens who are denied the full protection of EU law.

Finally, the EU institutions must develop more effective mechanisms for responding to systematic violations of rule of law values. The conditionality mechanism linking EU funds to rule of law compliance represents one such tool, but its effectiveness depends on consistent and determined application. Constitutional identity cannot be permitted to become a "trap card" that enables Member States to enjoy the benefits of EU membership while rejecting its fundamental legal obligations.[38]

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[37] Biernat S. 2021.

[38] Ultimately, the "values crisis" represented by the instrumentalization of constitutional identity has far-reaching implications, as a Union without shared common values has few reasons to exist and fails to protect the legal framework upon which it was founded. Pech L., Scheppele K. L. 2017, p. 5.

9. Jaraczewski J. Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal. Verfassungsblog, 12 October 2021. Available: https://verfassungsblog.de/gazing-into-the-abyss/
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SECTION 2

ENERGY AND ENVIRONMENTAL LAW: CONVERGENCE AND DIVERGENCE OF NATIONAL LEGAL SYSTEMS

https://doi.org/10.22364/iscflul.10.07

Indre Isokaite, *Dr. iur., Associate Professor*
Vilnius University, Faculty of Law, Lithuania

PROTECTING STATE'S CRITICAL MARITIME INFRASTRUCTURE FROM HYBRID THREATS

Key words: critical maritime infrastructure, State's undersea infrastructure, undersea cables and pipelines, hybrid threats, shadow fleet

Summary

The article explores basic challenges of the law of the sea to protect critical maritime infrastructure from hybrid threats. The research aims at a comprehensive analysis of the rights and jurisdiction of a coastal state, a flag state and other states in each of maritime zones in the area of critical undersea infrastructure with the aim to identify difficulties to take measures in response to injuries of such infrastructure caused by "shadow fleet" ships and to propose possible solutions to address such risks. Measures which would be available or effective in such cases are limited because of the lack of regulation of undersea infrastructure in the 1982 Law of the Sea Convention, limited coastal states' rights to board, intercept or start investigation in such cases beyond the limits of its territorial sovereignty, lack of suitable grounds in domestic law to be invoked in order to start and complete proceedings effectively, difficulties in establishing the violation and proving accountability, moreover, attributing it to a particular state, which in "shadow fleet" cases is often a flag of convenience, unwilling (or unable) to assume its flag state's jurisdiction. Taking the complexity of the factors underpinning the cases of disruption of state's critical maritime infrastructure and the limitations enshrined in the zone-based and jurisdiction-based character of maritime zones into account, the article concludes that the response should be multilayer, comprehensive and coordinated. Legal issues as regards developing proactive and unanimous interpretation of relevant rules and improving domestic legislation should go in hand with practical dimension – surveillance, trainings, military presence (deterrence), building resilience and strengthening protection. Coastal states should seek to invoke their prescriptive and enforcement jurisdiction to a maximum extent: in internal sea waters and territorial sea coastal states' rights are widest as they derive from a territorial sovereignty, in the exclusive economic zone and the continental shelf sovereign rights apply in respect of underwater critical infrastructure and should be interpreted as allowing action in defined fields (navigation, environment), however, a coastal state does not have unlimited rights of interdiction, instituting proceedings and implementing accountability in respect of a foreign vessel the state of which in many cases related to the alleged injuries of undersea infrastructure holds primary jurisdiction. In addition, states may ground their rights on the articles providing for jurisdiction in cases of environment protection or rely on necessity. Action on a domestic level should be strengthened

by international cooperation, processes and institutions that such international frameworks provide. At NATO, information sharing, trainings and overall deterrence shall be emphasized, although the alliance lists disruption of critical infrastructure among hybrid threats, which in an extreme case could even amount to consideration of invocation of a collective self-defence. At the EU, different measures aimed at capacity building and cooperation have been adopted for maritime security and protection of critical infrastructure in addition to application of sanctions. International Maritime Organisation explicitly indicated the threats posed by "shadow fleet" ships among global challenges to maritime safety and strengthening compliance with established shipping standards and the rules of jurisdiction is what must be further pursued.

Introduction

Lasting Russia's aggression against Ukraine is the most explicit example of a full-scale war, which is conventional, involving usual military tactics and weapons, but also hybrid, involving use of proxies, propaganda, among other means. Both types of this war are also lasting on the maritime domain: in addition to mining sea waters, attacking military vessels and blocking seaports, there is also involvement of one more silent belligerent – the so called "shadow fleet".[1] The passage of such ships, often behaving at sea (or even constructed as regards their intended service), unusually, considering the route or purpose of their voyage, carrying the flags of convenience, often leaves undersea infrastructure injured causing the risk of interruption of the provision of critical communication and energy transmission services. Such incidents and states' attempts to respond to them reveal challenges and lack of clarity as regards the measures at their disposal to address these threats.

In recent years, dozens of incidents of injuries or cutting undersea infrastructure at the Baltic Sea have been registered. Under often repeated statistics, more than 90% of global data flow is transmitted through undersea cables, therefore called "invisible highways".[2] For example, in 2025 Finland seized a ship sailing from Russia for injury of the cable between Finland and Estonia, a cable between

[1] "Shadow fleet" – also referred to as "dark fleet" or "ghost fleet" – describes a specific type of illegal maritime activity carried out by states to evade sanctions, improve their economies, and broadly disrupt the international order. Vassort I. Combating Maritime Insecurity: EU and NATO's strategic role against shadow fleet in the Indo-Pacific. 26 January 2026. Available: https://www.isdp.eu/combating-maritime-insecurity-eu-and-natos-strategic-role-against-shadow-fleet-in-the-indo-pacific/ [last viewed 12.02.2026].

[2] Undersea cables and pipelines may be injured by intentional and unintentional human activities, fishing, natural disasters and other factors. "There are typically 150 to 200 cable incidents each year, averaging about three to four per week", about / up to 80% are caused by human activities (fishing, anchors)". Invisible highways: the vast network of undersea cables powering our connectivity. Available: https://news.un.org/en/story/2026/02/1166867 [last viewed 12.02.2026]. Similar factors causing injuries are indicated by the International Cable Protection Committee. First Global Assessment of Environmental Considerations. 11 December 2025. Available: https://www.iscpc.org/news/ [last viewed 12.02.2026].

Finland and Germany was also cut and the one between Lithuania and Finland.[3] Most recently, in January 2026, Latvia reported having started investigation under the criminal code for intentional damaging or cutting subsea electric cable.[4] The series of explosions of a Nord Stream gas pipeline in 2022 is perhaps mostly surrounded by different interpretations. Despite public opinion expressed by state representatives or declarations at international forums and general depiction of such incidents, including the assessment of experts, as intentional,[5] there has been lack of proving attribution of a particular state or accountability in general.

This article aims to provide a comprehensive and systematic analysis of basic limitations enshrined in the law of the sea to respond to risks posed by "shadow fleet" ships to a state's undersea critical infrastructure[6] and to propose means to address them. Firstly, the rights, duties and jurisdiction as regards undersea cables and pipelines in different maritime zones are analysed and basic limitations are highlighted in the context of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and its interpretation. Secondly, measures taken by states on international level, mainly, NATO and the European Union (EU), as well as International Maritime Organisation (IMO), are explored. Thirdly, some key issues of enforcement to be taken at domestic level is generally addressed. The research, however, does not intend to encompass all possible scenarios which damaging undersea critical infrastructure might (in some rare cases) amount to, such as piracy, use of force, etc.

The research is based on a systematic analysis, doctrinal analysis and research of case law, comparison, critical approach and assessment-description are also needed, for clarification of a true meaning of treaty provisions methods for treaty interpretation are invoked (the aim, parties' intentions, etc.). Systematic analysis serves for the main aim of providing a comprehensive research, based on comparison and interpretation of treaty provisions, state practice and instruments of international organisations and taking relevant developments into account.

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[3] Finnish police seize ship suspected of sabotaging undersea cable. BBC, 31 December 2025. Available: https://www.bbc.com/news/articles/c62040np372o [last viewed 12.02.2026].

[4] Owner expects to repair damaged Lithuania-Latvia undersea cable within weeks. LRT, 5 January 2026. Available: https://www.lrt.lt/en/news-in-english/19/2797314/owner-expects-to-repair-damaged-lithuania-latvia-undersea-cable-within-weeks?srsltid=AfmBOoo5W9v8K15NB9gby8sYud-dHDZUhmYK1PlVJSGC0Ir0KbaQZzEQ [last viewed 12.02.2026].

[5] International surveys and individual researches have listed dozens of such incidents, for example: Milmo D. Wire cutters: how the world's vital undersea data cables are being targeted. Available: https://www.theguardian.com/world/2024/nov/22/wire-cutters-how-the-worlds-vital-undersea-data-cables-are-being-targeted [last viewed 12.02.2026].

[6] Mostly focusing on undersea cables for transmission of electricity and internet and gas pipelines, as there are some peculiarities in respect of each type of sea infrastructure and installations that fall outside the scope of this article.

1. "Navigating" under the Law of the Sea Convention

In this section, the term "navigating" is used symbolically, with no intention to limit the analysis of UNCLOS provisions to this issue, although fundamental for the topic of this article, as a right and freedom of navigation, which has evolved through centuries and developed as customary law, usually prevails over a coastal state's interference, but to emphasize difficulties to address "shadow fleet" enshrined in the nature of UNCLOS, which was adopted in a different security environment and another stage of technology development. As stated by A. Lott, "the drafters of the UNCLOS granted hardly any protection to underwater infrastructure. Submarine pipelines and power cables as well as telecommunications cables that carry 95 to 99% of intercontinental data flows were left unprotected from intentional or accidental damage".[7] Other authors also acknowledge a broad freedom of building submarine cables and pipelines and limited room for enforcement: "firm parameters for the measures that States can take on an individual basis to protect such infrastructure"[8].

The limits of maritime zones define the extent of the allowed or prescribed powers of states – rights, duties and jurisdiction (prescriptive or legislative and enforcement, adjudicative can be listed separately). In addition to the following key factors – the location of a foreign vessel, undersea infrastructure or occurrence of injury (also consequences) and a particular field at issue (area, for example, environment protection or situation, such as vessel collision), the rules of jurisdiction define exclusive, priority or conflicting rights of certain degree of interference by a flag state, a coastal state or particular states (e.g. of a citizenship, etc.). This is the general UNCLOS landscape which applies in respect to the "shadow fleet" ships and undersea infrastructure leaving ambiguities and definitely demanding interpretation.

Sovereignty characterises the legal regime of the internal sea waters and territorial sea[9] with the exceptions of, accordingly, flag state's jurisdiction's priority at seaports and innocent passage through territorial sea. UNCLOS is silent on undersea cables and pipelines in these maritime zones,[10] however, legal doctrine and case law confirm a coastal state's right to construct infrastructure, ensure its protection and seek liability for damage caused. So the right of prescriptive and enforcement jurisdiction arises from sovereignty and is based on the territorial principle extending to the outer limit of the territorial sea. Contiguous zone's

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[7] Lott A. Unconventional Legal Approaches to Protecting Underwater Infrastructure. The Hague: The Hague Centre for Strategic Studies, 2025, p. 1.

[8] Ratcovich Leopardi M. Critical Perspectives in the Law of the Sea – The Regulation of Underwater Infrastructure as an Example of Facilitation and Limitation in Parallel. In: Klamberg M., Svanberg K., Ronnelid L. (eds.). Reconstructing Power and Hegemony in Public International Law. The Hague: T.M.C. Asser Press, 2026, p. 84. https://doi.org/10.1007/978-94-6265-743-4_5

[9] UNCLOS Article 2.

[10] UNCLOS Paragraph 4 of Article 79.

regime[11] is less relevant in current case: disruption of infrastructure in this area would mostly fall under the regime of the exclusive economic zone with which the contiguous zone overlaps.

Coastal state holds sovereign rights and defined jurisdiction in its exclusive economic zone. Sovereign rights are granted "for the purpose of exploring and exploiting, conserving and managing the natural resources" and "with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds",[12] so may be interpreted as allowing construction related with living or natural resources, building wind power plants and other installations or safety zones across them and ensuring compliance. The list of areas of coastal state's jurisdiction explicitly lists the establishment and use of artificial islands, installations and structures,[13] marine scientific research, the protection and preservation of the marine environment, but the list is not exhaustive.

Over the continental shelf a coastal state exercises sovereign rights for the purpose of exploring it and exploiting its natural resources[14] and shall take "reasonable measures for the prevention, reduction and control of pollution from pipelines".[15] Although "the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters",[16] its regime is related with the exclusive economic zone as, for example, building of lighthouses, artificial islands, wind power plants stretches from the seabed to the surface as well as some constructions related with undersea cables and pipelines (maintenance platforms, safety zones, etc.).

On the high seas ships enjoy freedom of navigation and a flag state is responsible for its ships' compliance with international navigation standards,[17] including the duty not to injure infrastructure. A specific provision calling for making injury of cables and pipelines a punishable offence also establishes this as a duty of a flag state.[18] In specific situations there are explicit rules for jurisdiction, for example, penal jurisdiction in matters of collision or any other incident of navigation where jurisdiction of a flag state or a state of nationality applies.[19] Other provisions allow coastal states to inspect foreign ships in cases of pollution,[20] however, injury of cables would hardly amount to such consequences in the way gas pipelines would.

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11 UNCLOS Article 33.

12 UNCLOS Article 56.

13 Undersea cables and pipelines are not listed here, but the right to build such type construction derives from other UNCLOS provisions, mainly the continental shelf.

14 UNCLOS Paragraph 1 and Article 77.

15 UNCLOS Paragraph 2 of Article 79.

16 UNCLOS Paragraph 1 of Article 78.

17 UNCLOS Article 94.

18 UNCLOS Article 113.

19 UNCLOS Article 97.

20 UNCLOS Article 221, 112, etc.

Some grounds for defined extent of interference (boarding, interception, arrest or instituting proceedings) may be found in another conventions.[21]

International courts and tribunals have adopted some case law interpreting UNCLOS provisions which might be relied on in unclear cases of coastal state's rights. Moreover, they have even been called to interpret certain elements of hybridity on a maritime domain. For example, in the Case Concerning the Detention of Three Ukrainian Naval Vessels hybridity may be seen in overlap of time (peace and war), subjects acting (naval and civil) and mode of conduct (Russian Coast Guard ships stopping Ukrainian ships calling their home seaports in the area of Ukraine's sovereignty occupied by Russia). International Tribunal for the Law of the Sea (ITLOS) stated: "the traditional distinction between naval vessels and law enforcement vessels in terms of their roles has become considerably blurred".[22] Coastal state's jurisdiction in the exclusive economic zone could be asserted on the ground of vital national interests and plea of necessity. In the Arctic Sunrise Arbitration, the Arbitral Tribunal clearly indicated action to prevent dangerous situations that can result in injuries to persons and damage to equipment and installations, delay or interruption in essential operations, as well as violations of its laws adopted in conformity with UNCLOS and negative environmental consequences, as legitimate interests of coastal states.[23]

2. "Shadow fleet" at a glance of international organisations: NATO, EU and IMO

Disruption of undersea cables and pipelines threatens provision of critical state services, endanger maritime safety and security and undermine regional security and stability. Unsurprisingly, having faced such threats states raised concerns at both, NATO and the EU, also IMO. As acknowledged by NATO Secretary General M. Rutte, NATO and the EU are "really unique partners" which

[21] The relevance of the high seas regime and international seabed area is limited in cases of "shadow fleets" in Baltic Sea, as almost all sea falls under maritime zones of states. Just as an example, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and its 2005 Protocol provides for certain acts (the discharge of explosives or use of a ship that result in a death or serious injury or damage), however, authorization of a flag state is required to board the foreign vessel (Article 8bis(5)(c) of the Protocol 2005). 1884 Convention for the Protection of Submarine Telegraph Cables applies outside territorial waters and might be invoked to board a foreign vessel under established circumstances.

[22] Para. 64. ITLOS further noted that "it is not uncommon today for States to employ the two types of vessels collaboratively for diverse maritime tasks" and in Para 110 declared that "any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security." Order of 25 May 2019 in the Case concerning the detention of three Ukrainian Naval Vessels.

[23] Para. 327.

share interests and can do more together.[24] Recently international cooperation has seen more polarisation and fragmentation, geopolitical shifts have fostered states to individualise areas of aligning common interests invoking the advantages of and retaining the cooperation framework, even if some states are hesitating or reluctant to contribute to the values international organisation was established for. IMO listed "shadow fleet" "or "dark fleet" in addition to maritime security and decarbonisation among key global challenges on its Agenda 2025.[25]

Attacks on undersea critical infrastructure are classified by NATO among hybrid threats such as sabotage and propaganda and already for some 10 years NATO has been developing tools for response to hybrid activities having declared that they may even reach the threshold of Article 5 of NATO Treaty.[26] However, only high-scale attacks (hybrid, cyber) causing extremely severe consequences may call for considering the collective self-defence and this has not been an issue at least so far, in response to "shadow fleet" activities, NATO has mostly focused on such means as deterrence, training and developing resilience in maritime domain, which remains among priorities of action in order to maintain peace and security. This challenge has not emerged only recently, it was known years ago and is likely to remain in the future. As noticed in NATO 2030 report, "assertive Russian behavior has intensified in the High North and North Atlantic, with air and naval build ups in and around key maritime chokepoints in the Barents, Baltic, and Black seas, and the Mediterranean. In the last three of these, Russia has placed anti-access/area-denial (A2AD) capabilities, expanded hybrid warfare, and threatened energy and critical infrastructure".[27]

NATO not only serves as a political framework and a platform for consultation, but also provides a coordinated action needed – a range of maritime security operations and activities: Critical Undersea Infrastructure Coordination Cell, NATO-EU Task Force and NATO'S Critical Undersea Infrastructure Network

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[24] Remarks by NATO Secretary General Mark Rutte. NATO, 26 January 2026. Available: https://www.nato.int/en/news-and-events/events/transcripts/2026/01/26/remarks-by-nato-secretary-general-mark-rutte-at-the-meeting-of-the-european-parliaments-committee-on-security-and-defence [last viewed 12.02.2026]. EU-NATO cooperation is also witnessed by the EU-NATO Task Force on the Resilience of Critical Infrastructure Final Assessment Report of June 2023 (available: https://commission.europa.eu/system/files/2023-06/EU-NATO_Final%20Assessment%20Report%20Digital.pdf [last viewed 01.03.2026]), where parties agree on certain recommendations and to take joint action.

[25] Dark fleet, decarbonization and geopolitical pressures remain top maritime focus areas in 2025. International Maritime Organisation, 15 January 2025. Available: https://www.imo.org/en/mediacentre/pressbriefings/pages/dark-fleet-decarbonization-geopolitics-top-maritime-focus-areas.aspx [last viewed 12.02.2026].

[26] Countering Hybrid Threats. NATO, 29 January 2026. Available: https://www.nato.int/en/what-we-do/deterrence-and-defence/countering-hybrid-threats [last viewed 12.02.2026].

[27] NATO 2030: United for a New Era. Analysis and Recommendations of the Reflection Group Appointed by the NATO Secretary General. 25 November 2020. Available: https://www.ndc.nato.int/nato-2030-united-for-a-new-era-a-digest/ [last viewed 12.02.2026].

were established in 2023–2024.[28] In 2025, following incidents at the Baltic Sea cutting undersea critical infrastructure in December 2024, NATO launched Baltic Sentry as a comprehensive multi-domain activity in order to increase NATO's military presence and improve abilities to identify and respond to destabilising acts.[29]

Security has become a key issue for the EU and trespasses its policies and different areas – a comprehensive approach linking related areas, such as navigation, environment, economy, security characterises EU maritime regulation. In the field of countering threats posed by "shadow fleets", the following instruments should be emphasized. EU Maritime Security Strategy[30] is an "umbrella" for a closer collaboration within EU dealing with challenges on maritime domain and upholding rule-based international legal order as well as fostering international cooperation with likeminded countries, regional and international organisations and provides for maritime security exercises, maritime domain awareness, increasing resilience and better preparedness to respond to risks. EU Critical Entities Resilience Directive[31] defines critical entities[32] and creates a framework to ensure they are able to prevent disruptive incidents (ranging from natural hazards to sabotage) or recover from them, monitor and protect critical maritime infrastructure and ships from physical and cyber threats.

Following Russia's aggression against Ukraine the EU has accelerated the imposition of sanctions which used to be called unprecedented and cover a range of fields and subjects. The 20th sanctions package launched by the European Commission which lists 43 more vessels as part of the "shadow fleet" increases the list to 640 ships in total. Although insufficient to stop the war and often criticised as not strict enough, sanctions remain among the key tools at the disposal of the EU to target Russia's potential to further wage the war. Attempts are made to decrease Russia's abilities to acquire tankers to be used for the "shadow fleet", to limit provision of services for such ships, etc.[33]

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[28] NATO's maritime activities. NATO. Available: https://www.nato.int/en/what-we-do/operations-and-missions/natos-maritime-activities [last viewed 12.02.2026].

[29] Baltic Sentry. NATO. Available: https://shape.nato.int/operations/operations-and-missions/baltic-sentry [last viewed 12.02.2026].

[30] 10.3.2023, JOIN (2023) 8 final, European Commission, Joint Communication on the update of the EU Maritime Security Strategy and its Action Plan, "An enhanced EU Maritime Security Strategy for evolving maritime threats". Available: https://oceans-and-fisheries.ec.europa.eu/document/download/7274a9ab-ad29-4dae-83fb-c849d1ca188b_en?filename=join-2023-8_en.pdf [last viewed 12.02.2026].

[31] Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC (Text with EEA relevance) PE/51/2022/REV/1. OJ L 333, 27.12.2022, pp. 164–198.

[32] Article 2 provides that "critical entity" means a public or private entity which has been identified by a Member State in accordance with Article 6 as belonging to one of the categories set out in the third column of the table in the Annex.

[33] European Commission puts forward 20th package of sanctions against Russia. 9 February 2026. Available: https://euneighbourseast.eu/news/latest-news/european-commission-puts-forward-20th-package-of-sanctions-against-russia/ [last viewed 12.02.2026].

The EU and its Member States have also expressed their commitment to UNCLOS, including importance to follow its provisions and noted that UNCLOS provides a wide range of measures allowing to take action in response to threats posed by "shadow fleets".[34]

IMO does not apply sanctions, but its activities and policies are affected by and in line with them. Leading in establishment of global maritime safety standards and seeking adherence to them, IMO has referred to risks posed by "shadow fleets" in its resolution and provided a definition: "shadow feet" or "dark fleet" ships are ships engaging in illegal operations for the purposes of circumventing sanctions or engaging in other illegal activities.[35] Flag states bear primary responsibility to ensure their ships meet established standards and port state control allows coastal states to verify this compliance. Still, IMO is a key player in supporting states to fight fraudulent activities and deceptive practices and seek compliance with maritime safety standards: from urging universal participation in IMO conventions to strengthening their enforcement are among measures that IMO calls for.

Member States of NATO, the EU and IMO have also developed their cooperation on a regional level. For example, Memorandum of understanding on the protection of critical undersea infrastructure in the Baltic Sea was signed among Baltic states and the European Union,[36] where parties agreed to better monitor, prevent incidents, address sabotage, recover damages, develop undersea monitoring and repair capabilities, collaborate and coordinate and exchange best practices. International cooperation demands coordination of many interests and in different sectors: "integrating the different sectors and related policy fields is difficult to achieve and presents an enormous coordination challenge on a national but also regional level".[37]

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[34] Paragraph 9 of the Declaration of the European Union and its Member States of 15 December 2025 No. 16829/25 on making full use of the international law of the sea framework relating to threats from the "shadow fleet" and to the protection of critical undersea infrastructure provides that "international law permits States to take enforcement action in a number of scenarios potentially relevant to the protection of critical undersea infrastructure, including but not limited to Articles 21, 73, 110, 111, 220 and 221 of UNCLOS, as well as Article X of the 1884 Paris Convention for the Protection of Submarine Telegraph Cables, where applicable".

[35] International Maritime Organisation. Resolution A 33/Res.1192 A.1192(33) of 6 December 2023, Urging Member States and all Relevant Stakeholders to Promote Actions to Prevent Illegal Operations in the Maritime Sector by the "Dark Fleet" or "Shadow Fleet".

[36] Memorandum of Understanding among The Government of Denmark, the Government of the Republic of Estonia, the Government of the Republic of Finland, the Government of the Federal Republic of Germany, the Government of Iceland, the Government of the Republic of Latvia, the Government of the Republic of Lithuania, the Government of the Kingdom of Norway, the Government of Republic of Poland, the Government of Sweden and the European Union of 16 May 2025.

[37] Bueger C., Liebetrau T. Critical maritime infrastructure protection: What's the trouble? Marine Policy, Vol. 155, 2023, Article 105772. https://doi.org/10.1016/j.marpol.2023.105772

3. A few implications at a domestic level

Risks posed by "shadow fleets" are multifaceted and demand comprehensive response both, on international and domestic level. Although states have activated mechanisms and procedures at NATO, the EU and IMO, so far there have been more difficulties than effective solutions when dragging anchors, cutting cables or causing similar injuries to undersea infrastructure called states to act. Experts and politicians often referred to unclear regulation under UNCLOS, ambiguities left in its interpretation, loopholes in domestic law, limitations of the rights of countries other than a flag state to take enforcement action in respect of "shadow fleet" ships among other challenges. However, in the words of M. Rutte, "within the legal framework, there are ways to intervene".[38]

Territorial jurisdiction and sovereignty that coastal state enjoys allow to take broadest range of measures, such as port state control, regulation of innocent passage (which might establish specific requirements for navigation referring to undersea critical infrastructure), enforcement of sanctions, implementing jurisdiction in respect of foreign vessels, including criminal,[39] etc. In the exclusive economic zone and continental shelf, the rights to intercept or board a foreign vessel and start investigation mostly depend on the location of the vessel and occurrence of the incident (or consequences), the field and situation under which the incident can be classified (navigation (collision) or environment (pollution), etc.) and other circumstances. Even when coastal states took measures at initial stage, for example, made orders to comply with navigation route or even boarded the foreign vessel, further proceedings usually faced limitations and were terminated. For example, Finland has instituted proceedings in the case involving the tanker *Eagle S* for cutting undersea cables, however, the Helsinki District Court dismissed the charge as it was not possible to apply Finnish criminal law.[40]

States define criminal offences in their domestic law differently (sabotage, damage to state property, etc.), but they cannot be applied in all cases due to limited territorial scope of application or the need of proving intentional conduct or other reasons. Although excessive reliance on the introduction of new criminal offences to solve all "shadow fleet" problems is misleading, the relevance of the development and continuous review of national legislation as making an important contribution to the prevention and control of maritime fraud should be acknowledged.[41] Coastal states should be more brave or creative relying on a broader interpretation of UNCLOS provisions related with their sovereign rights and jurisdiction in respect

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[38] Remarks by NATO Secretary General Mark Rutte. 26 January 2026. Available: https://www.nato.int/en/news-and-events/events/transcripts/2026/01/26/remarks-by-nato-secretary-general-mark-rutte-at-the-meeting-of-the-european-parliaments-committee-on-security-and-defence [last viewed 12.02.2026].

[39] Subject to restrictions under UNCLOS Article 27.

[40] Finland dismisses case over Baltic cable cuts. Euractiv, 2025. Available: https://www.euractiv.com/news/finland-dismisses-case-over-baltic-cable-cuts/ [last viewed 12.02.2026].

[41] IMO Resolution A 33/Res.1192 A.1192(33) of 6 December 2023 (preamble).

of foreign vessels (in particular when the state of the latter fail to implement their flag state duties). "Protecting critical maritime infrastructure from hybrid threats requires a proactive and multi-faceted approach. The availability of robust legal authorities and close cooperation across what is a fragmented jurisdictional landscape are key".[42]

Much should be done on a practical level – exercises, deploying surveillance and sensing technologies, using drones, increasing physical protection and patrolling and in other ways strengthening awareness, resilience and response. Flag state's duties compliance shall be fostered by all states fighting the challenges posed by "shadow fleets" which rely on fraudulent registration and other deceptive practices distorting the true understanding of a flag state's responsibilities, historically perceived through a genuine link. Combining all tools could create a "coordinated pressure" making the Baltic Sea "inhospitable to Russia's illegal and dangerous maritime practices", in particular for Baltic and Nordic countries which are "uniquely positioned to act" as they "possess exceptional maritime domain awareness, capable coast guards and navies, and dense legal and regulatory ecosystems".[43]

Invoking various coordinated and harmonised measures by different actors and on separate levels could contribute to a more effective response.[44] "Improved monitoring and surveillance capabilities, protection and repair capabilities, stronger interagency cooperation and coordination, and robust regional mechanisms and partnerships" are among often proposed tools.[45]

Conclusions

Attacks on state's critical maritime infrastructure raise legal concerns and practical challenges as they threaten the provision of vital state services of communication and energy transmission. Difficulties to take measures against "shadow fleet" ships and respond to threats posed by them effectively are stipulated

[42] Sari A. Protecting maritime infrastructure from hybrid threats: legal options. Hybrid CoE Research Report No. 14, March 2025. Available: https://www.hybridcoe.fi/wp-content/uploads/2025/03/20250306-Hybrid-CoE-Research-Report-14-web.pdf [last viewed 12.02.2026], p. 36.

[43] Justina Budginaite-Froehly. The US is taking action against Russia's shadow fleet. In the Baltic Sea, Europe should follow suit. Atlantic Council, 22 January 2026. Available: https://www.atlanticcouncil.org/dispatches/the-us-is-taking-action-against-russias-shadow-fleet-in-the-baltic-sea-europe-should-follow-suit/ [last viewed 12.02.2026].

[44] For example, review of domestic legislation and development of harmonised regulation, establishment of cooperative mechanisms, subsea cable security and resilience in national preparedness and crisis response planning are proposed among other measures by C. Kavanagh, J. Franken, and W. He. Achieving Depth: Subsea Telecommunications Cables as Critical Infrastructure. Geneva: UNIDIR, 2025, p. 9.

[45] Chan J., Lim N. Protecting Critical Undersea Infrastructure. Accelerating the Momentum in ASEAN. IDSS Paper, 11 March 2026, p. 3.

by limited regulation of undersea critical infrastructure in UNCLOS which was adopted in a different from current international environment and mainly follows maritime zone-based and jurisdiction-based approach. Even if an injury of such infrastructure is established (at a real time), a coastal state's right to intercept or board the foreign vessel much depends on the consequences caused, the location of the vessel and other factors; and if a state proceeds with boarding and arresting the vessel and crew, it may face obstacles in pursuing the legal proceedings due to failure to prove intentional conduct, attribution to a particular state, etc.

Disruptive practices targeting critical maritime infrastructure cause a global concern. States should further combine their efforts making use of procedures, instruments and powers vested in the international organisations, such as NATO, the EU and IMO. Each acting within the limits of its mandate, they still have much in common. NATO perceives attacks on states' critical maritime infrastructure as hybrid threats and has developed a range of activities and tools allowing for a multi-domain action in response to threats posed by "shadow fleets" (military presence (deterrence), exercise, situational awareness, monitoring, etc.). "Shadow fleets" are also at a glance of the EU as their activities fall within a comprehensive concept of the EU maritime security. EU should provide for politically consented and practically enabled means aimed at strengthening the protection of critical infrastructure, identifying the injuries, keeping awareness, training response and uniting action. The sanctions imposed by the EU should further tackle Russia's capabilities to wage the war in Ukraine and limit its potential to use "shadow fleets" for its interests. IMO plays a leading role in fostering a global compliance with flag state responsibilities which is key in ensuring maritime safety and security.

Ambiguities left by UNCLOS provisions should not be perceived as limitations for states to take action in respect of "shadow fleet" ships. Coastal states' legislative and enforcement jurisdiction within its territorial sovereignty (internal sea waters and territorial sea) is comprehensive and limited only in cases provided for by UNCLOS. Beyond this area (in the exclusive economic zone and the continental shelf) costal states should take a proactive action in broadly interpreting their sovereign rights and jurisdiction under UNCLOS in a contemporary context as encompassing their legitimate rights to take action in order to enforce domestic regulation adopted in line with UNCLOS, to protect a state's vital interests, etc. On the high seas the allowed extent of intervention of states other than a flag state may be limited, however, states should develop a unified practice in taking all measures allowed under international law to address "shadow fleet" ships, which are usually sanctioned, the states of which fail to assume jurisdiction and disregard their flag state's duties. In updating their domestic maritime laws, states should explore the scope provided by UNCLOS, including regulation of innocent passage and navigation near critical infrastructure (or safety zones), take certain measures for pollution prevention, rely on a plea of necessity, on their international obligations outside UNCLOS (for example, EU sanctions regime), customary law or case law. Modern maritime security context will further demand an innovative and a more comprehensive

approach which would better reflect the realities and global trends in maritime domain and will develop guided by state practice and case law.

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Indre Zvaigzdiniene, *Dr., Associate Professor*
Vilnius University, Faculty of Law, Lithuania

FROM LAW TO ACTION: ADVANCING ENVIRONMENTAL ACCOUNTABILITY THROUGH COURTS AND POLICY

Key words: environmental accountability, access to justice, climate litigation, public participation, human rights

Summary

This article examines environmental accountability as a core principle of modern environmental governance, grounded in international, European Union, and national legal frameworks. Beginning with the 1972 Stockholm Declaration, it traces the evolution of accountability through binding instruments such as the Aarhus Convention, the UNFCCC, and the Convention on Biological Diversity, which embed transparency, participation, reporting, and compliance mechanisms into environmental law. Within the EU, directives such as the EIA, SEA, Water Framework, Habitats, and Birds Directives, alongside the European Green Deal, institutionalize both procedural and substantive accountability, reinforcing monitoring, public participation, and enforcement obligations.

Access to justice is identified as a central pillar of environmental accountability. International human rights guarantees, the Aarhus Convention's Article 9, EU legislation, and the jurisprudence of the Court of Justice of the European Union have progressively expanded standing and strengthened effective judicial protection. Recent EU regulations and directives further integrate dispute-settlement and procedural safeguards into environmental governance. Nevertheless, practical barriers, including procedural complexity and uneven implementation across Member States, continue to limit effectiveness.

The text then highlights climate litigation as an increasingly significant accountability mechanism. Landmark rulings have reinforced the human-rights basis of climate protection and clarified states' procedural and substantive obligations. However, their broader impact is limited by judicial deference and global asymmetries. Although courts can raise standards within certain jurisdictions, comprehensive and globally coordinated climate action is not guaranteed.

Introduction

Environmental protection has increasingly evolved from a primarily political objective into a legally enforceable responsibility grounded in principles of accountability, transparency, and participation. Contemporary environmental governance requires states, public authorities, private actors, and individuals not only to prevent environmental harm, but also to justify their actions through effective procedural and institutional mechanisms. Increasing environmental degradation, climate change, biodiversity loss, and pollution have demonstrated the limitations of purely political or voluntary approaches to environmental protection, thereby strengthening the role of law. In response, international and European legal frameworks have progressively developed procedural and substantive obligations aimed at ensuring effective environmental governance and public participation in environmental decision-making.

This article aims at examining the multi-level legal foundations of environmental accountability and analysing how access to justice and climate litigation contribute to strengthening environmental governance at the international, European Union, and national levels.

The research is based on doctrinal legal analysis employing systematic, comparative, and analytical methods. It examines international treaties, EU legal instruments, case law, and selected national legal developments in order to identify the key principles and mechanisms through which environmental accountability is operationalized.

1. Multi-level legal foundations of environmental accountability

Environmental accountability refers to the responsibility of states, institutions, and individuals to protect the environment, prevent ecological harm, and ensure that their actions do not cause damage to present or future generations. It represents a fundamental pillar of contemporary environmental governance, encompassing transparency, monitoring, reporting, and enforcement mechanisms that engage all stakeholders, including governments, businesses, communities, and individuals. The 1972 Stockholm Declaration,[1] while primarily foundational in articulating the imperative of environmental protection, contains several aspirational provisions that foreshadow modern accountability mechanisms, including obligations to inform and consult the public on environmental matters and to cooperate internationally in addressing transboundary environmental issues (e. g. paragraph 7 of the preamble, principles 13, 21, 22 etc.). At the level of international law, multilateral instruments such as the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making

[1] Declaration of the United Nations Conference on the Human Environment, 16 June 1972. Available: https://www.un.org/en/conferences/environment/stockholm1972 [last viewed 15.02.2026].

and Access to Justice in Environmental Matters[2]) concretize these principles by imposing procedural and substantive duties on Parties to guarantee access to environmental information, facilitate public participation in environmental decision-making, and provide access to justice in environmental matters. Aarhus convention recognizes the desirability of transparency in all branches of government and invites legislative bodies to implement the principles of this Convention in their proceedings. It also recognizes that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them. Aarhus convention acknowledges the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection. Other global treaties, including the United Nations Framework Convention on Climate Change (UNFCCC)[3] and the Convention on Biological Diversity[4] and many others, further embed accountability through reporting, review and compliance mechanisms that require states to account for their implementation efforts. Within the European Union, environmental accountability is reinforced through a comprehensive legislative framework; for example, the Environmental Impact Assessment (EIA) Directive[5] and the Strategic Environmental Assessment (SEA) Directive[6] institutionalize procedural accountability by mandating assessment and public participation prior to the adoption of plans or projects with significant environmental effects, while the Water Framework Directive[7] and Habitat[8] and Birds Directives[9] establish substantive objectives with monitoring and reporting

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[2] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998. Available: https://unece.org/DAM/env/pp/documents/cep43e.pdf [last viewed 15.02.2026].

[3] United Nations Framework Convention on Climate Change, 9 May 1992. Available: https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch_XXVII_07p.pdf [last viewed 15.02.2026].

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[7] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (with subsequent amendments). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02000L0060-20141120 [last viewed 15.02.2026].

[8] Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (with subsequent amendments). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01992L0043-20250714 [last viewed 15.02.2026]

[9] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (with subsequent amendments). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009L0147-20190626 [last viewed 15.02.2026].

obligations that enable both the Commission and the public to hold Member States accountable for environmental outcomes. The importance of environmental accountability was once again reaffirmed and further strengthened through the adoption of the European Green Deal,[10] which sets forth an ambitious plan to transform Europe's economy, energy systems, transport infrastructure, and industrial sectors toward a more sustainable future, with the ultimate objective of achieving climate neutrality by 2050. It explicitly emphasizes stakeholder engagement, recognizing that citizen participation is essential to the Green Deal's success and to achieving lasting environmental change.

Collectively, these international and EU instruments demonstrate a multi-layered legal architecture through which environmental accountability is put into practice. By combining normative principles, binding obligations, procedural safeguards, and inclusive participation mechanisms, this framework ensures that states, institutions, and individuals are responsible not only for preventing environmental harm but also for fostering a participatory and transparent approach to sustainable governance.

2. Empowering environmental governance through access to justice

Access to justice constitutes an essential pillar of environmental accountability, as it enables individuals, communities, and civil society actors to invoke legal mechanisms to challenge environmental harm and regulatory non-compliance. Effective judicial and quasi-judicial remedies strengthen the enforcement of environmental norms, deter unlawful conduct, and uphold the rule of law.

In international law, access to justice is anchored in the right to an effective remedy and the guarantee of a fair and public hearing before an independent and impartial tribunal, as reflected in Article 8 of the Universal Declaration of Human Rights[11] and Article 14 of the International Covenant on Civil and Political Rights.[12] At the regional level, Articles 6 and 13 of the European Convention on Human Rights[13] further elaborate these guarantees, requiring effective judicial protection and the availability of remedies for violations of protected rights.

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[10] 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. COM/2019/640 final. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0640 [last viewed 15.02.2026].

[11] The Universal Declaration of Human Rights, 10 December 1948. Available: https://www.un.org/en/about-us/universal-declaration-of-human-rights [last viewed 15.02.2026].

[12] International Covenant on Civil and Political Rights, 16 December 1966. Available: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [last viewed 15.02.2026].

[13] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. Available: https://www.echr.coe.int/documents/d/echr/Convention_ENG [last viewed 15.02.2026].

In the environmental sphere, these standards are significantly strengthened by the Aarhus Convention, which establishes a tripartite framework of rights: access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters. Article 9 of the Aarhus Convention, in particular, obliges States Parties to ensure that members of the public have access to review procedures that are fair, equitable, timely, and not prohibitively expensive, thereby activating and solidifying general international human rights guarantees within the specific context of environmental protection.

The Court of Justice of the European Union (CJEU) has emphasized that the objective of the European Union legislature in granting the public concerned "wide access to justice" reflects, more broadly, its commitment to preserving, protecting, and improving the quality of the environment. It further underscores the intention to ensure that, to that end, the public is enabled to play an active and participatory role in environmental protection.[14]

The European Union has consistently adhered to these objectives by further enhancing access to justice in recent legislation. For example, Regulation (EU) 2021/1767[15] introduced significant amendments to the EU's Aarhus framework in order to strengthen access to justice in environmental matters at Union level. First, it broadened the scope of the internal review mechanism by expanding the definition of "administrative acts"[16] to include acts of general scope adopted under environmental law, provided that they contain provisions capable of producing legal effects. This marked a substantial shift from the previous regime, which limited internal review largely to individual acts. Second, the Regulation clarified and widened the standing of non-governmental organisations (NGOs) by adjusting eligibility criteria and procedural conditions, thereby facilitating their ability to request internal review of EU acts that may contravene environmental law. Third, it introduced procedural improvements, including clearer time limits and obligations on EU institutions to provide reasoned responses, thus fostering transparency and accountability.

It should also be observed, that recent EU legislative developments in the environmental sphere consistently incorporate provisions ensuring access to justice and effective judicial remedies. While these instruments vest considerable discretion in Member States regarding implementation, they establish important baseline requirements that reflect the EU's commitment to the principles enshrined in the Aarhus Convention. For example, Article 6(6) of

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[14] CJEU judgment of 11 April 2013 in case No. C-260/11 the Queen, on the application of David Edwards and Lilian Pallikaropoulos v. Environment Agency and Others, para. 32.

[15] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Available: https://eur-lex.europa.eu/eli/reg/2021/1767/oj/eng [last viewed 15.02.2026].

[16] It defined administrative act, as follows: 'administrative act' means any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1).

the Regulation (EU) 2024/1735,[17] establishing a framework for strengthening Europe's net-zero technology manufacturing ecosystem, requires Member States to ensure that applicants have easy access to information on and procedures for the settlement of disputes concerning permit-granting processes, including, where applicable, alternative dispute resolution mechanisms provided by national law. Article 9(8) of the Regulation (EU) 2024/1252,[18] establishing a framework for ensuring a secure and sustainable supply of critical raw materials, mirrors the Net Zero Industry Act's approach, requiring Member States to ensure easy access to information on and procedures for dispute settlement concerning permit-granting processes for critical raw materials projects. Directive (EU) 2023/2413[19] on the promotion of energy from renewable sources also introduces significant access to justice provisions. Article 16(5) requires Member States to ensure that applicants and the general public have easy access to simple procedures for dispute settlement concerning permit-granting procedures and permit issuance for renewable energy plants, including alternative dispute resolution mechanisms. Article 16(6) establishes a requirement that administrative and judicial appeals in renewable energy project contexts be subject to the most expeditious procedures available at the relevant national, regional, and local levels. Directive (EU) 2024/1203[20] on the protection of the environment through criminal law contains Article 15, which requires Member States to ensure that persons affected or likely to be affected by criminal environmental offences, persons having a sufficient interest or maintaining the impairment of a right, and environmental NGOs meeting national law requirements have appropriate procedural rights in criminal proceedings concerning such offences. This provision extends participatory rights to the criminal law sphere, upgrading the overall framework for environmental accountability.

In parallel to legislation, the evolving case law of the CJEU has significantly contributed to clarifying and expanding the practical scope of such rights.

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[17] Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02024R1735-20250817 [last viewed 15.02.2026].

[18] Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02024R1252-20240503 [last viewed 15.02.2026].

[19] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652. Available: https://eur-lex.europa.eu/eli/dir/2023/2413/oj/eng [last viewed 15.02.2026].

[20] Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02024L1203-20240430 [last viewed 15.02.2026].

The Court of Justice of the European Union has developed significant jurisprudence on the relationship between Article 9(3) of the Aarhus Convention and Article 47 of the Charter of Fundamental Rights of the European Union, which guarantees the right to an effective remedy and a fair trial. This case law has established important principles governing access to justice in environmental matters. In case C-873/19 (Deutsche Umwelthilfe), the Court held that national courts must interpret procedural rules relating to standing to bring proceedings in a manner consistent with both the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of rights conferred by EU law.[21] This enables environmental associations to challenge decisions that may be contrary to EU environmental legislation, even where national procedural rules might otherwise restrict their standing. Significantly, while Article 9(3) of the Aarhus Convention does not itself have direct effect, Article 47 of the Charter is self-executing and operates as a limitation on Member State discretion. Where consistent interpretation proves impossible, national courts must disapply provisions precluding environmental associations from challenging administrative decisions contrary to EU environmental law[22].

In line with trends observed at the EU level, similar patterns of expanding access to justice in environmental matters are evident in national practices. For example, in Lithuania, as of 1 January 2022, amendments to the Law on Administrative Proceedings of the Republic of Lithuania[23] came into effect, providing that an application may be submitted to the administrative court to determine whether a normative administrative act related to the environment (or any part thereof) complies with the law or a government-issued normative act. This right is also granted to the public concerned, as defined in the Law on Environmental Protection of the Republic of Lithuania.

Overall, access to justice has evolved into a central and operational dimension of environmental governance at international, EU, and national levels. Through legislative reform and dynamic judicial interpretation (particularly by the Court of Justice of the European Union), procedural rights have been progressively strengthened to ensure that individuals and civil society actors can effectively challenge environmental harm and regulatory failures. This trajectory reflects a broader commitment to embedding environmental protection within the rule of law and to empowering the public as an active guardian of environmental integrity. Notwithstanding these important normative and jurisprudential advances, significant challenges remain in ensuring that access to justice in environmental matters is genuinely effective in practice. Procedural complexity, financial barriers, restrictive standing rules at national level, and uneven implementation across

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[21] CJEU judgment of 8 November 2022 in case No. C-873/19 Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland, para. 75.

[22] Ibid., paras. 78–80.

[23] Law on Administrative Proceedings of the Republic of Lithuania. Available in Lithuanian: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.72290/asr?positionInSearchResults=0&searchModelUUID=839eecc9-5497-42c7-ac12-728eaed877fa [last viewed 15.02.2026].

Member States continue to limit the transformative potential of these guarantees. Ultimately, the credibility of the EU's environmental and climate ambitions will depend not only on the breadth of legislative commitments, but on the consistent and practical realization of meaningful judicial protection throughout the Union.

3. Advancing environmental accountability through climate litigation

Climate litigation has emerged as a powerful instrument for promoting environmental accountability, enabling citizens, civil society organizations, and even subnational governments to hold both public authorities and private actors responsible for environmental harm. By leveraging national and international legal frameworks, climate litigation not only compels compliance with existing environmental laws but also drives policy change, enhances transparency, and amplifies public participation in environmental governance. Across jurisdictions, strategic litigation has increasingly targeted issues such as greenhouse gas emissions, climate adaptation obligations, and the enforcement of regulatory standards, creating legal precedents that shape the trajectory of climate action.

The Urgenda case[24] is widely regarded as a landmark in climate litigation, setting a pioneering precedent for holding governments legally accountable for insufficient climate action. In this case, the Hague District Court ruled that the government had a legal obligation to reduce greenhouse gas emissions by at least 25% by 2020 compared to 1990 levels, citing principles of human rights and tort law. The court emphasized that protecting citizens from the dangers of climate change is a fundamental duty of the state, establishing a powerful model for climate litigation worldwide. This decision was ultimately confirmed by the Supreme Court of the Netherlands on 20 December 2019. The Supreme Court clarified that the court's order does not require the government to take specific legislative measures. Instead, it allows the state to determine which measures to implement in order to achieve the 25% reduction in greenhouse gas emissions by 2020. The fact that many potential measures may require legislation does not alter this principle, as it remains the state's responsibility to decide which measures and legislation are necessary to meet the reduction target. The Urgenda ruling marked one of the first instances in which a court directly mandated a government to take specific, legally enforceable action to address climate change. This landmark decision has since inspired similar climate litigation in other countries, including France, Germany and others, where courts have also held governments accountable for insufficient climate policies.

Following a wave of climate litigation at the national level, cases have increasingly reached the European Court of Human Rights, establishing

[24] Judgment of the Supreme Court of the Netherlands of 20 December 2019 case No. 19/00135. Available: https://www.urgenda.nl/en/themas/climate-case/ [last viewed 15.02.2026].

it as a pivotal forum for addressing the intersection of state responsibility, environmental protection, and human rights in the context of climate change.

The KlimaSeniorinnen case[25] represents the first successful climate case before the European Court of Human Rights. The case concerned a complaint by four women and a Swiss association whose members were concerned about the consequences of global warming on their living conditions and health. The Court found that the Convention encompasses a right to effective protection by state authorities from the serious adverse effects of climate change on lives, health, well-being, and quality of life. While the Court declared inadmissible the individual applicants' complaints for failure to meet victim-status criteria under Article 34 of the Convention, the applicant association satisfied standing requirements. The Court held that there had been violations of both the right to respect for private and family life under Article 8 and the right of access to a court under Article 6. The Swiss Confederation had failed to comply with its positive obligations under the Convention concerning climate change. The Court established criteria for assessing whether states remain within their margin of appreciation regarding climate obligations: states must adopt general measures specifying target timelines for achieving carbon neutrality, set intermediate emissions reduction targets capable of meeting overall national goals, provide evidence of compliance with reduction targets, keep targets updated based on best available evidence, and act in good time and consistently when implementing relevant legislation and measures.[26]

On 28 October 2025, the European Court of Human Rights delivered its judgment in Greenpeace Nordic v. Norway,[27] marking its first procedural climate-rights ruling. Two NGOs (Greenpeace Nordic and Young Friends of the Earth Norway) and six individuals challenged the Norwegian government's issuance of licenses for oil and gas exploration in the Barents Sea. The Court held that the six individual applicants had not demonstrated a sufficiently serious or individualized impact on their life, health, or well-being attributable to climate change to establish victim status under Article 8. Relying on KlimaSeniorinnen, the Court reaffirmed that absent high-intensity exposure or pressing need for individual protection, the threshold for victim status is not met. In contrast, the two applicant organizations satisfied the criteria for locus standi and their Article 8 complaint was declared admissible. The Court in its judgment reiterated that the State's obligation under Article 8 is to do its part to ensure effective protection of those within its jurisdiction by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change. In this context, the State's primary duty is

[25] ECHR judgment of 9 April 2024 in case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Application No. 53600/20).

[26] Ibid., para. 550.

[27] ECHR judgment of 28 October 2025 in case of Greenpeace Nordic and Others v. Norway (Application No. 34068/21).

to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights, and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied so as to guarantee rights that are practical and effective, not theoretical and illusory.[28] The Court further reiterated that States have a wide margin of appreciation as regards their choice of the means of implementing their climate obligations. This includes operational choices and the adoption of policies in order to meet internationally agreed targets and commitments to combat climate change and its adverse effects, in the light of the State's priorities and resources. At the same time, however, the Court has considered the scientific evidence of how climate change affects Convention rights. It has also considered the scientific evidence that shows the urgency of combating the adverse effects of climate change; the severity of its consequences, including the grave risk of their reaching the point of irreversibility; and the scientific, political and judicial recognition of a link between the adverse effects of climate change and the enjoyment of (various aspects of) human rights.[29] Taking all this into account, the Court concluded that climate protection should carry considerable weight in the balancing of any competing considerations.[30] The Court stressed, that considering the grave and irreversible nature of the risks involved, the principle of precaution and the international case law on the matter, it is clear that especially material in determining whether the respondent State has remained within its margin of appreciation is the following procedural safeguard which is to be taken into account as regards the State's decision-making process in the context of environment and climate change: an adequate, timely and comprehensive environmental impact assessment in good faith and based on the best available science must be conducted before authorizing a potentially dangerous activity that may be harmful to the right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life. In the context of petroleum production projects, the environmental impact assessment must include, at a minimum, a quantification of the GHG emissions anticipated to be produced (including the combustion emissions both within the country and abroad). Moreover, at the level of the public authorities, there must be an assessment of whether the activity is compatible with their obligations under national and international law to take effective measures against the adverse effects of climate change. Lastly, informed public

[28] ECHR judgment of 28 October 2025 in case of Greenpeace Nordic and Others v. Norway (Application No. 34068/21), para. 314.

[29] Ibid., para. 315.

[30] Ibid., para. 316.

consultation must take place at a time when all options are still open and when pollution can realistically be prevented at source.[31]

The International Court of Justice (ICJ) advisory opinion on obligations of States in respect of Climate Change[32] cannot be left unmentioned, as it provides crucial guidance on the legal responsibilities of nations regarding environmental protection. ICJ affirmed that states are obliged to prevent transboundary environmental harm and to take measures addressing climate change. While certain specifics, such as detailed targets or methods of implementation, may remain unspecified, the opinion establishes that climate action is a binding legal duty rather than a voluntary endeavour.

Ultimately, while the above-mentioned landmark rulings have undoubtedly strengthened the human-rights basis of climate protection, the broader effectiveness of these rulings is far from assured. Judicial intervention primarily constrains states that are already embedded in robust legal systems and comparatively committed to climate governance. Yet climate change is a global collective-action problem, and many major emitters either lack comparable judicial avenues or demonstrate limited political will to implement ambitious mitigation measures. This asymmetry produces an uneven outcome: courts can raise standards and impose obligations on proactive jurisdictions, but they cannot ensure equivalent restraint or responsibility elsewhere. Consequently, climate litigation advances accountability within certain legal orders, while its capacity to generate a truly global and proportionate climate response is far less clear.

Conclusions

The analysis demonstrates that environmental accountability has evolved into a structurally embedded principle of contemporary governance, operating across international, European, and national legal orders. Foundational instruments together with EU secondary legislation and policy frameworks have progressively converted aspirational environmental commitments into enforceable procedural and substantive obligations. This multi-layered architecture integrates transparency, public participation, monitoring, and compliance mechanisms, thereby transforming environmental protection from a predominantly policy-driven objective into a normatively structured legal responsibility grounded in the rule of law.

Access to justice functions as the operational backbone of environmental accountability. Through the interpretative approach of the Court of Justice of

[31] ECHR judgment of 28 October 2025 in case of Greenpeace Nordic and Others v. Norway (Application No. 34068/21), paras. 318–319.

[32] The International Court of Justice advisory opinion on obligations of States in respect of Climate Change of 23 July 2025. Available: https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf [last viewed 15.02.2026].

the European Union, particularly in light of Article 47 of the EU Charter and Article 9(3) of the Aarhus Convention, procedural rights have been strengthened to ensure effective judicial protection. Legislative reforms at EU level and evolving national practices further expand standing and review mechanisms. Nevertheless, persistent obstacles, such as restrictive national standing rules, procedural complexity, financial barriers, and uneven implementation, continue to limit the transformative potential of these guarantees in practice.

The rise of climate litigation marks a significant doctrinal shift by situating climate protection within human rights law and clarifying states' positive obligations. Courts have reinforced procedural safeguards, science-based decision-making, and accountability standards. However, judicial restraint, the broad margin of appreciation afforded to states, and global asymmetries in implementation reveal structural limits. Climate litigation enhances normative clarity and accountability within certain jurisdictions, yet its capacity to overcome the systemic and transnational dimensions of the climate crisis is inherently limited.

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Rafal Cieslak, *Dr. iur.*
University of Warsaw, Poland

ENERGY PERFORMANCE CONTRACTING AS AN INSTRUMENT FOR IMPLEMENTING THE ENERGY EFFICIENCY FIRST PRINCIPLE

Key words: Energy Efficiency First, energy efficiency, Energy Performance Contracting, Energy Union

Summary

The Energy Efficiency First (EE1) principle has emerged as a cornerstone of the European Union's energy transition, transforming energy efficiency from a policy objective into a binding decision-making rule within the Energy Union framework. Codified in Regulation (EU) 2018/1999 and further operationalised in the recast Energy Efficiency Directive (EU) 2023/1791, EE1 requires Member States to systematically assess and prioritise cost-effective demand-side measures before pursuing supply-side investments. This article examines the normative evolution, legal meaning and practical implications of the EE1 principle, with particular emphasis on its implementation through Energy Performance Contracting (EPC).

The study argues that EE1 functions both procedurally and substantively: procedurally, by imposing duties of assessment, comparison and justification in planning and investment decisions; substantively, by establishing a presumption in favour of energy efficiency where it delivers equivalent energy services at lower societal cost and risk. Against this background, EPC is analysed as a key contractual instrument that translates the "first fuel" logic of efficiency into enforceable obligations, measurable performance guarantees and risk allocation mechanisms. By linking remuneration to verified energy savings, EPC operationalises EE1 in public infrastructure, procurement and large-scale renovation projects, particularly within the public sector.

Drawing on EU secondary legislation, European Commission recommendations and other sources, the article demonstrates that EPC embodies the systemic, life-cycle and cost-benefit logic required by EE1. The article concludes that while EE1 has acquired normative status in EU law, its effectiveness ultimately depends on the extent to which instruments such as EPC are embedded in national legal frameworks and administrative practice, thereby ensuring that energy efficiency is treated not as a residual option but as the primary pathway toward climate neutrality and energy security.

Introduction

Energy efficiency is one of the key elements of European Union energy policy. It has long been recognized as "hidden fuel" – one of the most cost-effective instruments for reducing greenhouse gas emissions, enhancing energy security and strengthening economic development. According to the International Energy Agency, the reduced energy demand stemming from energy efficiency over past decades suggests also a shift from energy efficiency a "hidden fuel" to the category of a "first fuel",[1] Although science recognizes that there is no simple correlation between energy efficiency and energy demand reduction,[2] there is no doubt that energy efficiency should be a top priority in government, regional, and local policies.

The development of the Energy Efficiency First Principle (EE1) and giving it normative character is a milestone in shaping European energy policy and the European Union's energy transition. By promoting energy efficiency, the principle emphasizes not only the need to reduce fossil fuel consumption, but also the importance of reducing energy demand and, consequently, production. Both the public and private sectors are therefore encouraged to invest in energy efficiency first, ahead of other, more complex or costly solutions to the energy transition.[3] Moreover, the EE1 posits that enhancements in energy efficiency and other demand-side resources should always be considered equally to supply side resources in energy system planning and prioritized when they are more economically advantageous than comparable power plants, transmission systems, storage solutions, and other supply-side infrastructures.[4]

The EE1 is reflected in regulations imposing numerous energy efficiency obligations on EU Member States. In the Directive on Energy Efficiency (recast)[5] the European Union has adopted an ambitious target to reduce EU final energy consumption by 11.7% by 2023 (compared to 2020 projections for 2030). As it is underlined, while the energy savings potential remains large in all sectors, there is a particular challenge relating to buildings, since 75% of the Union's building stock

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1 International Energy Agency. Energy Efficiency Market Report 2013, pp. 18, 55. Available: https://www.oecd.org/content/dam/oecd/en/publications/reports/2013/10/energy-efficiency_g1g27dbf/9789264206052-en.pdf [last viewed 07.01.2026].

2 Sorrell S. A review of issues, challenges and approaches. Renewable and Sustainable Energy Reviews, Vol. 47, 2015, pp. 76–79.

3 European Commission. Energy Efficiency First. Available: https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficiency-targets-directive-and-rules/energy-efficiency-first_en [last viewed 07.01.2026].

4 Jimenez Casanova P., Pinto J. Interpreting the Energy Efficiency First Principle: Help or Hindrance for the Hydrogen Economy? European Energy and Environmental Law Review, Vol. 33, Issue 6, 2024, p. 274.

5 Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023L1791 (EED) [last viewed 07.01.2026].

has a poor energy performance.[6] Moreover, only the public sector is responsible for approximately 5% to 10% of the Union's total final energy consumption.[7] Hence, giving the public sector an exemplary role, the EED introduced a new annual energy consumption reduction target of 1.9% for the public sector as a whole and the annual 3% buildings renovation obligation is being extended to all levels of public administration. To fulfil their obligation, Member States should target the final energy consumption of all public services and installations of public bodies.[8]

Of course, the EED does not prescribe specific methods and tools to achieve the planned results, leaving Member States relatively free to choose them. Obviously, energy efficiency measures can be implemented in different ways and in different forms. The key factors here are the policy adopted and the instruments used to implement it. With regard to energy efficiency, the following policy instruments are named:[9] regulatory, financial and fiscal, information and awareness, qualification and training, market-based, voluntary action and infrastructure investment. Energy efficiency improvement measures can be implemented in various legal forms. Traditionally, public procurement is used for construction works (e.g., deep renovation of public buildings), supplies (e.g., heat supply from renewable energy sources), and services (e.g., energy management). One of these is Energy Performance Contracting (EPC), which combines various elements in an integrated and comprehensive manner to achieve long-term results in energy efficiency.

The legal relevance of EE1 becomes most visible when it is translated into actionable instruments. Among these, energy efficiency improvement agreements – especially EPCs – are pivotal because they contractually bind performance outcomes (savings, avoided demand, improved efficiency) to payment and risk allocation. In other words, they make the "first fuel" (efficiency) operational through enforceable obligations, measurement frameworks and remedies. Thus, EPC, as a policy tool – financial and efficiency scheme, might be applied especially in public sector infrastructure, operationalizing the EE1 principle in an effective way.

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6 See recital 13.

7 See recital 33.

8 Recital 35.

9 Bertoldi P. Overview of the European Union policies to promote more sustainable behaviours in energy end-users. In: Lopes M., Henggeler Antunes C., Janda K. B. (eds.). Energy and Behaviour: Towards a Low Carbon Future. Academic Press, 2020, pp. 451–477.

1. Energy efficiency first principle

1.1. Evolution of the EE1

At EU level, early legislative efforts focused on promoting energy efficiency as one objective among many. Directive 2006/32/EC on energy end-use efficiency and energy services introduced the first coordinated framework, but did not elevate efficiency to a priority decision rule.[10] A more substantial step followed with Directive 2012/27/EU on energy efficiency,[11] which consolidated EU action and established binding measures across the energy chain. By covering both supply and demand-side energy efficiency, it acts as a binding clip for EU energy efficiency policies.[12]

The pivotal role of EE1 was introduced in the vocabulary of EU energy and climate policy with the Juncker Commission's communication on the Energy Union and the "Clean Energy for All Europeans"[13] legislative package from 2016, which included a proposal for a regulation on the governance of the Energy Union and climate action.[14] The principle has further been included in subsequent regulations and amendments of a variety of directives[15] and was first published in 2018 in a Governance Regulation.[16]

A decisive milestone was Commission Recommendation (EU) 2021/1749, which explicitly defined EE1 and provided methodological guidance for its application "from principles to practice".[17] The recast Energy Efficiency Directive in 2023 (EED), completed this evolution by embedding EE1 into binding EU law

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[10] Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC. Available: https://eur-lex.europa.eu/eli/dir/2006/32/oj/eng [last viewed 08.01.2026].

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[12] Ringel M. Is the updated Energy Efficiency Directive fit for purpose? A critical assessment based on replies from European stakeholders. Energy Research & Social Science, Vol. 127, 2025, Article 104244, p. 1.

[13] European Commission. Clean Energy for All Europeans. COM (2016) 860 final. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016DC0860 [last viewed 08.01.2026].

[14] von Malmborg F. First and last and always: Politics of the 'energy efficiency first' principle in EU energy and climate policy. Energy Research & Social Science, No. 101, 2023, Article 103126, p. 1.

[15] Chlechowitz M., Reuter M., Eichhammer W. How first comes energy efficiency? Assessing the energy efficiency first principle in the EU using a comprehensive indicator-based approach. Energy Efficiency, Vol. 15, 2022, Article 59, p. 59.

[16] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1999 [last viewed 08.01.2026].

[17] Commission Recommendation (EU) 2021/1749 of 28 September 2021 on Energy Efficiency First: from principles to practice – Guidelines and examples for its implementation in decision-making in the energy sector and beyond. Available: https://eur-lex.europa.eu/eli/reco/2021/1749/oj [last viewed 08.01.2026].

and requiring its systematic consideration in energy-related decision-making. The Directive frames energy efficiency as a priority in energy-system planning and investment decisions, requiring that efficiency solutions be considered systematically in relevant decision-making processes.

1.2. EE1 – definition and legal meaning

The Energy Efficiency First principle is defined in Art. 2(18) of the Regulation (EU) 2018/1999, as follows:

> *"energy efficiency first" means taking utmost account in energy planning, and in policy and investment decisions, of alternative cost-efficient energy efficiency measures to make energy demand and energy supply more efficient, in particular by means of cost-effective end-use energy savings, demand response initiatives and more efficient conversion, transmission and distribution of energy, whilst still achieving the objectives of those decisions. From a legal perspective, EE1 operates as both a procedural and a substantive principle. Procedurally, it obliges decision-makers to identify, assess and document efficiency alternatives in a transparent and verifiable manner. Substantively, it implies a preference for efficiency measures where they are demonstrably superior according to objective criteria such as cost-effectiveness, sustainability or system value. However, it has been argued that a clear decision rule would require dedicated legal conditions defining when efforts to consider demand-side resources in investment and policymaking are considered adequate to comply with the principle.*[18]

The EE1 legal meaning has been further implied by the EED provisions, still at the general level. According to the EDD, the EE1 is an overarching principle that should be taken into account across all sectors, going beyond the energy system, at all levels, including in the financial sector. Energy efficiency solutions should be considered as the first option in policy, planning and investment decisions when setting new rules for the supply side and other policy areas.[19]

This approach is supported by other EED provisions, concerning especially public procurement law (in case of which contracting authorities should make energy-efficient purchasing decisions and apply the EE1 in different public contracts and concessions), and the obligation to remove barriers by creating business opportunities for suppliers and energy service providers in this regard.[20]

The impact of EE1 on investment decisions is specifically defined in Art. 3(1) of the EED which obliges. Member States to ensure that energy efficiency solutions, including demand-side resources and system flexibilities, are assessed in planning,

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[18] Mandel T., Pato Z., Broc J-S., Eichhammer W. Conceptualising the energy efficiency first principle: insights from theory and practice. Energy Efficiency, Vol. 15, 2022, Article 41, p. 41.

[19] See recital 15.

[20] See recital 49.

policy and major investment decisions of a value of more than 100 000 000 euro each or 175 000 000 euro for transport infrastructure projects, relating both to the energy systems and non-energy sectors.

As can be seen, the "hard" obligation applies only to very large investment projects. This does not change the fact that the Commission requires (Art. 3(5)), when in applying EE1, Member States shall, among others, promote and, where cost-benefit analyses are required, ensure the application of, and make publicly available, cost-benefit methodologies that allow proper assessment of the wider benefits of energy efficiency solutions where appropriate, taking into account the entire life cycle and long-term perspective, system and cost efficiency, security of supply and quantification from the societal, health, economic and climate neutrality perspectives, sustainability and circular economy principles in transition to climate neutrality. This commitment corresponds to and directly translates into EE1 implementation instruments such as energy service agreements, in particular – Energy Performance Contracting.

1.3. Operationalization of the EE1

EE1's practical impact depends on how Member States and public authorities translate it into policy, legal, procurement and finance regulations. To be legally and administratively meaningful, EE1 must thus be operationalised. Overall, Commission Recommendation 2021 proposed turning EE1 into a structured process: define objectives; identify efficiency alternatives; compare costs and benefits over the life cycle; include system-wide effects; and document the reasoning transparently. Consequently, Commission Recommendation 2021 aimed to transform the concept from principle to practice, and to encourage the correct implementation of the EE1 principle and make it more operational.

The recommendation to EU Member States identifies specific measures to be taken to ensure the correct application of the principle, while the accompanying guidelines support the practical implementation of the principle with practical solutions and refer to measures in various sectors, from energy supply and distribution to end-use sectors.[21] In the context of this article especially important is section 3.7.3 of the Recommendation, concerning EE1 for energy infrastructure investments. European Commission notices that since demand-side solutions are not under the control of transmission and distribution system operators, their implementation and effectiveness would need to be ensured by other players (e.g., energy companies, Energy Service Companies). Thus, it is important to find ways to ensure comparability between short-term measures and long-term investments, as well as developing mechanisms that could guarantee reliability of contracted measures in the longer-time perspective. In terms of buildings (p. 4.4) the Recommendation proposes using Energy Performance Contracts to ensure

[21] von Malmborg F. 2023, p. 8.

guaranteed, measurable and predictable energy efficiency gains (both in final and primary energy terms). This operational logic is precisely what energy efficiency improvement agreements deliver when designed well: they embed baseline-setting, performance indicators, measurement and verification (M&V), and remedial mechanisms into the contract. It is also worth noting that the important role of energy service providers has been recognized in a policy and regulatory planning recommendations.[22]

2. Energy performance contracting

2.1. EPC – definition and legal meaning

Among the various measures to improve energy efficiency, it is no coincidence that the EED focuses on Energy Performance Contracting, promoting EPC in developing, designing, building, and arranging financing for projects that save energy, reduce energy costs, and decrease operations and maintenance costs.[23]

According to Art. 2(33), "energy performance contracting" means a contractual arrangement between the beneficiary and the provider of an energy efficiency improvement measure, verified and monitored during the whole term of the contract, where the works, supply or service in that measure are paid for in relation to a contractually agreed level of energy efficiency improvement or another agreed energy performance criterion, such as financial savings. The energy service provider (Art. 2(29)) is defined as a natural or legal person who delivers energy services or energy efficiency improvement measures in a final customer's facility or premises. In practice, this term mainly refers to ESCO companies.

It is commonly understood that under EPC arrangement an external organization (ESCO) implements a project to deliver energy efficiency and uses the stream of income from the cost savings, or the renewable energy produced, to repay the costs of the project, including the costs of the investment. The approach is based on the transfer (to a greater or smaller extent) of technical risks from the client to the ESCO based on performance guarantees given by the ESCO. In EPC, payment is based on performance; a measure of performance is the level of energy savings.[24]

According to the Art. 29(1)(a) Member States shall promote the energy services market by disseminating i.e. information on available energy service

[22] See European Commission. Analysis to support the implementation of the Energy Efficiency First principle in decision-making. Final report, December 2020. Available: https://op.europa.eu/en/publication-detail/-/publication/b9cc0d80-c1f8-11eb-a925-01aa75ed71a1/language-en [last viewed 09.01.2026].

[23] See recital 74.

[24] See more: Bertoldi P., Rezessy S., Vine E. Energy service companies in European countries: Current status and a strategy to foster their development. Energy Policy, Vol. 34, Issue 14, 2006, pp. 1818–1832.

contracts and clauses that should be included in such contracts to guarantee energy savings and final customers' rights. Annex XV of the EED, which contains the minimum items to be included in EPCs (or in the associated tender specifications) – these are, among others: (i) a clear and transparent list of the efficiency measures to be implemented or the efficiency results to be obtained, (ii) guaranteed savings to be achieved by implementing the measures of the contract, (iii) reference date(s) to establish achieved savings, (iv) a clear and transparent list of steps to be performed to implement a measure or package of measures and, where relevant, associated costs, (v) a clear and transparent display of the financial implications of the project and the distribution of the share of both parties in the monetary savings achieved, namely the remuneration of the service provider, (vi) a clear and transparent provisions on measurement and verification of the guaranteed savings achieved, quality checks and guarantees, (vii) detailed information on the obligations of each contracting party and of the penalties for their breach.

As a result, the EPC model set out in the EED allows different and equally flexible concepts of EPC cooperation to be implemented in Member States' legislation.[25]

From the point of view of the statistic treatment of EPC contract liabilities in government debt, the methodology for evaluating EPC projects as defined by Eurostat is relevant. The rules for the recognition of EPC contracts on the balance sheet of the private sector are related to its status as "economic owner of the asset". This is the case when the ESCO bears the risk of operating, maintaining and improving the assets from which it derives the benefits of the EPC contract, while its remuneration cannot be guaranteed by a public sector entity and must depend on the guaranteed energy savings.[26]

2.2. Obligations under the EED

Of course, the EED is not limited to defining concepts and general principles of cooperation between public entities and ESCOs. The EE1 principle in relation to EPC is also reflected in the establishment of numerous information and promotional obligations. In particular (Art. 29(1)), Member States are obliged to promote the energy services market and access to it for small and medium entrepreneurs, especially by disseminating clear and easily accessible information on: (i) available energy service contracts and clauses that should be included in such contracts to guarantee energy savings and final customers' rights; (ii) financial instruments, incentives, grants, revolving funds, guarantees, insurance schemes,

[25] Cieslak R. The risk of guaranteed savings in energy performance contracts in the EU and Polish perspective. Energy Efficiency, Vol. 18, 2025, Article 42, p. 6.

[26] See: Eurostat, European Investment Bank, A Guide to the Statistical Treatment of Energy Performance Contracts, May 2018, pp. 16–17. Available: https://www.eib.org/files/pj/guide_to_statistical_treatment_of_epcs_en.pdf [last viewed 09.01.2026].

and loans to support energy efficiency service projects; (iii) available energy services providers, such as ESCOs, that are qualified or certified and their qualifications or certifications; (iv) available monitoring and verification methodologies and quality control schemes. Moreover, other provisions of the EED (Art. 29(5)) impose obligations including: (i) providing model contracts for EPC which take into account the existing European or international standards, available tendering guidelines and the Eurostat guide to the statistical treatment of EPC in government accounts; (ii) providing information on best practices for EPC; (iii) promoting and making publicly available a database of implemented and ongoing EPC projects. Except of this, Member States shall make publicly available and regularly update a list of available energy service providers that are qualified or certified (Art. 29(3)). These responsibilities naturally require specific actions, such as developing guidelines, model contracts, databases on projects and ESCOs, and good EPC practices.

Given that EPC is one of the methods for achieving energy efficiency, the EED does not introduce mandatory use of EPC. The most far-reaching obligation of contracting authorities provided in Art. 29(4) is to promote and ensure (where technically and economically feasible) the use of EPC for renovations of large buildings that are owned by public bodies. For renovations of large non-residential buildings with a total useful floor area above 750 m^2, Member States shall ensure that public bodies assess the feasibility of using EPD and other performance-based energy services. Although in practice this provision only requires an analysis of the appropriateness of using an EPC, it is mandatory. This means that when planning the renovation of larger buildings, the public sector must at least take the EPC into account. Furthermore, Member States may encourage public bodies to combine EPD with expanded energy services, including demand response and storage, in order to ensure energy savings and maintain the results obtained over time through continuous monitoring, effective operation and maintenance. This approach highlights the comprehensive nature of EPC, going beyond energy savings to promote a holistic approach to the renovation of existing building stock.

It is also worth noting that the EED significantly strengthened EE1 in terms of EPC by translating it into procedural duties. Art. 7(3) and (7) oblige Member States to ensure that contracting authorities assess the feasibility of concluding long-term energy performance contracts that provide long-term energy savings when procuring service contracts with significant energy content and that they shall establish the legal and regulatory provisions, as well as administrative practices, regarding public purchasing and annual budgeting and accounting, necessary to ensure that individual contracting authorities are not deterred from using energy performance contracting and third-party financing mechanisms on a long-term contractual basis. Moreover, Art. 5(3d sentence) provides obligation to Member States in supporting contracting authorities in the uptake of energy efficiency requirements (including at regional and local level), by providing clear rules and guidelines including methodologies on the assessment of life cycle costs and environment impacts and costs.

Conclusions

EE1 is an overarching principle that should be taken into account across all sectors, going beyond the energy system, at all levels. In accordance with European Union legislation, this principle must be taken into account in policies, legal and administrative regulations, as well as in instruments for implementing energy efficiency. Taken together, these provisions confirm that EE1 is not merely aspirational, but operationally enforceable through policy, planning, investment and public procurement procedures.

Among the various legal and financial instruments implementing EE1, the EPC model deserves attention, and the EED devotes considerable attention to it. It can reasonably be argued that EPCs – as long-term and comprehensive agreements covering guaranteed energy savings, M&V mechanisms, and risk allocation – are fully in line with the idea and normative nature of EE1. EPC allow public and private entities to overcome capital constraints to implement efficiency projects that reduce demand before investing in new, costly supply infrastructure. This approach contributes to a cost-effective energy transition, reduces greenhouse gas emissions, and enhances security of supply.

The EED regulation provides for a number of legal solutions, the effective implementation of which is crucial for the implementation of the EE1 principle. With regard to EPC, however, it should be emphasized that the mere adoption of legal solutions and tools dedicated to promoting this model does not yet mean that EPC will be used on a wider scale. As practice to date (prior to the transposition of the EED) shows, that in the EU is not a widely used instrument yet.[27]

The transposition of the EPC provisions of the EED should have been carried out by Member States by 11 October 2025. This means that the development of the EPC/ESCO formula can be expected in the next 2–3 years, and it will certainly be worthwhile to conduct research on the manner and effects of the transposition of the EED in this area.

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[27] Camarasa C., Lutken S., Yargattimath T. The Global ESCO Market 2025. The Global ESCO Network, UN Environment Programme, Copenhagen Climate Centre, 2025, pp. 11–13.

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Leda Zilinskiene, *Dr.*
Vilnius University, Faculty of Law, Lithuania

LITHUANIA'S RENEWABLE TRANSFORMATION WITHIN EU: WHEN ACCELERATION MEETS ITS LIMITS[1]

Key words: Lithuania, renewable energy, renewable energy acceleration, Law on Energy from Renewable Sources, energy trilemma, *in dubio pro futura*

Summary

This paper examines Lithuania's renewable energy transformation within the EU by taking a two-pronged approach that combines a country case study with a broader doctrinal lens. The initial segment delineates Lithuania' s energy transition trajectory and the accelerated growth of renewables. It then analyses the current status quo of "legal acceleration" for renewables in Lithuania, focusing on recent legislative amendments, including measures linked to EU directives. The second part of the paper addresses the fact that acceleration cannot be understood through legal change alone. Energy governance involves making choices between competing objectives and demands. To structure these trade-offs, the article introduces the energy trilemma as an established analytical framework and evaluates *in dubio pro futura* as a future-oriented decision rule that may assist in prioritisation under legal uncertainty. The two parts are deliberately integrated: Lithuania's experience provides empirical and legal material that reveals where acceleration meets limits, while the theoretical tools offer a coherent method for interpreting and justifying decision-making across those limits.

1. Introduction

The transition to renewable energy has become an urgent task of legal and institutional design within the European Union. However, the acceleration of renewable-energy deployment cannot be reduced to a question of legal regulation alone: it is contingent upon technical and economic conditions and must be

[1] This article is a result of the project "Acceleration of legal framework promoting transition to renewable energy – in dubio pro futura", which has received funding from the Research Council of Lithuania (LMTLT), agreement No. S-PD-24-85.

pursued with due regard to energy security, cost-effectiveness, environmental sustainability and other public interests.

When examining this issue, Lithuania serves as a pertinent case study. Following the closure of the Ignalina Nuclear Power Plant, the country experienced an energy-generation gap and a high degree of import dependence. At the same time, it was pursuing energy independence, integration into the European energy system and the expansion of renewables. The resulting strategic and legislative measures, including recent amendments implementing EU requirements, highlight the need to reconcile long-term decarbonisation objectives with short-term operational constraints of the energy system.

The article examines Lithuania's recent renewable-energy transformation and the principal legal measures supporting it. It poses the question of whether the energy trilemma can provide a framework for understanding the competing objectives encountered at the limits of acceleration, and whether *in dubio pro futura* can provide a basis for evaluating the resulting legal choices in a forward-looking manner. The study employs doctrinal legal analysis to relevant Lithuanian legal and policy instruments and case law, contextualised by official energy data and secondary literature.

The analysis is divided into two parts. The first part of the article outlines Lithuania's renewable-energy trajectory, strategic objectives and recent legal developments. The second examines the limits of acceleration through the energy trilemma and *in dubio pro futura*, using the Constitutional Court's ruling on the limitation of aggregate solar-power capacity as a practical illustration. The article contends that the energy trilemma highlights competing objectives but does not address specific legal decisions. *In dubio pro futura* may complement proportionality and reason-giving by making the temporal dimension explicit and assisting in evaluating whether short-term constraints preserve a credible pathway towards long-term climate and energy objectives.

2. Accelerating Lithuania's energy transition: Context and legal developments

In recent years, Lithuania has seen a rapid increase in renewable energy deployment, reflecting the progress made in this field. Eurostat data show that renewables accounted for 35.4% of Lithuania's gross final energy consumption in 2024, which is about ten percentage points above the EU average (25.2%)[2]. Overall, Lithuania's increase since 2020 has been substantially stronger than the EU-wide trend[3].

[2] Eurostat. Share of energy from renewable sources. Eurostat, 2022. https://doi.org/10.2908/NRG_IND_REN

[3] Lithuania: 26.77% (2020), 29.60% (2022), 35.40% (2024); EU-27: 22.04% (2020), 23.00% (2022), 25.20% (2024).

In Lithuania, these results were largely driven by the share of renewable energy sources (RES), which accounted for 52.08% of final energy consumption for heating and cooling, and by the RES share in electricity, which made up 48.99% of total electricity consumption[4]. The most challenging situation remains the transport sector, where RES accounted for 8.98% of final energy consumption.

According to data from the Lithuanian Energy Agency, total electricity generation in Lithuania increased by 91.4% between 2014 and 2024, rising from 4 054 TWh to 7 761 TWh.[5] This growth was primarily driven by an increase in electricity generation from solar and wind power plants, which have become the primary sources of electricity production. In comparison with 2014, electricity generation from solar and wind power plants in 2024 increased by approximately 17-fold and fivefold, respectively.

Electricity demand in the country has remained stable in recent years, fluctuating around 12–13 TWh per year. In 2024, the amount of electricity imported to Lithuania's Power System accounted for 64.7% of the total electricity demand in the country (which was 13.2 TWh).[6] This indicates that domestic electricity generation has not yet been sufficient to fully meet national demand, implying continued reliance on electricity imports. In terms of energy import dependency, Lithuania ranked 18th in the EU in 2024, with a dependency rate that exceeded the EU average, although its overall score decreased by almost 10 points over the 10-year period.[7]

Following the shutdown of Unit 2 of the Ignalina Nuclear Power Plant on 31 December 2009 (a commitment undertaken by Lithuania's accession to the European Union), domestic nuclear electricity generation ceased and an 'energy generation vacuum' emerged. This development fundamentally reshaped both the national energy mix and Lithuania's energy security calculus. The vacuum did not remain empty: it was filled through a combination of increased reliance on imported natural gas and electricity – alongside diversification measures such as the Klaipeda LNG Terminal – and accelerated deployment of renewables, most visibly bioenergy in the heating sector. Domestic electricity production still does not meet the demand.

Although Lithuania joined the European Union in 2004, its electricity system for many years remained synchronously operated within the IPS/UPS area,

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[4] Lithuanian Energy Agency. Current RES statistics. Available: https://www.ena.lt/aktuali-aei-statistika/ [last viewed 31.01.2026].

[5] Lithuanian Energy Agency. Overview of Lithuanian energy sector data, 2024, p. 7. Available: https://www.ena.lt/uploads/2024-metines-EDA-apz/2024_metine-EDA.pdf [last viewed 31.01.2026].

[6] VKEKK. Annual Report on Electricity and Natural Gas Markets Submitted to the European Commission. Available: https://vert.lt/en/Pages/2025-07/Annual-Report-On-Electricity-And-Natural-Gas-Markets-Submitted-To-The-European-Commission.aspx?utm_source=chatgpt.com [last viewed 31.01.2026].

[7] Eurostat. Energy import dependency by products. Available: https://ec.europa.eu/eurostat/databrowser/view/sdg_07_50/default/table?lang=en&utm_source=chatgpt.com [last viewed 31.01.2026].

where system frequency control is centred in Russia.[8] This changed in February 2025, when the Baltic electricity systems were successfully synchronised with the Continental Europe Synchronous Area on 9 February 2025.[9] Essentially, the issue of energy security is particularly important for Lithuania.[10]

Lithuania has clearly defined objectives of energy independence and the development of renewable energy sources in its primary legal acts and strategic policy documents. The Lithuanian energy sector is guided by two key documents, updated in 2024. On 11 December 2024, the Government approved an update to the National Energy and Climate Plan of the Republic of Lithuania (LNECP.)[11] On 26 June 2024, the *Seimas* (Parliament) approved a new recast of Lithuania's National Energy Independence Strategy (LNEIS).[12] The LNEIS 2018 and LNEIS 2024 strategies both focused on accelerating the development of renewable energy, but the 2024 strategy also emphasised the goal of energy export. The export was planned to rely on wind energy, including offshore wind energy, as the main source and hydrogen production. However, the assessment of certain assumptions has evolved over time. The LNEIS 2024 has outlined four strategic energy objectives for Lithuania: ensuring a secure and reliable energy supply, achieving 100% climate-neutral energy for Lithuania and the region, facilitating the transition to an electricity economy, and developing a high-value-added energy industry, while ensuring energy resources are accessible to consumers. Currently, ambitions in the field of RES are being raised, and by 2030 it is planned to achieve a 55% share of RES in final energy consumption, including 100% of electricity and 90% of energy in the district heating sector.

The Law on Energy from Renewable Sources of the Republic of Lithuania (hereinafter referred to as LRES) was adopted in 2011 as the principal national legal act in the field of renewable energy. The LRES is subject to rather frequent amendments. The 2022 amendment to the LRES,[13] included in the so-called Breakthrough Package, introduced a number of provisions to facilitate the deployment of RES. The content of these amendments has been analysed

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[8] LITGRID. Baltic TSOs have sent a notice on decoupling from Russia-controlled electricity system in February 2025. Available: https://www.litgrid.eu/index.php/news-events-/news/baltic-tsos-have-sent-a-notice-on-decoupling-from-russia-controlled-electricity-system-in-february-2025/32852 [last viewed 31.01.2026].

[9] ENTSO-E confirms successful synchronization of the Continental European electricity system with the systems of the Baltic countries. Available: https://www.entsoe.eu/news/2025/02/09/entso-e-confirms-successful-synchronization-of-the-continental-european-electricity-system-with-the-systems-of-the-baltic-countries/?utm_source=chatgpt.com [last viewed 31.01.2026].

[10] Pauzaite-Kulvinskiene J., Zvaigzdiniene I., Zilinskiene L. Lithuania [online]. Wydawnictwo Uniwersytetu Slaskiego, 2025. Available: https://epublications.vu.lt/object/elaba:238839027/238839027.pdf [last viewed 15.01.2026].

[11] Lithuania's National Energy and Climate Plan. Available: https://www.e-tar.lt/portal/en/legalAct/dabeaf52b7b811ef88c08519262548c4 [last viewed 31.01.2026].

[12] Lithuania's National Energy Independence Strategy. Available: https://www.e-tar.lt/portal/lt/legalAct/TAR.E151BC09AE62/asr [last viewed 31.01.2026].

[13] Seimas of the Republic of Lithuania. Amendment no XIV-1169 to the Law on Energy from Renewable Sources of the Republic of Lithuania No. XI-1375 [online] Available: https://www.e-tar.lt/portal/lt/legalAct/86a0dea0fdf411ec8fa7d02a65c371ad [last viewed 29.10.2024].

in a separate publication.[14] On 25 June 2025, an amendment to the LRES[15] was adopted to implement the RED III Directive. It introduced provisions on the designation of renewables acceleration areas, new deadlines for the issuance of permits, and a range of other measures.

This section provides an overview of Lithuania's renewable energy legislation, policy objectives and relevant statistics, clearly demonstrating the national regulatory framework's explicit orientation towards accelerating renewable energy deployment. However, even where strategic direction is clear, the energy transition entails unavoidable trade-offs. Accordingly, the next chapter will introduce the necessary doctrinal and theoretical tools for structuring, prioritisation and supporting consistent, legally defensible decision-making.

3. Where acceleration meets its limits: The energy trilemma and *in dubio pro futura*

3.1. The energy trilemma: Balancing competing objectives at the limits

The ability to reach balanced decisions regarding the deployment of renewable energy sources is of critical importance, even within a highly developed and increasingly 'accelerated' legal framework. The expansion of renewable energy is not solely determined by regulatory frameworks; it is also influenced by the inherent physical characteristics of electricity systems and the operational constraints of power networks. Renewable energy sources (especially wind and solar) are variable and can't be transported, so production doesn't always match existing networks.[16] Although falling technology costs are enabling energy to be produced for households and communities, but infrastructure (historically designed around fossil-fuel generation), carbon lock-in effects and regulatory constraints often hinder integration.

For this reason, legal mechanisms and planning instruments must be aligned with the technical and economic realities of the energy system if they are to produce implementable outcomes rather than merely aspirational targets. Energy law scholarship has already developed an analytical tool for structuring such reality-based choices: the energy trilemma.

The energy trilemma is a concept used to describe the need to balance three competing objectives and demands when developing energy law and policy. The literature provides a range of labels for these objectives; however, for

[14] Zilinskiene L. Accelerating permit issuances for renewable energy projects. Teise. Vilniaus universiteto leidykla, Vol. 136, 2025, p. 137. https://doi.org/10.15388/Teise.2025.136.9

[15] Amendment No. XV-330 to the Law on Energy from Renewable Sources of the Republic of Lithuania No. XI-1375. Available: https://www.e-tar.lt/portal/lt/legalAct/bd0c979255c611f0b070ee7f1ceefc75 [last viewed 31.01.2026].

[16] Woolley O. Renewable Energy Law. Hart Publishing, 2023, p. 18. https://doi.org/10.5040/9781509936496

analytical clarity, I distinguish between a broader framing (economics, politics and the environment) and a more sector-specific formulation (energy security, cost-effectiveness and environmental sustainability).[17] The narrower formulation better reflects the distinctive features of the energy sector and is more workable in practice. Although the objectives of the energy trilemma are formulated in narrower terms, they remain sufficiently broad. For instance, the concept of energy security is broad,[18] which raises internal dilemmas in defining the content of security even before compromises between the three main objectives of the energy trilemma are made. The trilemma is often used to assess the wider impacts of new technologies, e.g. carbon capture and storage, but its ability to explain and justify decisions is limited in more specific cases.[19]

The utility of the energy trilemma in the context of adopting and justifying energy legislation and policy decisions is constrained, yet there is an objective necessity to enhance decision-making methodologies.

3.2 *In dubio pro futura*: A doctrinal orientation for decisions where acceleration meets its limits

The energy trilemma could be complemented by a decision-making method (or principle) of *in dubio pro futura*. A more extensive account of *in dubio pro futura* is provided in the author's earlier work.[20] Evaluating in dubio pro futura as a decision-making principle is both timely and warranted because it is not yet normatively established, yet it has begun to gain traction in recent academic debate and judicial professional discourse, suggesting growing practical relevance. For instance, the Environmental Law Working Group of the European Association of Judges of Administrative Courts held a seminar in Nancy in 2023 on the topic of "*In dubio pro futuro*: Protection of Future Generations in Public Law", which employed the concept of *in dubio pro futura*.[21]

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[17] Zilinskiene L. Renewable Energy Deployment Dilemmas: An Approach to Addressing the Energy Trilemma? Bratislava Law Review, Vol. 9, No. 1, 2025, pp. 182–183. https://doi.org/10.46282/blr.2025.9.1.962

[18] Ibid., p. 183.

[19] Fleming R. The 'Trias': A New Methodology for Energy Law. European Energy and Environmental Law Review, Vol. 28, Issue 5, 2019. https://doi.org/10.54648/EELR2019018

[20] Renewable energy: decision-making at the intersection of climate and energy law [Atsinaujinanciu istekliu energetika: sprendimu priemimas klimato ir energetikos teises sankirtoje]. Available: https://www.15min.lt/verslas/naujiena/energetika/atsinaujinanciu-istekliu-energetika-sprendimu-priemimas-klimato-ir-energetikos-teises-sankirtoje-664-2611436 [last viewed 31.01.2026].

[21] Nancy 2023. AEAJ. The Association of European Administrative Judges. Available: https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/Climate_Justice/2023-10-03-72-WG_Environmental_Law_Agenda_workshop_in_Nancy_September_2023.pdf [last viewed 31.01.2026].

In academic discourse, the notion of *in dubio pro futura* has been proposed by C. Bublitz and C. Winter[22] as a novel legal decision rule. The main idea here is, as follows: "in the face of legal indeterminacy, when the law does not provide a single correct answer but a range of several acceptable answers, courts should choose the one most favourable to the future of humanity"[23]. The rule is intended to broaden judicial reasoning to include the interests of future generations.

The Latin term *in dubio* is translated into English as "in doubt", i.e. having doubts or of doubtful or uncertain character.[24] C. Bublitz and C. Winter borrowed the term *in dubio* from *in dubio pro reo*, according to which courts must rule in favour of defendants if the facts of the case remain doubtful.[25] It is this author's opinion that the *in dubio pro futura* principle is also related to the environmental protection principle of *in dubio pro natura*. This principle is rooted in the constitutional right to a clean environment, where harmlessness is a prerequisite for the utilisation of any technology with the potential to adversely impact the environment.[26] Nevertheless, the principle of in dubio pro natura is not widely employed or universally recognised by other environmental law scholars. The principle of in dubio pro natura suggests that energy law can be brought closer to environmental law.

The notion of *in dubio pro futura* holds particular appeal and relevance in the context of legal deliberation, as it promotes a forward-thinking approach to legal decision-making. When faced with uncertainty, this concept guides decisions towards outcomes that are not only beneficial in the present but also contribute to the long-term well-being of society.

The author contends that this principle should be applied not only to intergenerational justice, but also to a common long-term perspective. This approach has the potential to facilitate the reconciliation of the frequently incompatible objectives of climate and energy law with the practical constraints inherent in their implementation. In the context of a long-term perspective on the large-scale deployment of renewable energy, its implementation may be constrained by significant and unavoidable short-term requirements.

However, formulating *in dubio pro futura* principle would go beyond the intersection of climate and energy law and extend to a future-oriented consistency requirement across sectoral objectives (e.g., food security, housing, defence). It should be taken into account that many public investments in infrastructure, education and technology are inherently future-facing. The principle

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[22] Bublitz C., Winter C. In Dubio Pro Futura. Verfassungsblog. Verfassungsblog, 2022. https://doi.org/10.17176/20220819-181947-0

[23] Ibid.

[24] Fellmeth A. X., Horwitz M. Guide to Latin in International Law [online]. Oxford; New York: Oxford University Press, Inc., 2009, p. 125. Available: http://ebookcentral.proquest.com/lib/viluniv-ebooks/detail.action?docID=3053797 [last viewed 21.01.2026].

[25] Bublitz C., Winter C. 2022.

[26] de Sadeleer N. Environmental Principles: From Political Slogans to Legal Rules. Oxford: Oxford University Press, 2020, p. 5.

would seek to prevent short-term choices from shifting disproportionate burdens onto future generations, for example by leaving an overexploited environment, and would encourage decisions that are conducive to achieving long-term objectives.

In dubio pro futura is not expressly formulated in Lithuanian law. However, this does not mean that courts do not assess the long-term and short-term consequences of legislative acts when making decisions. One such example is the constitutional case of the Republic of Lithuania regarding the limitation of the total installed capacity of solar power plants to 2 GW (provisions of Article 13(10) of the LRES)[27]. In its ruling of 7 November 2023, the Constitutional Court did not find this restriction to be unlawful per se (unconstitutionality was found due to the failure to regulate the procedures initiated). The Constitutional Court's ruling identified the positive benefits of renewable energy development for the long-term goal of mitigating climate change. The Constitutional Court stated that the development of electricity production from renewable energy sources helps to reduce the use of fossil fuels and the environmental pollution caused by them, as well as increasing the state's energy independence (reducing dependence on energy imports), and thus helps to ensure the public interest. Recognition of such a long-term goal should imply that restrictions should not be justified. However, the Constitutional Court justified such a restriction and its motivation is linked to the achievement of energy law objectives, in particular the objective of energy security as "the aim had been to ensure the reliable and safe functioning of electricity networks and the uninterrupted supply of electricity". These aspects, due to the broad concept of energy security, can also be interpreted as different dimensions of energy security.[28] The restriction on the development of new solar power plants was assessed as a temporary measure. This is probably one of the reasons why the court did not find the restriction itself to be contrary to the Constitution.

This case shows how important the time dimension is – the coordination of short-term and long-term goals, the temporary nature of measures – when making decisions that shape the foundations of the energy system. The *in dubio pro futura* approach could encourage a particularly careful assessment of whether restrictions on the development of renewable energy sources are really necessary and proportionate. It is important to distinguish whether the reasons for the restrictions are truly short-term (e.g., related to the current state of the networks) and, at the same time, to assess the prospects, timelines, and alternatives for network modernization. After all, most networks were built a long time ago and were not really designed to integrate intensive, decentralized, and intermittent renewable energy production.

The *in dubio pro futura* approach can support sustainability and long-term objectives if operationalised within existing legal tests. A practical "future-consistency" test would require decision-makers to show that (a) a short-term

[27] On the limitation on the total installed capacity of solar power plants [online]. 2023 Available: https://lrkt.lt/en/court-acts/search/170/ta2952/summary [last viewed 29.10.2024].

[28] Zilinskiene L. 2025, pp. 187–188.

measure does not foreclose the relevant long-term objective; (b) reversibility is preserved (sunset clause, review duty, or objective trigger linked to system upgrades); and (c) a credible pathway exists to remove the constraint once the bottleneck is addressed. Applied in this manner, the approach can help align climate and energy-law objectives and avoid unnecessary constraints on renewable deployment.

Conclusions

Lithuania has achieved particularly rapid growth in renewable energy, and its strategic goals and regulatory framework demonstrate a clear commitment to integration. At the same time, the Constitutional Court's case law shows that this policy direction is not absolute: it upheld limitations on the aggregate capacity of solar power plants, recognising that departures from long-term renewable deployment targets may be justified.

The energy trilemma describes the need to balance three competing objectives when developing energy law and policy. Its utility for adopting and justifying energy legislation and policy decisions is limited, which underscores the need to strengthen decision-making methodologies. Rather than remaining purely theoretical, *in dubio pro futura* can be framed as an emerging doctrinal orientation that complements proportionality and reason-giving by making the time dimension explicit and testing whether short-term constraints preserve a credible pathway to long-term transition goals. From a renewable energy perspective, applying *in dubio pro futura* could better align energy and climate law objectives and help remove unnecessary constraints on renewable energy development.

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SECTION 3

DIGITALISATION AND ARTIFICIAL INTELLIGENCE

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Laurynas Didziulis, *Dr. iur., Professor*
Vilnius University, Lithuania

CURRENT STATE OF DIGITALIZATION IN LITHUANIAN CIVIL LAW AND EU INFLUENCES

Key words: digitalization, electronic transactions, digital assets, EU private law, Lithuanian law

Summary

The article examines the current state of digitalization in Lithuanian civil law, analyzing the influence of EU law and policy alongside the national legislator's advances beyond EU minimum. Drawing on the analysis, the article identifies stronger digital integration in economic relations (companies, obligations, intellectual property and digital assets) and civil procedure in contrast with weaker impact in social relations (family law, personality rights). Based on this assessment, the article offers targeted recommendations to enhance interaction between civil law and digitalization: fostering openness to innovations for transaction cost reduction, upholding functional equivalence and technological neutrality, and ensuring coherence and smooth integration of EU law into national frameworks. These steps aim to promote efficiency, accessibility, and legal certainty in an evolving digital landscape.

Introduction

Digitalization represents a socio-economic trend, which is increasingly relevant for European private law, including Lithuanian civil law. As private law governs economic relations between private actors and underpins a market economy increasingly reliant on digital technologies, traditional legal structures face inevitable pressure to adapt. Yet the impact of digitalization is not uniform across all areas of civil law: while some fields have undergone substantial change, others remain largely based on traditional legal forms.

In Lithuania, the digitalization of civil law is driven by two closely intertwined forces. First, as an EU Member State, Lithuania is subject to a growing body of EU law on digital technologies and data, which has significantly shaped areas such as electronic commerce, electronic signatures, digital content, intellectual property, data access, crypto-assets and digital judicial cooperation. Second, the Lithuanian legislator and courts have developed certain solutions that go

beyond the EU minimum, showing that national civil law retains considerable capacity to adapt to technological change on its own terms.

This article, using the dogmatic analysis of positive law, examines the extent and character of digitalization in Lithuanian civil law, researching whether this development has been uniform across the key areas of civil law and whether the existing legal framework is flexible enough to accommodate further technological change. It begins by situating the broader phenomenon of digitalization within the evolution of European digital private law, before turning to Lithuanian developments in the civil law of persons, property, obligations and procedure. It concludes by outlining future directions grounded in integrative principles of openness to innovation, technological neutrality, functional equivalence and coherence between EU and national law.

1. Digitalization

Digitalization may be defined as the integration of digital elements across the economy, social relations and public sphere. The society lives and thrives within the general framework of civil law – *ius commune* of the whole legal system. This makes civil law – both substantive and procedural[1] – an unavoidable target of various digitalization initiatives, which intensified lately due to rapid technologic development and, interestingly, as a response of COVID-19 pandemic, which together with quarantine restrictions complicated ordinary physical dealmaking. As a result of this, not just Lithuanian civil law became digital – today texts of civil legislation and court judgments are predominantly accessed in their electronic form. Digital assets in Lithuania are protected as property and exchanged against money and other property, traders and their customers are increasingly using electronic commerce as a more convenient and time efficient way of trade, entrepreneurs are establishing companies online, real estate transactions are formed and notarised in electronic form, the procedure of resolving civil disputes in courts and arbitration is becoming more and more digital. All this contributes to the overall efficiency of economy, but various risks also arise which should be addressed by the existing system of civil law. Main digital initiatives relevant for civil law are coming from Brussels, since the EU is quite active (sometimes even overly so) in the regulation of digital technologies and data, but national input is also significant.

[1] The term "civil law" as a distinct branch of law (in contrast to popular use of the word to simply denote continental legal systems) may be understood broadly or narrowly. In a narrow and most precise sense it means general branch of substantive law, which govern horizontal legal relations between equal persons over their personality, property and obligations. In a broad sense, which is used in this article, civil law also encompass procedure for adjudication of civil disputes.

2. European digital private law

It's characteristic for at least recent EU lawmaking that legislation is preceded by various policy action plans and strategies. The same is true with the EU digital law, development of which was accompanied by the Digital Agenda for Europe (2010),[2] Digital Single Market Strategy (2015),[3] European Strategy for Data (2020),[4] 2030 Digital Compass: The European Way for the Digital Decade (2021),[5] etc. Thus, for example, one of the key EU private law legislations – Digital Content Directive[6] was adopted following the Digital Single Market Strategy. These strategies should add coherence to different pieces of legislation, improve legal certainty and may serve as useful explanatory tools for the interpretation of EU digital law.

EU legislation has already more or less affected various branches of private law. Thus, in the area of persons, EU created comprehensive regulation on the protection of personal data, promulgated the European digital identity framework and facilitated electronic corporate actions (company formation and voting). According to Art. 6 of General Data Protection Regulation 2016/679 (GDPR),[7] processing shall be lawful where the data subject has given consent to the processing of his or her personal data for one or more specific purposes. Such consent in civil law may be characterized as a unilateral legal act (transaction, deal). Moreover, personal data may be used as a counter-performance (consideration) in onerous consumer contracts for digital content (Art. 3 of the Digital Content

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[2] Communication from the Commission of 19 May 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (A Digital Agenda for Europe) COM(2010) 245 final. Available: https://eur-lex.europa.eu/EN/legal-content/summary/digital-agenda-for-europe.html [last viewed 09.03.2026].

[3] Communication from the Commission of 6 May 2015 to the European Parliament, the Council, the European economic and social committee and the Committee of the regions (Digital Single Market Strategy for Europe) COM(2015) 192 final. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52015DC0192 [last viewed 09.03.2026].

[4] Communication from the Commission of 19 February 2020 to the European Parliament, the Council, the European economic and social committee and the Committee of the regions (European Strategy for Data) COM(2020) 66 final. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020DC0066 [last viewed 09.03.2026].

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[6] Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Available: https://eur-lex.europa.eu/eli/dir/2019/770/oj [last viewed 06.03.2026].

[7] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Available: https://eur-lex.europa.eu/eli/reg/2016/679/oj/eng [last viewed 06.03.2026].

Directive)[8]. According to Art. 13g of the Company Law Directive 2017/1132,[9] Member States shall ensure that the formation of companies may be carried out fully online without the necessity for the applicants to appear in person. However, family law was practically untouched by the EU law on digital technologies and data. Minor exception is the rule on child's consent to process his/her personal data. Art. 8 of GDPR states that where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorized by the holder of parental responsibility over the child.[10]

EU intellectual property law has been intensively affected by technological change. Due to its specific subject matter – namely, the protection of results of creative and innovative activities – the law of intellectual property has been closely intertwined with the development of digital technologies and online markets. Over the past three decades, the EU legislator has adopted a number of legislative instruments aimed at adapting copyright and related rights to the digital environment, including the Database Directive,[11] Software Directive,[12] Digital Single Market Copyright Directive,[13] Online Broadcasting Directive,[14] etc. In parallel with these legislative developments, the Court of Justice of the European Union has delivered important rulings in landmark cases related to ownership of digital objects.[15]

Although in the area of general property law EU law is traditionally more restrictive, it has created the right to access and transfer proprietary data held in devices. Pursuant to Art. 4 of Data Act (Regulation 2023/2854),[16] where data cannot be directly accessed by the user from the connected product or related

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[8] Directive 2019/770 of the European Parliament and of the Council of 20 May 2019.

[9] Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification). Available: https://eur-lex.europa.eu/eli/dir/2017/1132/oj/eng [last viewed 06.03.2026].

[10] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 (GDPR).

[11] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996L0009 [last viewed 09.03.2026].

[12] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. Available: https://eur-lex.europa.eu/eli/dir/2009/24/oj/eng [last viewed 09.03.2026].

[13] 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. Available: https://eur-lex.europa.eu/eli/dir/2019/790/oj/eng [last viewed 09.03.2026].

[14] Directive 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes. Available: https://eur-lex.europa.eu/eli/dir/2019/789/oj/eng [last viewed 09.03.2026].

[15] CJEU judgment of 3 July 2012 in case No. C-128/11 UsedSoft GmbH v. Oracle International Corp; CJEU judgment of 19 December 2019 in case No. C-263/18 Tom Kabinet Internet BV v. Nederlands Uitgeversverbond.

[16] Regulation 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data (Data act). Available: https://eur-lex.europa.eu/eli/reg/2023/2854/oj/eng [last viewed 06.03.2026].

service, data holders shall make readily available data, as well as the relevant metadata necessary to interpret and use that data, accessible to the user without undue delay. This right by some authors may be potentially qualified as a property right.[17] Other notable initiatives concern digital financial assets, namely crypto assets subject to rules of MiCA Regulation[18] and draft Regulation on the establishment of the digital euro.[19] No substantive digitalization so far was seen in EU succession law.[20]

Following the general EU pattern, one of the biggest impacts of EU digital policy has been on the law of obligations, including rules on e-commerce, e-signatures, contracts for a digital content, product liability for malware programs and AI as well as specific regulation of economic sectors heavily related on IT (electronic financial markets – non-physical trading venues, algorithmic trading, crypto markets, also electronic communications markets [internet services, digital TV]), etc. Thus, for example, already Directive on Electronic Commerce 2000/31/EC[21] required Member States to ensure that their legal system allows contracts to be concluded by electronic means, i.e. forced the legal recognition of electronic contracts. Closely related to this is the Regulation on electronic identification (eIDAS) No 910/2014,[22] according to which a qualified electronic signature shall have the equivalent legal effect of a handwritten signature. Next to digital form of contracts, EU law has advanced into their digital content. Thus, Art. 7 of Digital Content Directive states that in order to conform with the contract, the digital content or digital service shall, in particular, where applicable, be of the description, quantity and quality, and possess the functionality, compatibility,

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17 Zech H. Data Access Rights as Property Rights. In: S. R., D.. Private Law and the Data Act. London: Bloomsbury Publishing, 2024, pp. 45–58.

18 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets (MiCA). Available: https://eur-lex.europa.eu/eli/reg/2023/1114/oj/eng [last viewed 06.03.2026].

19 Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro. COM/2023/369 final. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0369 [last viewed 06.03.2026].

20 Some authors have analyzed the possibility to form existing EU certificate of succession in a digital form but the analysis shows that currently this is very complicated, because even if some electronic tools are used, the original Certificate of Succession still must be prepared and issued by the competent authority, to guarantee that the information is in accordance with the requirements of the Succession Regulation and the factual situation. See Van Erp S., Zimmermann K. The EU Succession Certificate: From standardization to digitalization. ERA Forum. Journal of the Academy of European Law, Vol. 23, Issue 2, 2022, p. 274.

21 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). Available: https://eur-lex.europa.eu/eli/dir/2000/31/oj/eng [last viewed 06.03.2026].

22 Regulation 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market. Available: https://eur-lex.europa.eu/eli/reg/2014/910/oj/eng [last viewed 06.03.2026].

interoperability and other features, as required by the contract.[23] To tackle risks of digital technologies and AI to consumers, EU law has expanded the concept of product as to include all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software (Art. 4 of the Product Liability Directive[24]).

Finally, EU law had moderate effect on the digitalization of civil procedures, including e-CODEX[25] and use of video conferencing in EU cross border litigation. Hence, according to Art. 8 of Regulation (EU) 2022/850[26], Member States shall authorize e-CODEX access points for the connected systems in their territory in accordance with applicable national and Union law. Art. 20 of Regulation (EU) 2020/1783[27] encourages court to take evidence using videoconferencing or other distance communications technology provided that such technology is available to the court and the court considers the use of such technology to be appropriate in the specific circumstances of the case.

Therefore, even if the EU private law is eclectic in general, in the field of digital technologies and data we may notice ongoing systemic change and impact on the existing civil law – both substantive and procedural. Following the general pattern, the impact is more obvious in respect to economic transactions (contracts, consumer protection) and barely seen in more 'national' areas of private law – family, property and inheritance law.

3. Advanced digitalization of Lithuanian civil law

Next to the EU minimum, Lithuanian legislator has pushed national civil law even further to digital dimension. For the sake of simplicity, I will briefly overview this process across four key areas of Lithuanian civil law: persons, property, obligations and procedure.

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[23] Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Available: https://eur-lex.europa.eu/eli/dir/2019/770/oj [last viewed 06.03.2026].

[24] Directive 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products. Available: https://eur-lex.europa.eu/eli/dir/2024/2853/oj/eng [last viewed 09.03.2026].

[25] The e-CODEX system is electronic tool specifically designed to facilitate the cross-border electronic exchange of documents and evidence in digital form in civil and criminal cases.

[26] Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system). Available: https://data.europa.eu/eli/reg/2022/850/oj [last viewed 06.03.2026].

[27] Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence). Available: https://eur-lex.europa.eu/eli/reg/2020/1783/oj/eng [last viewed 06.03.2026].

3.1. Persons

Regarding natural persons, an important aspect related to digitalization is the characterization of personal data, including digital data, as the object of civil legal rights and subject to rules and protection under civil law. In theory, personal data under civil law should be understood as incident of personality which all natural persons have. Personality rights are civil legal rights *erga omnes* over own body, image, name, dignity, privacy (Lithuanian Civil Code (LCC)[28] Art. 2.20-2.26) and nowadays – personal data. Such data is any information relating to an identified or identifiable natural person (Art. 4 of GDPR)[29]. Consent to processing personal data, according to its legal nature, is a unilateral transaction, i.e. unilateral action of person intended to create, modify or extinguish their civil legal rights and duties (LCC Art. 1.63) and may be expressed in a digital form.

As to other unilateral transactions, Lithuanian civil law gives possibility to issue power of attorney in digital form by the natural person to deal with legal persons (companies, associations, institutions, etc.). Normally such power of attorney should have notarial form in order to be valid but digital form and publication in a public registry fully exempt the document from notarial approval (LCC Art. 2.138).

In contrast, holographic wills under Lithuanian civil law may be only handwritten (LCC Art. 5.30), which at least formally exclude the possibility to draft digital personal wills. Official wills are drafted by the notaries and signed by the persons in paper, although LCC Art. 5.28 arguably leaves some space to interpret its rules according to the principle of technology neutrality and as a result recognize the official will created in a digital form and signed by the qualified digital signature, if all other formalities were satisfied.

Legal persons in Lithuania may be fully formed and registered online. Their articles may be fully digital if they follow standard simplified content drafted by the administrator of a public registry. Again, in such a case, digitalization makes an exception from notarial approval which is normally necessary for the approval of company articles (LCC Art. 2.64). Remote participation and voting in a shareholders meeting are also available for Lithuanian companies – mandatory for listed companies and by demand of at least 1/10 of shareholders for all other companies (Art. 21 of Law on Stock Companies of Republic of Lithuania).[30]

As with EU family law, Lithuanian family law mostly is untouched by the digitalization.

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[28] Civil Code of Republic of Lithuania of 18 July 2000, No. 74-2262. Available: https://www.e-tar.lt/portal/lt/legalAct/TAR.8A39C83848CB/asr [last viewed 06.03.2026].

[29] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 (GDPR).

[30] Law on Stock Companies of Republic of Lithuania of 13 July 2000, No. 64-1914. Available: https://www.e-tar.lt/portal/it/legalAct/TAR.E22116F1B0E0/asr [last viewed 06.03.2026].

3.2. Property

In Lithuania, general property law is crucial for digitalization because it acknowledges property rights not only over tangible things but also over "other assets" (LCC Art. 4.38). Since things are defined as objects of material (physical) world (LCC Art. 4.1), those "other assets" mean elements with economic value originating in non-material (non-physical) world: finance, art, digital space or other world, which does not physically exist but is created by a human imagination or consensus. Supreme Court of Lithuania in a case involving financial assets has ruled that intangibles are treated and protected as property by applying over them *mutatis mutandis* ordinary property rules.[31] This paved the road to characterize as 'other assets' an emerging and increasingly important subclass of intangibles – digital assets, i.e. digitally recorded valuable objects subject to control in a virtual space. Digital assets differ from intellectual property by their 'rival' nature, i.e. normally a power over a specific asset can be exercised by only specific holder at a time. When such an asset is transferred, the previous holder loses control over it. In contrast, intellectual property protects intangible creations such as works, inventions, or databases. These objects are typically non-rivalrous: the use of protected work by one person does not prevent others from using the same work simultaneously. For example, a digital music file, software program, or literary text can be copied and accessed by multiple users at the same time without diminishing the original.

According to Lithuanian legal doctrine, digital assets comprise a wide variety of objects, which for convenience can be divided into two groups: simple and crypto assets. Simple digital assets include digital identifiers (email addresses, internet addresses (URLs), domain names, etc.), digital content files, and various non-cryptographic metaverse objects. Crypto assets consist of cryptography-based virtual objects (tokens), including virtual currencies.[32] Being a species of property, digital assets may be transferred *inter visos* or *mortis causa* and also protected by actions *in rem*. Therefore, proprietary status of digital assets, where they satisfy cumulative criteria of economic value, specificity and control, is a manifestation of flexibility of Lithuanian civil law, giving legal certainty to new markets and technologies.

In the field of intellectual property law, Lithuanian legal framework governing copyright in the digital environment closely reflects the structure and concepts of EU copyright law, while national initiatives have primarily focused on the digitalization of administrative procedures and intellectual property registers.

3.3. Obligations

Law of obligations in Lithuania so far is the mostly affected by digitalization area of civil law, however this impact in essence is based on ongoing harmonisation

[31] Supreme Court of Lithuania 2 October 2013, ruling in civil case No. 3K-3-470/2013.

[32] Didziulis L., Taminskas A., Matiukas M. Daiktine teise: vadovelis [Property law; textbook], Vilnius: Vilniaus universiteto leidykla, 2025, p. 124.

and modernisation of law of obligations by EU legislator. Apart from rules based on EU law, there are not much purely domestic initiatives.

As required by the Electronic Commerce Directive, Lithuanian law acknowledges electronic contracts. Consequently, LCC Art. 1.73 prescribes that documents signed by the parties and transmitted by means of communication terminal equipment have the same power as having been made in the handwritten form, providing the protection of the text is guaranteed and the signature can be identified. Regarding the validity of signature, the aforementioned Regulation on electronic identification (eIDAS) No 910/2014[33] states that a qualified electronic signature shall have the equivalent legal effect of a handwritten signature. National law adds to it by prescribing that the legal effect of an electronic signature that does not meet the requirements for a qualified electronic signature is equivalent to that of a handwritten signature only if users of such electronic signature agree to this in advance in writing and that it is possible to store this agreement on a durable medium (Art. 5 Law on electronic identification and trust services for electronic transactions).[34] However, Lithuanian case law is still fluctuating on this point. In some judgments Supreme Court applies strictly latter rule and acknowledges only qualified signature as sufficient electronic signature, which comply with eIDAS Regulation, and other secure signatures where parties have agreed on use of that in advance (in handwritten or qualified electronic form).[35] In other judgments Supreme Court adopted more flexible attitude and affirmed as valid electronic transactions which did not comply with formal requirements of signatures.[36] Besides ordinary transactions, in recent years Lithuanian legislator has created possibilities to conclude and notarise in electronic form even solemn transactions, such as sales of real estate. This is now become possible by using *e-notaras* system where parties may meet notary remotely and sign the solemn contract in electronic form (Art. 28^1 of Law on Notaries).[37] As to digital content in consumer contracts (B2C), Lithuanian civil law fully follows Digital Content Directive,[38] however, since rules are quite advanced and adapted to digital realms they could be *mutatis*

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[33] Regulation 910/2014 of the European Parliament and of the Council of 23 July 2014.

[34] Law on Electronic identification and Trust services for electronic transactions of Republic of Lithuania of 26 April 2018. Available: https://www.e-tar.lt/portal/legalAct.html?documentId=88ad61b052c111e884cbc4327e55f3ca [last viewed 06.03.2026].

[35] Supreme Court of Lithuania 3 July 2023, ruling in civil case No. e3K-3-193-969/2023.

[36] Supreme Court of Lithuania 23 February 2022, ruling in civil case No. e3K-3-36-781/2022; 13 November 2025, ruling in case No. e3K-3-158-421-2025.

[37] Law on Notaries of the Republic of Lithuania of 15 September 1992, No. 192-0. Available: https://www.e-tar.lt/portal/it/legalAct/TAR.BE3136A78E80/asr [last viewed 06.03.2026].

[38] On the transposition of the directive in Lithuanian civil law, see Didziulis L. The Impact of EU Directives 2019/770 and 2019/771: Lithuania. In: De Franceschi A. & Schulze R. (eds.). Harmonizing digital contract law. The impact of EU directives 2019/770 and 2019/771 and the regulation of online platforms: A handbook. Baden-Baden: Nomos Verlagsgesellschaft mbH & Co., 2023, pp. 400–424; Didziulis L. EU Digital Content Directive and evolution of Lithuanian contract law. Journal of Intellectual Property, Information Technology and E-Commerce Law, Vol. 12, No. 2, 2021, pp. 260–270.

mutandis extended by legislator of courts even to all types of contracts for supply of digital content and digital services (C2C, B2C, B2B).

Lithuanian tort law has a very broad protective scope and covers various situations (LCC Art. 6.263), including the strict liability for damage caused by dangerous objects (LCC Art. 6.270), potentially including malware and high-risk AI, however no substantial litigation has taken place in this respect. It may be relevant for situations falling aside from the new EU regime of product liability, which protects consumers from such kind of torts in the European internal market.

Quasi contractual obligations (performance not due, unjustified enrichment and benevolent intervention into affairs of another) are traditionally conservative and functionally neutral, thus no digitalization with respect to them was neither needed nor has taken place.

3.4. Procedure

In field of civil procedure, justice has become increasingly digital and that added speed, economy, simplicity and overall efficiency to a civil adjudication. Most of pleadings and other procedural documents together with accompanying evidence nowadays are filled in electronic form through the special webpage (*Elektroniniu paslaugu portalas, EPP*) operated by the National Administration of Courts. Furthermore, after the COVID-19 crisis, the prevailing practice is to resolve major part of civil disputes in remote court sessions where judges, litigants and other participants of the case access the hearings with an electronic conferencing program (usually ZOOM). Remote hearing is also used in alternative dispute resolution such as commercial arbitration and mediation. All court judgments are signed in paper but their copies are accessible in electronic form. Execution of judgments is also facilitated by another special webpage *antstoliai.lt,* open to use for bailiffs and litigants. Thus, civil procedure is the exceptional area of law where Lithuanian legislator has done much more than EU law to modernise legal relations and enable their existence in digital form.

Conclusions and the way forward

EU law functions as a constant catalyst for innovation in digitalization within private law of Member States. Through directives and regulations, it establishes European standards mandating the legal recognition of crypto assets, electronic contracts, signatures, data rights, and cross-border digital procedures. These instruments require Member States to adapt traditional civil law structures to the digital era, promoting the modernization of legal systems and reducing barriers to cross-border digital transactions. Yet, the EU approach often leaves room for national legislators to exceed these minima, enabling further advancements where domestic conditions allow that.

The current state of digitalization in Lithuanian civil law exemplifies this dynamic interplay between EU-driven harmonization and national initiatives. Digital integration is most pronounced in economic civil relations, including corporate law, contracts, e-commerce, and property rights over intellectual property and digital assets. Lithuanian law not only fulfills EU requirements but occasionally goes further, as exemplified by a flexible approach to intangibles, including crypto and simple digital assets and the *e-notaras* system for remote notarization of solemn transactions, such as real estate sales. These innovations enhance efficiency in the commercial sphere, supporting market economy needs amid rapid technological change.

Conversely, digitalization remains limited in social civil relations, such as family law and succession law. These areas are largely untouched by EU digital initiatives (with minor exceptions, such as child consent under GDPR Art. 8) and exhibit minimal national progress – for example, holographic wills must remain handwritten (LCC Art. 5.30), and family law has seen little adaptation to digital forms.

Civil procedure has undergone intensive digitalization efforts. At the EU level, mechanisms like e-CODEX facilitate cross-border document exchanges, while other provisions encourage the use of videoconferencing in cross-border litigation (e.g., Regulations (EU) 2020/1783 and 2023/2844). Domestically, Lithuania has gone further by enabling comprehensive electronic access to justice through platforms such as the *Elektroniniu paslaugu portalas* (EPP) for electronic filings, remote hearings via ZOOM (accelerated by COVID-19 crisis), and electronic access to judgments and their execution. These innovations improve procedural efficiency, accessibility, and speed while preserving legal certainty.

Looking ahead, the future development of digitalization in civil law should prioritise the following:

Firstly, fostering openness to digital innovation and reducing transaction costs. Removing unnecessary formal barriers (e.g., expanding digital options in areas like wills) and encouraging emerging technologies can streamline economic and procedural interactions, increasing accessibility and efficiency.

Secondly, maintaining technological neutrality and functional equivalence. Civil law rules should prioritize functional outcomes over specific technologies, allowing flexibility for emerging tools – such as AI-assisted contracts or blockchain-based assets – while ensuring equivalence with traditional forms.

Thirdly, ensuring coherence between EU initiatives and national law. Harmonization requires aligning EU-derived rules with national civil law, preventing fragmentation within the legal system. Policy strategies should emphasize systemic coherence, technological neutrality, and functional equivalence to safeguard the integrity of national civil law while supporting the evolution of EU private law in the digital era.

By pursuing these priorities, national legislators can leverage EU momentum while exploiting national flexibility to build a resilient, inclusive, and future-proof civil law framework – one that supports digital transformation without compromising core principles of justice, freedom, and solidarity.

Interestingly, the phenomenon of digitalization may provide new opportunities for the EU legislator to harmonize European private law after the setbacks of previous unification projects at the EU level (such as the European Civil Code or Common European Sales Law). Digitalization could even serve as a practical agenda for renewed efforts to consolidate private law across Europe, aligning substantive rules and procedural practices with the technological realities of the twenty-first century, for example, by creating harmonized EU-level property rights over digital assets.

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Irena Barkane, *Dr. iur., Lecturer and Researcher*
University of Latvia, Latvia

Neringa Gaubiene, *Dr. iur., Assistant Professor*
Vilnius University, Lithuania

SEEKING BALANCE BETWEEN AI REGULATION AND INNOVATION: THE FIRST STEPS TO IMPLEMENT THE EU ARTIFICIAL INTELLIGENCE ACT IN LATVIA AND LITHUANIA AND THE NATIONAL POLICY ACTIONS

Key words: balancing AI regulation and innovation, implementation of the AI Act in Baltics, trustworthy AI, AI policy in Latvia and Lithuania, AI regulatory sandboxes

Summary

The EU Artificial Intelligence Act (AI Act), the first comprehensive legal framework on AI, entered into force on 1 August 2024 and is expected to become fully applicable in all EU Member States on 2 August 2026. EU countries, including Baltic states, have taken necessary actions to enforce and implement the AI Act into national legal systems. This paper aims to explore what measures Latvia and Lithuania have taken to implement the AI Act and how they balance the promotion of uptake of AI and innovation and protection of fundamental rights.

Latvia has undertaken several important measures to implement the AI Act, namely adopted the first national AI-related legally binding regulations and determined the responsible institutions and necessary actions to implement the AI Act. At the same time, Latvia's efforts are largely focused on fostering innovation and building AI capacity and resilient infrastructure. In 2025, Latvia adopted Artificial Intelligence Centre Law which aims to promote the responsible application and advancement of AI technologies. The AI Centre was established bringing together representatives from government, research institutions and digital sector to foster partnerships, innovations, and development. It will support AI initiatives in high-potential areas aligned with national interests and economic competitiveness. In 2026, the Cabinet of Ministers adopted further regulation defining the procedures for the AI Centre to create a special regulatory environment for testing and advancement of AI systems.

Likewise, during 2024–2025, Lithuania undertook significant measures to implement the AI Act, focusing on aligning national legislation and institutions with the regulation. In late 2024, the Ministry of Economy and Innovation introduced amendments to the Law on Technology and Innovation and the Law on Information Society Services, which were approved by

the Parliament in January 2025 to integrate the requirements of the AI Act into national law. This legislative reform designated the national Innovation Agency as Lithuania's notifying authority for AI (responsible for accrediting and overseeing AI conformity assessment bodies) and appointed the Communications Regulatory Authority as the market surveillance authority and single point of contact for AI regulation. Lithuania also launched an "AI sandbox" pilot program – one of the first such regulatory sandboxes in the EU – to allow companies to safely develop and test AI solutions in a controlled environment under the emerging regulatory framework. Furthermore, the Ministry of Economy and Innovation published the list of national public authorities – such as the Equal Opportunities Ombudsperson's Office and other human-rights ombuds – tasked with safeguarding fundamental rights under the AI Act, thereby empowering these bodies to request documentation or investigations of high-risk AI systems in line with the AI Act's oversight provisions.

The authors of this paper emphasise that it is crucial to effectively implement measures to support development and uptake of AI at national level. At the same time, it is also important to actively promote fundamental rights, ethical principles and values, for example through the development of both horizontal and sector-specific regulatory guidelines to promote legal certainty and facilitate compliance, AI literacy framework and strengthening capacity of institutions responsible for enforcing the requirements of the AI Act.

Introduction

The approach to artificial intelligence (AI) in the EU, including in Baltic countries, is designed to promote responsible innovation and the development and uptake of trustworthy AI. It is reflected in the EU Artificial Intelligence Act[1] (the AI Act), the world's first comprehensive AI legal framework, which aims to promote the uptake of human centric and trustworthy AI and support innovation while ensuring a high level of protection of health, safety, and fundamental rights, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems. By prioritizing regulation and protection of fundamental rights and values, the EU member states, including Latvia and Lithuania, aim to address the risks AI systems raise and build public trust in AI technologies.

Critics of Europe's approach argue that while regulation is necessary, overly strict rules can hinder innovation and put Europe at a disadvantage. The EU is a leader in AI regulation, but lags behind both the United States (US) and China in terms of AI innovation and development. While the US economy has developed new, innovative technologies and investment has followed, redirecting resources to sectors with high potential for productivity growth; Europe maintains a weaker position in digital technologies.

[1] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). Available: https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng [last viewed 15.02.2026].

A common view advocated by the tech industry is that more stringent regulation of the digital economy inevitably compromises innovation and undermines technological progress. However, as a professor at Columbia Law School Anu Bradford has indicated the relationship between digital regulation and technological progress is considerably more complex. The existing technological gap between the US and the EU is caused by various other more foundational factors. Besides lack of investment, there is a fragmented digital single market that limits the scaling of innovations within the EU.[2] Bureaucracy at both EU and national level remains a significant barrier.[3]

Legal barriers are also the key obstacles to innovation that should be avoided. The EU now has around 100 technology-focused laws and over 270 regulators working on digital networks across all member states.[4] It is crucial not to create new regulatory barriers, but to simplify regulatory framework and to help companies, in particular small and medium size, to navigate through it.

For the purposes of this paper, the concept of "balance" between AI regulation and innovation is defined through three analytical criteria. First, regulatory flexibility, referring to the extent to which national frameworks enable experimentation and technological development, for example through regulatory sandboxes or adaptive governance mechanisms. Second, rules, mechanisms and safeguards for fundamental rights, including institutional oversight and national accountability mechanisms. Third, support for innovation, including investments in infrastructure, access to data and computing resources, and policy measures for fostering AI adoption. These criteria are essential for comparing national approaches to the implementation of the AI Act in Latvia and Lithuania.

On 19 November 2025, the European Commission issued the Digital Omnibus proposal[5]. It includes a set of amendments to a large corpus of digital legislation, which aims to simplify compliance with the digital rulebook and boost EU competitiveness. It has raised a broad debate over appropriate balance between simplification and protecting fundamental rights and whether the proposed amendments, including to the well-established data protection rules, are well

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2 Bradford A. The False Choice Between Digital Regulation and Innovation. Northwestern University Law Review, Vol. 119, No. 2, 2024, pp. 377–454. Available: https://scholarlycommons.law.northwestern.edu/nulr/vol119/iss2/3 [last viewed 15.02.2026].

3 The Future of European Competitiveness. Part A. A competitiveness strategy for Europe, 2024. Available: https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf [last viewed 15.02.2026].

4 Ibid.

5 European Commission. Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2016/679, (EU) 2018/1724, (EU) 2018/1725, (EU) 2023/2854, and Directives 2002/58/EC, (EU) 2022/2555 and (EU) 2022/2557 as regards the simplification of the digital legislative framework, and repealing Regulations (EU) 2018/1807, (EU) 2019/1150, (EU) 2022/868, and Directive (EU) 2019/1024 (Digital Omnibus), 2025. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52025PC0837 [last viewed 15.02.2026].

justified.[6] The Digital Omnibus proposal serves the EU's ambition to become an AI continent. In April 2025, the EU adopted AI Continent Action Plan[7] which includes actions to build large-scale AI data and computing infrastructures, increase access to high-quality data, foster AI adoption in strategic sectors, strengthen AI skills and talent, and facilitate the implementation of the AI Act. In October 2025, the European Commission adopted the Apply AI Strategy[8] which aims to enhance the competitiveness of strategic sectors and strengthen the EU's technological sovereignty.-

The AI Act entered into force on 1 August 2024 and is expected to become fully applicable on 2 August 2026. In response, EU countries have begun to introduce regulatory and practical measures to implement the requirements of the AI Act into national legal systems and promote AI development. This paper aims to explore and compare what measures Latvia and Lithuania have taken to implement the AI Act and how they promote the uptake of trustworthy AI and innovation while also seeking to protect fundamental rights and democracy. These implementation efforts will be evaluated further.

1. AI regulatory environment and policy directions in Latvia

On 6 March 2025, the Artificial Intelligence Centre Law (AI Centre Law)[9] was adopted by the *Saeima*, the Parliament of the Republic of Latvia, which lays the foundation for an AI technology ecosystem, providing a legal framework for collaboration between the public and private sectors as well as universities. It aims to promote the responsible application and advancement of AI technologies and authorises the creation of the AI Centre.

The AI Centre was officially launched in April 2025. It is a foundation which brings together representatives from government, research institutions and digital sector to foster partnerships, innovations, and development. It aims to strengthen the country's competitiveness by leveraging AI technologies, to enhance public AI literacy. According to Article 2 and 4 of the AI Centre Law, the AI Centre's

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[6] EDPB-EDPS Joint Opinion 2/2026 on the Proposal for a Regulation as regards the simplification of the digital legislative framework (Digital Omnibus), 2026. Available: https://www.edps.europa.eu/system/files/2026-02/edpb_edps_jointopinion_202602_digitalomnibus_en.pdf [last viewed 15.02.2026]; A call to EU legislators: protect rights and reject the call to delete transparency safeguard in AI Act. 2026. Available: https://www.accessnow.org/press-release/a-call-to-eu-legislators-protect-transparency-safeguard-in-ai-act/ [last viewed 15.02.2026].

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[8] European Commission. Communication from the Commission to the European Parliament and the Council Apply AI Strategy, 2025. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52025DC0723 [last viewed 15.02.2026].

[9] Artificial Intelligence Centre Law. Available: https://likumi.lv/ta/en/en/id/359339-artificial-intelligence-centre-law [last viewed 15.02.2026].

tasks include promoting the application of AI in the public and private sector and the implementation of AI initiatives in fields with high potential in conformity with national interests (i.e. in state administration, the national economy, internal security, defence, education, culture, welfare, sports, health and other fields); to promote the skills and equality of society in the field of AI; to ensure the integration of the Latvian language and cultural heritage into AI systems; to ensure that AI systems are used ethically, responsibly, and securely while respecting fundamental rights. It will support AI initiatives in high-potential areas aligned with national interests and economic competitiveness.[10]

The AI Centre is also authorised to create a special regulatory environment (sandboxes) for testing and advancement of AI systems (Article 4 (9), 8 and 9 of the AI Centre Law).[11] In 2025, the Public Utilities Commission (PUC) Special regulatory environment regulation[12] was adopted laying down conditions for establishing special regulatory environment or so called regulatory sandboxes which allow businesses to test new or significantly improved products, technologies, or services under controlled conditions, which temporarily allow certain deviations from the existing regulatory framework. On 13 January 2026, the Cabinet of Ministers adopted the regulation defining the procedures for the AI Centre to organize the special regulatory environment and data processing.[13]

A comprehensive regulatory framework governing AI inevitably intersects with other existing horizontal laws, such as data protection, consumer protection, and liability law both at EU and national level. For instance, Latvia has adopted new regulation which aims to address the risks AI systems pose to democracy, namely to AI-facilitated misinformation in election context. In 2024, the *Saeima* adopted amendments to the Pre-Election Campaign Law[14] which introduce the obligation to inform voters about the use of AI in the preparation of campaign materials. In order to combat deep fakes in the electoral process, two amendments were also made to the Criminal Law. On 22 May 2024, amendments to the Criminal Law came into force, which introduced criminal liability for influencing the electoral process using deep fake technology.[15] On 22 October 2024, amendments to the Criminal Law came into force, introducing criminal liability for the production

[10] Artificial Intelligence Centre Law. Available: https://likumi.lv/ta/en/en/id/359339-artificial-intelligence-centre-law [last viewed 15.02.2026].

[11] Ibid.

[12] Specialas regulativas vides noteikumi [Special regulatory environment rules]. Available: https://likumi.lv/ta/id/359947-specialas-regulativas-vides-noteikumi [last viewed 15.02.2026].

[13] Kartiba, kada Maksliga intelekta centrs organize specialo regulativo vidi un datu apstradi [Procedures for the Artificial Intelligence Centre to organize the special regulatory environment and data processing]. Available: https://likumi.lv/ta/id/365787-kartiba-kada-maksliga-intelekta-centrs-organize-specialo-regulativo-vidi-un-datu-apstradi [last viewed 15.02.2026].

[14] Grozijumi Prieksvelesanu agitacijas likuma [Amendments to the Pre-election Campaign Law]. Available: https://likumi.lv/ta/id/356149-grozijumi-prieksvelesanu-agitacijas-likuma%20 [last viewed 15.02.2026].

[15] Grozijumi Kriminallikuma [Amendments to the Criminal Law]. Latvijas Vestnesis, 97, 21.05.2024. Available: https://likumi.lv/ta/id/352098-grozijumi-kriminallikuma [last viewed 15.02.2026].

or dissemination of knowingly false information using deep fake technology in order to discredit a candidate for a public official position elected, appointed or approved by the *Saeima*.[16]

Regarding AI institutional environment, on 25 February 2025, the Cabinet of Ministers approved the information report On the implementation of the Requirements of the AI Act[17] which defines the necessary actions and responsible institutions for the implementation of the AI Act in Latvia. The Ministry of Smart Administration and Regional Development is designated as the responsible authority for the implementation of the AI Act as a whole, as well as for cooperation with the European Commission. The Ministry of Economy will perform the functions and tasks of the notifying authority, liaising with the European Commission and informing it about the conformity assessment bodies and procedures. The Latvian National Accreditation Bureau will act as the national accreditation body. The Ombudsman will perform the functions and tasks of the authority for the protection of fundamental rights under the AI Act. Market surveillance of the AI Act will be carried out by the Consumer Rights Protection Centre, the Health Inspectorate, the State Agency "Civil Aviation Agency", the Latvian Maritime Administration, the State Railway Technical Inspectorate, the State Technical Supervision Agency, the Road Traffic Safety Directorate, the State Service for Quality of Education, the State Data Inspectorate, the State Security Service, the Military Intelligence and Security Service and the Office for Constitutional Protection, in line with the areas identified in the Information Report. At the same time, the State Data Inspectorate will provide market surveillance of prohibited AI practices and high-risk AI systems, while the Bank of Latvia will provide market surveillance of AI systems made available on the market, put into operation or used by financial institutions under its supervision.

The implementation and enforcement rely heavily on existing sector-specific institution, making a certain degree of sectoral fragmentation likely inevitable.[18] Regulatory guidelines and standards on the sectoral level can enable more agile responses to technological advancements and innovations and may serve as key

[16] Grozijumi Kriminallikuma [Amendments to the Criminal Law]. Latvijas Vestnesis, 196, 08.10.2024. Available: https://likumi.lv/ta/id/355469-grozijumi-kriminallikuma [last viewed 15.02.2026].

[17] Informativais zinojums "Par Maksliga intelekta akta prasibu ieviesanu" [Information Report "On the implementation of the Requirements of the AI Act"], 2025. Available: https://tapportals.mk.gov.lv/legal_acts/2d28c354-9baa-4aa2-ab31-fb4757687050 [last viewed 15.02.2026].

[18] Larouche P. Legal Framework for an Effective Implementation of the AI Act, 2025, CERRE Policy Issue Paper. Available: https://cerre.eu/wp-content/uploads/2025/02/Legal-Framework-for-an-Effective-Implementation-of-the-AI-Act_FINAL.pdf [last viewed 15.02.2026].

instruments to promote legal certainty and facilitate compliance, possibly complementing more abstract standards and guidelines at the horizontal level.[19]

Besides establishing AI regulatory and institutional environment, Latvia's efforts are largely focused on building resilient infrastructure and AI capacity. Latvia is consolidating state computing resources into four national data centres. Latvia has also become part of the European network of AI factories. Latvia has received support for the implementation of a national-level initiative for the development of AI capacities and competences – the project "AI Factory Antenna – Latvia, AIFA-LAT". Between 2026 and 2028, Latvia will establish a National Competence Centre for AI that will strengthen the Latvian AI ecosystem. This Centre will connect Latvia to the LUMI AI Factory consortium in Finland, enhancing access to European-level supercomputing and AI expertise. Currently, Latvia is already specialising in several niche AI fields: language technologies – using AI for translation, speech recognition, and text-analysis solutions; health data analytics – where AI helps analyse genomics, microbiomes, and diagnostic imaging; cybersecurity – where AI solutions are applied to monitoring and threat detection in national critical infrastructure. The project will help further develop these areas by providing access to powerful AI and computing resources and by fostering collaboration between science, industry, and public administration.[20] From the perspective of the analytical framework, while Latvia demonstrates consistent support for innovation, including through adopting legally binding rules, there is a need for more unified and coordinated policy.[21]

2. AI regulatory environment and policy directions in Lithuania

Lithuania has positioned itself as an early adopter and proactive policymaker in AI field. The country adopted its first national AI strategy in 2019, becoming one

[19] Schnurr D. Implementing the European AI Act: Balancing Horizontal Consistency with Sector-Specific Requirements. Network Law Review, 2025. Available: https://www.networklawreview.org/schnurr-ai-act/ [last viewed 15.02.2026]; Schnurr D. Effective Implementation of Requirements for High-Risk AI Systems Under the AI Act: Transparency and Appropriate Accuracy. CERRE Policy Issue Paper, 2025. Available: https://cerre.eu/wp-content/uploads/2025/02/Effective-Implementation-of-Requirements-for-High-Risk-AI-Systems-Under-the-AI-Act_FINAL-1.pdf [last viewed 15.02.2026].

[20] Ministry of Education and Science. Latvia Joins the European Artificial Intelligence Factories Network, Strengthening Science, Innovation, and Digital Literacy. 2025. Available: https://www.researchlatvia.gov.lv/en/latvia-joins-european-artificial-intelligence-factories-network-strengthening-science-innovation [last viewed 15.02.2026].

[21] Latvijas Republikas Valsts kontrole. Maksliga intelekta izmantosana un ieviesana Latvija [Use and Implementation of Artificial Intelligence in Latvia]. 2025. Available: https://lrvk.gov.lv/lv/getrevisionfile/29802-kdDeizr20XEB2uoEZrVd5HxISMQ1zFcr.pdf [last viewed 15.02.2026].

of the first EU Member States to formalize a national vision for AI development.[22] The strategic ambition was to create one of the most favourable environments for AI innovation in Central and Eastern Europe while ensuring alignment with EU principles of trustworthy and human-centric AI.

Since then, Lithuania has taken a comprehensive approach to AI development, combining regulatory readiness, infrastructure investment, talent development, and business ecosystem support. AI is increasingly viewed not only as a technological innovation but also as a key enabler of national economic growth, public sector modernization, and digital sovereignty. The Lithuanian government has recognized that the effective deployment of AI requires coordinated action across education, infrastructure, research, and regulatory domains.

On 6 February 2026, Lithuania presented its updated National Artificial Intelligence Strategic Guidelines for 2026–2035 (National AI Guidelines), marking a new phase in its national AI policy.[23] These guidelines establish a long-term vision of AI as a foundational driver of economic competitiveness, public sector transformation, and national resilience, emphasizing human-centric innovation, infrastructure development, and economic impact.[24]

AI adoption in Lithuania is growing steadily but remains uneven across sectors. According to national and industry data, approximately 8.8% of Lithuanian companies currently use AI technologies, although adoption is significantly higher among large enterprises, where around 31% have implemented AI solutions.[25] These figures indicate both progress and substantial growth potential, especially among small and medium-sized enterprises (SMEs).

AI adoption also has significant implications for productivity. International estimates suggest that up to 57% of tasks performed by an average employee could be automated or enhanced through AI technologies,[26] highlighting the potential efficiency gains for Lithuanian businesses and public institutions.

The Lithuanian public sector is also gradually integrating AI technologies, although adoption remains limited. Currently, only around 15% of public institutions use AI solutions, despite evidence suggesting that AI implementation

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[22] Ministry of the Economy and Innovation of the Republic of Lithuania. Lietuvos dirbtinio intelekto strategija: ateities vizija [Lithuanian artificial intelligence strategy: Vision of the future]. 2019. Available: https://eimin.lrv.lt/uploads/eimin/documents/files/DI_strategija_LT(1).pdf [last viewed 15.02.2026].

[23] Innovation Agency Lithuania. Renginio informacija [Event listing]. Available: https://inovacijuagentura.lt/events-ext/view/5541?lang=lt [last viewed 15.02.2026].

[24] Seimas of the Republic of Lithuania. Dirbtinio intelekto strateginiu gairiu 2026–2035 m. projektas [Draft law of National Artificial Intelligence Strategy Guidelines for 2026–2035]. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/12ffb3a0fa8411f0b9baf24db8ed7e40 [last viewed 15.02.2026].

[25] Ministry of the Economy and Innovation of the Republic of Lithuania. Artificial intelligence. Available: https://eimin.lrv.lt/en/sector-activities/digital-policy/artificial-intelligence/ [last viewed 15.02.2026].

[26] McKinsey Global Institute. Agents, robots, and us: Skill partnerships in the age of AI. McKinsey & Company, 2025. Available: https://www.mckinsey.com/mgi/our-research/agents-robots-and-us-skill-partnerships-in-the-age-of-ai [last viewed 15.02.2026].

could reduce workload and increase operational efficiency by up to 30%.[27] These figures demonstrate both early progress and the need for further capacity-building initiatives.

According to the National AI Guidelines, Human capital is one of the key determinants of AI development. Lithuania has made progress in expanding its digital workforce, with ICT specialists accounting for approximately 5.3% of total employment as of 2024. This reflects significant growth compared to previous years and aligns with national and EU digital transformation goals.

These figures highlight the need for continued investment in AI literacy, AI education, and workforce reskilling. Higher education and talent development initiatives are increasingly focused on interdisciplinary AI skills. Lithuania has invested in AI training programs, university-industry partnerships, and specialized educational initiatives, including national programs to strengthen STEM education and increase the number of AI researchers and doctoral students.

Robust digital infrastructure is essential for AI development. Lithuania has made significant progress in building national data infrastructure, including the establishment of a government cloud platform, open data systems, and national data spaces. These initiatives provide secure and scalable computing environments for AI applications and support data-driven innovation.

One of the most significant developments is the creation of the LitAI Artificial Intelligence Competence and Technology Centre, a 130 million euro national initiative funded jointly by the EU and the Lithuanian government.[28] This centre will provide high-performance computing resources, data infrastructure, and technical expertise to businesses, researchers, and public institutions. The LitAI centre is part of the broader European High Performance Computing (EuroHPC) initiative and represents a major step toward strengthening Lithuania's technological sovereignty and AI research capacity. It will serve as a national hub for AI innovation, enabling local companies and researchers to develop advanced AI models without relying on foreign infrastructure.

Lithuania has also invested significantly in developing national language resources for AI. Approximately 26 million euro has been allocated to create open Lithuanian language datasets and AI-ready linguistic resources, supporting the development of localized AI applications and reducing dependence on foreign-language models.[29]

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[27] National Audit Office of Lithuania. Valstybes kontrole: dirbtinis intelektas galetu sutaupyti iki 30 proc. darbo laiko [National Audit Office: Artificial intelligence could save up to 30% of working time]. Available: https://www.valstybeskontrole.lt/EN/Post/18423/national-audit-office-artificial-intelligence-could-save-up-to-30-percent-of-working-time [last viewed 15.02.2026].

[28] Ministry of the Economy and Innovation of the Republic of Lithuania. Lietuva laimejo 65 mln. euru ES konkursa pirmajam salies dirbtinio intelekto centrui steigti [Lithuania wins 65 million euro EU tender for the country's first artificial intelligence centre]. Available: https://eimin.lrv.lt [last viewed 15.02.2026].

[29] Ministry of the Economy and Innovation of the Republic of Lithuania. Artificial intelligence. Available: https://eimin.lrv.lt/en/sector-activities/digital-policy/artificial-intelligence/ [last viewed 15.02.2026].

Lithuania has taken a proactive role in shaping AI governance. National authorities have been designated to oversee AI regulation in line with the EU AI Act, including the Innovation Agency Lithuania and the Communications Regulatory Authority.

Lithuania has also established one of the first AI regulatory sandboxes in the EU,[30] providing legal and technical support to companies developing AI solutions. This sandbox enables organizations to test AI systems in controlled environments, helping ensure compliance with regulatory requirements while encouraging innovation. Lithuania places a strong emphasis on regulatory flexibility and innovation support, while its institutional framework for safeguarding fundamental rights is being further strengthened in line with the evolving regulatory environment.

Conclusions

EU countries, including Latvia and Lithuania, are taking first regulatory and policy measures to implement the AI Act at a national level which largely aim to foster innovation, AI development and adoption. The AI Act as a horizontal regulation covers a broad and diverse range of domains and use cases and intersects with other existing horizontal laws, such as data protection, consumer protection, and liability law, as well as sector-specific laws, e.g. for public services. The implementation and enforcement of the AI Act largely rely on existing sector-specific institutions. Alongside more general guidelines at the horizontal level, regulatory guidelines and standards on the sectoral level may not only serve as important instrument to promote legal certainty and facilitate compliance but also enable more agile responses to technological advancements and innovations.

Latvia has undertaken several important measures to implement the AI Act, namely, adopted the first national AI-related legally binding regulations and determined the responsible institutions and necessary actions to implement the AI Act. Latvia has adopted new rules to address emerging AI risks, i.e. AI-facilitated misinformation in electoral context. At the same time, Latvia's efforts are largely focused on fostering innovation and building AI capacity and resilient infrastructure. In 2025, Latvia adopted Artificial Intelligence Centre Law which aims to promote the responsible application and advancement of AI technologies. The AI Centre was established bringing together representatives from government, research institutions and digital sector to foster partnerships, innovations, and development. It will support AI initiatives in high-potential areas aligned with national interests and economic competitiveness. In 2026, the Cabinet of ministers

[30] Ministry of the Economy and Innovation of the Republic of Lithuania. Lithuania accelerates development of artificial intelligence by creating a sandbox to test the technology. Available: https://eimin.lrv.lt/en/structure-and-contacts/news-1/lithuania-accelerates-development-of-artificial-intelligence-by-creating-a-sandbox-to-test-the-technology [last viewed 15.02.2026].

adopted further regulation defining the procedures for the AI Centre to create a special regulatory environment for testing and advancement of AI systems.

Lithuania has adopted a proactive and strategic approach to AI by combining early policy development, regulatory preparedness, and targeted investments in infrastructure, talent, and innovation ecosystems. At the same time, the country seeks to ensure the responsible and human-centric deployment of AI by strengthening governance frameworks, promoting compliance with the EU AI Act, and fostering sustainable AI adoption across both the public and private sectors. Lithuania has presented its National AI Guidelines for 2026–2035, marking a new phase in its national AI policy. The guidelines establish a long-term vision of AI as a foundational driver of economic competitiveness, public sector transformation, and national resilience, emphasizing human-centric innovation, infrastructure development, and economic impact. In addition, sector-specific AI strategies, including initiatives in healthcare and digital health, are under development, reflecting Lithuania's strategic commitment to gradual AI integration across key sectors and public services.

Both countries recognize the importance of promoting the development and uptake of AI technologies at both the EU and national levels by strengthening AI capacity and infrastructure and implementing measures to support innovation, such as regulatory sandboxes. While both countries has applied innovation-driven approach, Latvia has focused on adoption of legally binding national rules for promoting partnership, establishing national regulatory sandboxes as well as addressing the risks AI systems pose to democracy in electoral context, while Lithuania has revised its national AI strategy setting unified and coordinated policy for the use and development of AI by applying more integrated approach. However, both countries have not yet fully utilised the potential of existing mechanisms to systematically balance innovation with the protection of fundamental rights. It is important to actively promote fundamental rights, ethical principles and values, for example through the development of both horizontal and sector-specific regulatory guidelines to promote legal certainty and facilitate compliance, AI literacy framework and strengthening capacity of institutions responsible for enforcing the requirements of the AI Act.

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Aleksei Kelli, *PhD, Professor*
University of Tartu, Estonia

Vadim Mantrov, *Associate Professor*
University of Latvia, Latvia

Ramunas Birstonas, *Dr. iur., Professor*
Vilnius University, Lithuania

Maris Vutt, *PhD, Visiting Lecturer*
University of Tartu, Estonia

LANGUAGE, CULTURE, AND LAW: MORAL RIGHTS IN THE AI-DRIVEN DIGITALIZATION OF SMALL LANGUAGES

Key words: moral rights, text and data mining, artificial intelligence, language digitalization, small languages, EU copyright law

Summary

This article examines the interaction between moral rights and text and data mining (TDM) in the context of AI-driven language digitalization, with particular attention to small-language environments. While EU copyright law has increasingly facilitated TDM through exceptions and regulatory mechanisms centred on economic rights, moral rights remain largely unharmonised and unaddressed at the level of AI governance. The authors argue that, although moral rights are formally language-neutral, their practical impact is context-sensitive and may be significantly amplified in small-language settings characterised by limited textual resources, repeated reuse of works, and heightened author identifiability. Drawing on doctrinal analysis of EU and international copyright law and illustrative examples from Estonia, Latvia, and Lithuania, the article demonstrates how this regulatory configuration creates structural tensions in AI-driven language digitalization. The authors conclude that moral rights need not function as obstacles to technological development, and that governance-oriented approaches – integrating authorship interests into the institutional and infrastructural design of language resources – offer a viable path for reconciling copyright protection with the requirements of scalable language technology development.

Introduction

The rapid development of artificial intelligence (AI) systems[1] has intensified the importance of language data as a foundational resource for technological innovation. Natural language processing (NLP) applications – such as machine translation, speech recognition, and large language models – depend on the large-scale availability and reuse of textual materials.[2] As has been noted in the technical literature, "Platforms such as social networks, e-commerce websites, blogs and research journals generate such data in the form of unstructured text and it is essential to analyze, synthesise and process such data for efficient retrieval of useful information".[3] While globally dominant languages benefit from extensive digital corpora, many smaller languages remain underrepresented in AI-driven technologies, raising concerns about digital language inequality and its implications for linguistic and cultural diversity.

International policy discourse increasingly recognizes that unequal access to language technologies entails not only technical but also cultural consequences. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has called for assessments of the "cultural impact of AI systems", especially NLP applications like translation and voice assistants, noting risks such as "the reduction of use, which could lead to the disappearance of endangered languages, local dialects, and tonal and cultural variations associated with human language and expression".[4] Within the European Union, where linguistic diversity constitutes a core value, these concerns are particularly salient for small and under-resourced languages.

The digitalization of language is not merely a technical challenge but also a legal one. Text and data mining (TDM) has become a central mechanism for enabling automated analysis of language data in AI development, and the EU legislator has sought to facilitate such practices through specific copyright

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[1] Article 3(1) of the Artificial Intelligence Act defines AI system as "a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments" – Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) – OJ L, 2024/1689, 12.7.2024.

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[3] Anoop V. S., Asharaf S., Deepak P. Unsupervised Concept Hierarchy Learning: A Topic Modeling Guided Approach. Procedia Computer Science, 89, 2016, pp. 386–387. https://doi.org/10.1016/j.procs.2016.06.086

[4] UNESCO Recommendation on the Ethics of Artificial Intelligence. 2022, pp. 32–33. Available: https://unesdoc.unesco.org/ark:/48223/pf0000381137 [last viewed 30.01.2026].

exceptions in the DSM Directive[5]. As has been observed, "[w]hereas TDM is essential for data analysis, artificial intelligence (AI) and innovation, [...] the 'lawful access' requirement in Art. 3 CDSM Directive may actually restrict research by complicating the applicability of the TDM provision or even rendering it inoperable." [6] While this critique has primarily been advanced in the context of scientific research and economic rights, it also illustrates a broader structural feature of EU copyright law: the facilitation of TDM is pursued through narrowly framed economic-rights mechanisms, while other authorial interests remain largely external to the regulatory design. This structural tension is particularly significant for language technologies that depend on large-scale reuse of textual materials, as it foreshadows the uneven accommodation of moral rights in AI-driven language digitalization – an effect that becomes especially pronounced in small-language environments characterised by limited resources and concentrated reuse.

At the same time, EU copyright law does not harmonise moral rights and deliberately leaves their regulation to national legal systems. This position is expressly confirmed in Recital 19 of the InfoSoc Directive[7], which states that "[t]he moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive".

While existing legal and scholarly debates on TDM have largely focused on economic rights, the role of moral rights has received comparatively limited attention. Scholarly writings have explicitly noted that "the relationship of artificial intelligence and moral rights remains relatively obscure".[8] This gap is particularly significant in copyright systems grounded in the *droit d'auteur* tradition. Although moral rights do not vary in formal scope depending on language size, their practical impact may be amplified in small-language environments characterized by limited textual resources and heightened author visibility.

Against this background, the authors of this article examine the interaction between moral rights, as well as text and data mining in the AI-driven digitalization of small languages. They proceed from the premise that, while EU copyright law has increasingly facilitated TDM through economic rights-based

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[5] 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 (DSM Directive). OJ L 130, 17.5.2019, pp. 92–125.

[6] Szkalej K. The Paradox of Lawful Text and Data Mining? Some Experiences from the Research Sector and Where We (Should) Go from Here. GRUR International, Vol. 74, No. 4, 2025, p. 307. https://doi.org/10.1093/grurint/ikaf029

[7] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) OJ L 167, 22.6.2001, pp. 10–19.

[8] Miernicki M., Ng (Huang Ying) I. Artificial intelligence and moral rights. AI & Society, Vol. 36, 2021, p. 319. https://doi.org/10.1007/s00146-020-01027-6

regulation, moral rights remain largely unaddressed at the level of AI governance. The central analytical question is whether this regulatory configuration adequately accommodates moral rights in AI-driven language digitalization, or whether it creates structural tensions that are particularly acute in small-language contexts. The hypothesis is advanced that, although moral rights are formally language-neutral, their practical impact is context-sensitive and may be significantly amplified where linguistic resources are scarce, reuse is concentrated, and author identifiability is high. On this basis, governance-oriented approaches are explored for reconciling moral rights with the technological requirements of language digitalization, without undermining the personal and cultural values embedded in *droit d'auteur* systems.

Methodologically, the article combines doctrinal legal analysis with a contextual examination of small-language environments. EU copyright law and international norms are analysed as the primary normative framework, while selected national legal systems are used illustratively to demonstrate how moral rights operate in practice. In particular, the legal systems of Estonia, Latvia, and Lithuania are employed as case examples, not as exhaustive comparative case studies, but as representative small-language contexts characterised by extensive moral rights protection, limited language resources, and strong constitutional and cultural commitments to language preservation. These jurisdictions provide a concrete empirical backdrop against which the interaction between moral rights, TDM, and AI-driven language digitalization can be examined.

OpenAI's ChatGPT and Grammarly were used to assist with communicative effectiveness, language and structure; the core arguments are entirely the authors' own.

1. Language data and text and data mining

In the context of artificial intelligence and digital technologies, data functions as a foundational yet legally heterogeneous concept. From a legal perspective, data does not constitute a uniform category of protected subject matter. Instead, different layers of data may be subject to distinct legal regimes depending on their nature, structure, and mode of expression. While individual facts and raw data are, as a rule, excluded from copyright protection, the selection, arrangement, or expression of data may give rise to protected works or related rights. This layered understanding of data is particularly relevant in the field of language technologies, where technical processing frequently intersects with expressive content.

EU data and AI legislation adopts a broad and technologically neutral understanding of data. Article 2(1) of the Data Governance Act[9] defines "data"

[9] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act). OJ L 152, 3.6.2022, pp. 1–44.

as "any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording". Similarly, the Artificial Intelligence Act conceptualises data in functional terms, distinguishing between different roles data may play within AI systems. Art. 3 defines 'training data' as "data used for training an AI system through fitting its learnable parameters", and 'input data' as "data provided to or directly acquired by an AI system on the basis of which the system produces an output". These definitions emphasise the operational role of data in AI systems rather than its legal qualification under intellectual property law. From a science policy perspective, the OECD has developed a complementary, research-oriented concept of data. It defines research data as "factual records (such as numerical scores, textual records, images, and sounds) resulting from research".[10] This definition focuses on the epistemic function of data as a primary resource for scientific inquiry and validation, and it expressly includes textual records, thereby encompassing language data used in research and technological development.

Language data[11] is a specific subset of data closely linked to human expression and authorship and is therefore legally complex. It includes texts, speech recordings, lexicons, annotated corpora, and other linguistic materials used in natural language processing. From a legal perspective, language data often falls within the scope of intellectual property[12], particularly copyright[13] and related rights, as it may comprise protected works, performances, and sound recordings, while at the same time frequently containing personal data[14]. At the same time, it also contains unprotected elements – such as individual words, grammatical structures, or factual statements – so that a single dataset may combine protected and unprotected material and engage multiple legal regimes simultaneously.

Language digitalization encompasses a wide range of processes through which language data is transformed into machine-readable and computationally

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[10] OECD. Recommendation of the Council concerning Access to Research Data from Public Funding. OECD/LEGAL/0347, 2025, p. 7. Available: https://legalinstruments.oecd.org/en/instruments/159?utm_source [last viewed 30.01.2026].

[11] For further discussion, see Kelli A., Tavast A., Linden K. Building a Chatbot: Challenges under Copyright and Data Protection Law. In: Ebers M., Poncibo C., Zou M. (eds.). Contracting and Contract Law in the Age of Artificial Intelligence. Hart Publishing, 2022, pp. 115–134. https://doi.org/10.5040/9781509950713.ch-007

[12] Intellectual property (IP) includes rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields – Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization (as amended on September 28, 1979). Available: https://www.wipo.int/wipolex/en/text/283854 [last viewed 31.01.2026].

[13] In the Infopaq judgment, the Court of Justice of the European Union (CJEU) suggested that 11 consecutive words could constitute a copyright-protected work – CJEU judgment of 16 July 2009 in case No. C-5/08 Infopaq International A/S vs. Danske Dagblades Forening, para. 48.

[14] Article 4(1) of the General Data Protection Regulation defines personal data as "any information relating to an identified or identifiable natural person" – Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) – OJ L 119, 4.5.2016, pp. 1–88.

exploitable formats. These processes include the digitisation of analogue texts, the creation of corpora, linguistic annotation, and the development of AI-based language models. In contemporary AI-driven environments, language digitalization relies heavily on the automated analysis of large volumes of textual data. Text and data mining has therefore emerged as a key enabling mechanism for the development of language technologies, particularly for small and under-resourced languages where the availability of structured language resources is inherently limited.

The DSM Directive defines text and data mining as "any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations".[15] From a technical perspective, text mining is described as "the process of automatically extracting information from the text with the aim of generating new knowledge".[16] This definition reflects a technologically neutral and function-oriented understanding of TDM, capable of encompassing a broad spectrum of computational techniques used in AI development. Recital 9 of the DSM Directive further clarifies the relationship between TDM and copyright protection by emphasising that "Text and data mining can also be carried out in relation to mere facts or data that are not protected by copyright, and in such instances no authorisation is required under copyright law." This statement underscores that TDM, as a technical process, does not necessarily presuppose the use of copyright-protected subject matter and may operate entirely outside the scope of copyright where unprotected data are concerned.

The introduction of explicit TDM exceptions in the DSM Directive did not, however, displace earlier legal mechanisms facilitating automated data analysis. Prior to the DSM reform, certain forms of TDM could already be accommodated under the InfoSoc Directive, notably through the research exception, the mandatory exception for temporary acts of reproduction, and contractual models governing access to digital content. This continuity is expressly acknowledged in Recital 9 of the DSM Directive, which clarifies that certain TDM activities continue to be governed by the temporary reproduction exception under the InfoSoc Directive.[17]

Within the current EU legal framework, text and data mining is primarily addressed through the DSM Directive. As confirmed at EU level, "TDM is a central part of GenAI development, as it is the main process through which content is collected, analysed and used as an input to develop an AI model's parameters

[15] Article 2(2) of the DSM Directive.

[16] Lamba M., Madhusudhan M. Text Mining for Information Professionals: An Uncharted Territory. Springer, 2022, p. 10. https://doi.org/10.1007/978-3-030-85085-2

[17] For a detailed and critical analysis of the limited and case-specific applicability of the temporary reproduction exception to NLP model training under EU law prior to the DSM Directive, see Eckart de Castilho R., Dore G., Margoni T., Labropoulou P., Gurevych I. A Legal Perspective on Training Models for Natural Language Processing. Proceedings of the Eleventh International Conference on Language Resources and Evaluation (LREC 2018), Miyazaki, Japan, ELRA, 2018, pp. 1267–1274. Available: http://www.lrec-conf.org/proceedings/lrec2018/pdf/1006.pdf [last viewed 31.01.2026].

and weights".[18] This characterisation underscores that TDM is not a marginal or ancillary practice, but a structural prerequisite for contemporary AI training.

Art. 3 establishes a mandatory exception permitting TDM for scientific research conducted by research organisations and cultural heritage institutions, while Art. 4 introduces a broader exception applicable to all users, subject to an explicit opt-out by rightholders. As the EUIPO study explains, "the exception under Article 4 is subject to rights holders ability to reserve their exclusive reproduction rights, commonly referred to as 'opting-out' of the TDM exception".[19] The opt-out thus operates as the principal mechanism through which rightholders may retain control over large-scale automated reuse of their works. At the same time, legal scholarship has emphasised that the body of European case law concerning the DSM Directive remains.[20]

Together, these provisions aim to balance copyright protection with the promotion of technological innovation and are widely regarded as essential for the development of AI systems. However, it has been argued that "in the digital environment, especially with online uses, lawful access requirements lead to a paradox – they are meant to ensure that the user's access is bona fide, but in doing so they risk rendering the exception inoperable".[21] This paradox weakens legal predictability for actors engaging in large-scale language digitalization, particularly where access conditions are shaped by contractual and technological controls. This concern is empirically reinforced by the EUIPO study, which observes that "TDM users are generally responsible for properly configuring their data collection policies, scraping tools, and data cleaning procedures, to comply with expressed TDM reservations".[22] This legal uncertainty is not merely incidental, but structurally linked to the way access to protected content is organised in practice.

As has been observed, "[t]he very impulse of a diligent user of having to reach out to obtain a subscription or some other authorisation to access content inevitably activates a market opportunity,"[23] enabling rightholders to influence the legal and technical parameters of access in ways that may indirectly affect the practical availability of text and data mining for language digitalization.

This balance is further specified and institutionally reinforced by the Artificial Intelligence Act, which explicitly connects the lawful development of general-purpose AI models to compliance with the opt-out mechanism laid down in

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[18] European Union Intellectual Property Office. Development of Generative Artificial Intelligence from a Copyright Perspective, 2025, p. 12. Available: https://www.euipo.europa.eu/en/publications/genai-from-a-copyright-perspective-2025 [last viewed 04.02.2026].

[19] Ibid.

[20] Grimm S., Muenster L. M. Training von KI in der EU: Fragen zum Nutzungsvorbehalt beim Text und Data Mining sowie zur Beweislast. GRUR-Prax, No. 13, 2025, p. 443.

[21] Szkalej K. 2025, p. 307.

[22] European Union Intellectual Property Office. Development of Generative Artificial Intelligence from a Copyright Perspective, 2025, p. 16. Available: https://www.euipo.europa.eu/en/publications/genai-from-a-copyright-perspective-2025 [last viewed 04.02.2026].

[23] Szkalej K. 2025, p. 312.

Art. 4(3) of the DSM Directive. Art. 53(1)(c) of the AI Act imposes a positive obligation on providers of general-purpose AI models to put in place internal copyright compliance policies, including the identification and observance – through state-of-the-art technical means – of reservations of rights expressed by rightholders. This obligation effectively transforms the opt-out from a passive limitation on the scope of the TDM exception into an *ex ante* compliance requirement for AI developers, particularly in large-scale training environments.

In addition, Article 53(1)(d) introduces a transparency obligation requiring providers to draw up and make publicly available a sufficiently detailed summary of the content used for training their models. While this requirement stops short of mandating disclosure of individual works, it enhances the practical effectiveness of the opt-out regime by enabling rightholders to assess whether their content may have been used and whether their reservation of rights has been respected. Taken together, these provisions do not establish a direct remuneration entitlement for rightholders but instead position the opt-out mechanism as a market-shaping regulatory tool, preserving bargaining power and indirectly incentivising licensing where access to protected content is commercially indispensable for AI development. In this regard, it has been argued that "[i]t remains questionable if the introduction of the opt-out rule in Article 4(3) CDSMD actually strengthens the rightsholders' position given its legal uncertainties".[24]

This regulatory approach has nevertheless been criticised for relying excessively on exclusion and transactional licensing rather than collective redistribution mechanisms: "it seems preferable to follow an alternative path and introduce an output-oriented levy system that imposes a general payment obligation on all providers of generative AI systems in the EU. In contrast to remuneration systems based on AI training activities, this alternative approach would not weaken the position of the European AI sector or make the EU less attractive as a region for AI development".[25]

At the same time, the scope of these exceptions is limited to acts governed by economic rights, while moral rights remain unaffected. As noted in the Commission-commissioned Study on the application of the InfoSoc Directive, "although moral rights stay clearly outside the scope of the directive, the condition of attribution in certain exceptions seems to overlap the moral right concerned".[26] In particular, the TDM exceptions do not impose any positive obligation of

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[24] Ziaja G. M. The text and data mining opt-out in Article 4(3) CDSMD: Adequate veto right for rightholders or a suffocating blanket for European artificial intelligence innovations? Journal of Intellectual Property Law & Practice, Vol. 19, No. 5, 2024, p. 459. https://doi.org/10.1093/jiplp/jpae025

[25] Senftleben M. Generative AI and Author Remuneration. International Review of Intellectual Property and Competition Law, Vol. 54, No. 10, 2023, p. 1556. https://doi.org/10.1007/s40319-023-01399-4

[26] European Commission: Directorate-General for the Internal Market and Services, Brussels Bar, Crids and De Wolf & Partners, Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "Infosoc Directive"), European Commission, 2013, p. 463. Available: https://data.europa.eu/doi/10.2780/90141 [last viewed 31.01.2026].

attribution, nor do they address potential effects of automated processing on the integrity of protected works. In small-language environments, where available textual corpora are necessarily limited and author visibility is high, this legal configuration implies that a significant proportion of language data used for TDM may engage moral rights concerns. As a result, the interaction between language data, TDM practices, and moral rights acquires particular practical and systemic importance in the context of AI-driven language digitalization. In this regard, the Commission-commissioned Study observes that "[t]he moral right of integrity may therefore, in certain cases and probably more in certain countries than in others, constitute an obstacle to the enjoyment of actual or potential exceptions".[27]

2. Language digitalization, moral rights, and small-language contexts

Text and data mining is a core technique in the development of contemporary artificial intelligence systems, including large language models trained predominantly on globally dominant languages. At the level of EU copyright law, the legal framework governing TDM does not distinguish between large and small languages, nor do moral rights vary in formal scope depending on linguistic context. Nevertheless, the relevance of moral rights in AI-driven language digitalization is shaped by the socio-technical conditions under which language data is produced, reused, and governed. These conditions differ significantly between dominant and small-language environments.

As scholars and policymakers increasingly recognize, unequal access to language technologies across linguistic communities carries not only technical but also cultural consequences. In this regard, it has been observed that "digital language inequality poses a direct threat to Europe's linguistic and cultural diversity".[28] This issue is particularly acute in the Baltic context, where the digital presence of Estonian, Latvian, and Lithuanian depends on comparatively limited linguistic resources. The central challenge concerns not only the technical development of AI, but also the legal permissibility and practical usability of language data, which encompasses not only words, phrases, and grammar, but also culturally embedded content. As has been observed, "Language fills the spaces between us with sound; culture forges the human connection through them. Culture is in language, and language is loaded with culture".[29]

From a doctrinal perspective, moral rights protect the personal dimension of authorship. Article 6*bis*(1) of the Berne Convention for the Protection of Literary

[27] Ibid., p. 464.

[28] Giagkou M., Lynn T., Dunne J., Piperidis S., Rehm G. European Language Technology in 2022. In: European Language Equality: A Strategic Agenda for Digital Language Equality. Springer, 2023, p. 91. https://doi.org/10.1007/978-3-031-28819-7

[29] Agar M. Language shock: Understanding the Culture of Conversation. HarperCollins Publishers, 2002, p. 28.

and Artistic Works (Berne Convention) provides the canonical formulation of moral rights: "[i]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation". The Berne Convention thus established two main moral rights: the right of attribution and the right of integrity.

These moral rights retain their relevance in technologically mediated uses of works. As has been observed, "In the context of text mining, a first relevant moral right is the right of attribution, i.e., the right to be mentioned as the author of a copyrighted work. A second moral right is the right to integrity, which allows the author to oppose against harmful modifications of his work".[30] Legal scholars have therefore questioned the conditions under which such data mining is permissible, given that the applicable requirements have not yet been definitively articulated.[31]

It was also proposed to add an additional right to the Berne Convention. It would be 'the right to decide whether the work shall be made public' also known as 'the right of divulgation'. This right would mean that the author has the sole right to decide whether, and in what form, his work shall be presented to the public. However, since opinions differed, the proposal was dropped.[32] Nevertheless, it reflects a continuing concern with authorial control over the contextual presentation of works, which remains relevant in automated processing environments.

Since moral rights are not harmonised either at the international level or within EU copyright law, their scope and intensity continue to depend on national legal systems. Beyond the core moral rights recognised under the Berne Convention, certain Member States provide for additional authorial prerogatives. For example, under the Estonian Copyright Act[33], the author has the right to "request that the use of the work be terminated (right to withdraw the work)". Although this right is rooted in copyright law and protects the personal bond between the author and the work, its practical effects in data-driven environments may, in certain respects, resemble those of the data subject's right to erasure ("right to be forgotten") under

[30] Truyens M., Van Eecke P. Legal aspects of text mining. Computer Law & Security Review, Vol. 30, No. 2, 2014, p. 160. https://doi.org/10.1016/j.clsr.2014.01.009

[31] Grimm S., Muenster L. M. 2025, p. 443.

[32] World Intellectual Property Organization (1978), Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). WIPO Publication No 615(E), pp. 42–43. Available: https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf?utm_source [last viewed 01.02.2026].

[33] Estonian Copyright Act. Passed 11.11.1992. Available in English: https://www.riigiteataja.ee/en/eli/520102025003/consolide [last viewed 07.02.2026].

the General Data Protection Regulation (GDPR).[34] This functional proximity does not amount to doctrinal convergence, but it illustrates how multiple legal regimes may interact in constraining the continued use of language data in AI-driven processing.

In relation to the right of attribution, a parallel may be drawn with contemporary AI regulation. The Artificial Intelligence Act provides that "Providers of AI systems, including general-purpose AI systems, generating synthetic audio, image, video or text content, shall ensure that the outputs of the AI system are marked in a machine-readable format and detectable as artificially generated or manipulated" (Art. 50(2)). Although this obligation does not concern copyright attribution as such, it reflects a broader regulatory emphasis on transparency and traceability in data-driven content ecosystems.

The particular relevance of moral rights in small-language digitalization does not arise from doctrinal exceptionalism, but from contextual amplification. Small languages are characterised by a limited and non-substitutable pool of textual resources, which leads to repeated and concentrated reuse of the same works across datasets and projects. This structural constraint is particularly significant given that "[t]ext mining cannot be performed without access to a vast amount of data"[35], making repeated reliance on the same textual sources effectively unavoidable in under-resourced language contexts. Author identifiability is correspondingly higher, and reputational interests are more closely linked to individual works. Moreover, language digitalization in small-language contexts is frequently framed as a matter of cultural preservation and public interest rather than purely technological innovation.

This cultural framing is not merely policy-driven, but is reflected at the constitutional level in the Baltic states. The Preamble of the Constitution of the Republic of Estonia emphasises the duty to guarantee the preservation of the Estonian nation, language, and culture "through the ages".[36] Similarly, the Preamble of the Constitution of the Republic of Latvia highlights that the identity of Latvia has been shaped by "the Latvian language" and its cultural traditions,[37] while the Preamble of the Constitution of the Republic of Lithuania refers to the Lithuanian Nation as having preserved its "native language, writing,

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[34] According to Art. 17(1) of the GDPR, "the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her". Copyrighted works used in language digitalisation may also qualify as personal data where the content relates to an identified or identifiable natural person, as in the case of autobiographical texts, academic writings, or speech recordings, with identifiability being particularly pronounced in small-language contexts.

[35] Lamba M., Madhusudhan M. 2022, p. 10.

[36] The Constitution of the Republic of Estonia. Passed 28.06.1992. Available in English: https://www.riigiteataja.ee/en/eli/523042025001/consolide [last viewed 01.02.2026].

[37] The Constitution of the Republic of Latvia. Adopted by the Constitutional Assembly in a joint meeting on 15 February 1922. Available in English: https://likumi.lv/ta/en/en/id/57980?utm_source [last viewed 01.02.2026].

and customs".[38] Taken together, these constitutional commitments underscore that language is understood not merely as a communicative tool, but as a foundational element of cultural continuity and statehood.

Against this background, the relevance of moral rights in small-language environments is closely connected to the underlying conception of authorship embedded in *droit d'auteur* systems. The heightened relevance of moral rights in small-language environments is closely connected to the underlying conception of authorship embedded in *droit d'auteur* systems. These characteristics intensify the interaction between automated language processing and the personal and cultural interests protected by moral rights. As CISAC explains, "'Author's right' – *droit d'auteur* in French – is founded on the idea, born in continental Europe, that a work of creation is intimately linked with its creator. The work cannot be separated from its author, like a child from his father. The 'copyright' concept stems from the Anglo-Saxon tradition, according to which authors hold a property right to their creations, that can be traded on the basis of economic principles".[39]

While the tension between data-driven technologies and personal authorship exists in all language contexts, it becomes more visible and normatively charged in small-language environments. As emphasized in scholarly analysis, moral rights are not merely technical copyright entitlements but "appear to be highly based on ideological values, the legal recognition of which is the task of the legislator".[40] Accordingly, moral rights assume particular practical importance in the AI-driven digitalization of small languages, even though the applicable legal framework is formally language-neutral. EU copyright law facilitates TDM primarily through economic regulation, while leaving moral rights untouched. In small-language contexts, this creates a structural tension between the requirements of scalable language technology development and the personal and cultural values embedded in *droit d'auteur systems*. The following chapter therefore examines governance-oriented approaches aimed at reconciling moral rights with AI-driven language digitalization.

3. TDM and moral rights: Constraints and paths to reconciliation

The appropriate regulatory response to the interaction between moral rights and TDM depends on a clear identification of the normative conflict at issue. Where the concern is that moral rights may interfere with TDM-based language

[38] The Constitution of the Republic of Lithuania. Adopted by the citizens of the Republic of Lithuania in the Referendum of 25 October 1992. Available in English: https://www.lrs.lt/home/Konstitucija/Constitution.htm [last viewed 01.02.2026].

[39] CISAC (International Confederation of Societies of Authors and Composers). Authors' Rights vs. Copyright. Available: https://members.cisac.org/CisacPortal/page.do?id=45&utm_source [last viewed 01.02.2026].

[40] Miernicki M., Ng (Huang Ying) I. 2021, p. 323.

digitalization, the preliminary question is which moral rights are potentially engaged and to what extent such interference is legally and practically significant. This chapter therefore examines the relevance of attribution and integrity rights in the context of TDM and subsequently explores doctrinal, legislative, and governance-oriented approaches for reconciling moral rights with the technological requirements of AI-driven language digitalization.

The right of attribution provides a natural starting point, as it is the moral right most explicitly reflected – albeit indirectly – in EU copyright exceptions. A comparison between the TDM exception for scientific research and other research-related exceptions reveals a deliberate regulatory differentiation. Under the InfoSoc Directive, the exception for use for the sole purpose of illustration for teaching or scientific research permits limitations on the reproduction right and the right of communication to the public only where "the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved".[41] This express requirement operationalises the moral right of attribution within the scope of the exception.

By contrast, the DSM Directive does not impose any comparable attribution obligation in relation to text and data mining. Art. 3, which establishes a mandatory TDM exception for scientific research, is silent on attribution, despite the fact that the same directive explicitly requires source and author indication in other contexts. In particular, Art. 5 of the DSM Directive, concerning digital and cross-border teaching activities, permits the digital use of protected content only where such use "is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible".[42] This internal contrast strongly suggests that the absence of an attribution requirement in Arts. 3 and 4 DSM Directive is intentional. On the basis of the legislative design, it may therefore be argued that attribution is not a condition for lawful TDM under EU copyright law, even where the mined material consists of protected works.

This position is partially nuanced, but not fundamentally altered, by subsequent AI regulation. While the DSM Directive itself does not introduce an attribution requirement for general TDM under Art. 4, Art. 53(1)(d) of the Artificial Intelligence Act obliges providers of general-purpose AI models to "draw up and make publicly available a sufficiently detailed summary about the content used for training of the general-purpose AI model, according to a template provided by the AI Office". The European Commission, acting through the AI Office, has adopted a binding template and explanatory notice to operationalise this obligation.[43] The template requires structured transparency concerning the types

[41] InfoSoc Directive, Art. 5(3) (a).

[42] DSM Directive Art. 5(1) (b).

[43] European Commission. Explanatory Notice and Template for the Public Summary of Training Content for general-purpose AI models. 24 July 2025. Available: https://digital-strategy.ec.europa.eu/en/library/explanatory-notice-and-template-public-summary-training-content-general-purpose-ai-models?utm_source [last viewed 08.02.2026].

and sources of training data, including the provenance of datasets and categories of content used, with the aim of enabling rightholders to assess compliance with Union law, including the operation of the TDM opt-out mechanism. However, this transparency obligation does not amount to an attribution requirement in the classical moral-rights sense. It does not require the identification of individual works or authors, nor does it seek to fulfil the author's personal right to be named. Rather, it constitutes a regulatory mechanism aimed at copyright compliance and market transparency rather than moral rights enforcement.

Text and data mining may also raise questions under the right of integrity, insofar as TDM processes involve technical transformations of protected works, such as fragmentation, format conversion, or abstraction into statistical representations. Although these operations are typically automated, non-expressive, and invisible to the public, they may nonetheless qualify as modifications at a technical level. According to Art. 6*bis*(1) of the Berne Convention, the core of the integrity right is the author's right "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation". This formulation embeds a qualitative threshold: not every modification is prohibited, but only those that are prejudicial to honour or reputation.

Several EU Member States adhere closely to this standard. For example, Article 14(1) clause 3 of the Lithuanian Copyright Act[44] grants the author "the right to object to any distortion or other alteration of the work or its title, as well as to any other attack on the work that may damage the author's honor or reputation". Other Member States go further. Estonian law grants the author the right to permit or prohibit any changes to the work and to contest any changes made without consent[45], while Latvian law[46] provides that the author may prohibit "any modifications, amendments and additions" to the work. The wording of these provisions suggests that integrity rights may extend to purely technical alterations, including those required for TDM, even where such alterations are functionally necessary and devoid of expressive intent. In addition, certain Member States recognise moral rights exceeding the Berne minimum, such as the withdrawal right, which may acquire practical relevance in AI training environments where continued computational use of works is at issue.

One possible path to reconciliation lies in doctrinal clarification through judicial interpretation and scholarly consensus. It may be argued that language digitalization through TDM does not, as such, interfere with moral rights where the processing is purely functional, non-expressive, and does not result in public dissemination of modified works. The structure of the DSM Directive supports this

[44] Lithuanian Law of the Republic of Lithuania on Copyright and Related Rights. Date of admission: 18.05.1999. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.81676/asr [last viewed 08.02.2026].

[45] Estonian Copyright Act § 12 (1) clause 3.

[46] Latvian Copyright Law. Adopted: 06.04.2000. Available: https://likumi.lv/ta/id/5138-autortiesibu-likums [last viewed 07.02.2026].

reading, as it expressly permits reproductions for TDM while omitting attribution obligations. Building on the Court of Justice's case law in *Spiegel Online*[47] and *Funke Medien*[48], legal scholarship has argued that "copyright exceptions constitute user rights".[49] The approach functions to ensure that public interests are enhanced. Under this approach, moral rights should not be interpreted so expansively as to neutralise legislatively recognised exceptions.

A second path concerns legislative techniques at national level. Given the lack of harmonisation of moral rights within EU copyright law, Member States retain discretion to define their scope and limits, subject to compliance with the Berne Convention. Legal literature analysing the InfoSoc framework has suggested that "A possible future reform of limitations might thus be an opportunity to clarify the scope of moral rights when derogating from an economic right: while certain basic nonpecuniary interests of the author should always be respected, they should not lead to abusive hampering of creative uses".[50]

A model solution may be found in the European Copyright Code[51] proposed by the Wittem Group. Art. 5.6 (Relation with moral rights) seeks to prevent moral rights from unduly interfering with limitations and exceptions, while Art. 3.6 (Interests of third parties) provides that moral rights shall not be enforced where doing so would cause manifestly disproportionate harm to the legitimate interests of third parties.

Comparable solutions already exist in national law. Lithuanian copyright law provides that moral rights in computer programs and databases may not be exercised in a manner that unreasonably restricts the exercise of economic rights, except where the author's honor or reputation is harmed[52], and Latvian law similarly limits the exercise of moral rights in relation to computer programs.[53] These provisions demonstrate that principled limitations on moral rights are compatible with the *droit d'auteur* tradition and could be extended, by analogy, to TDM-related uses of language data.

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47 CJEU judgment of 29 July 2019 in case No. C-516/17 Spiegel Online GmbH vs. Volker Beck, para. 54.

48 CJEU judgment of 29 July 2019 in case No. C-469/17 Funke Medien NRW GmbH vs. Bundesrepublik Deutschland, para. 70.

49 Szkalej K. 2025, p. 310.

50 Geiger C., Schoenherr F. The Information Society Directive. In: Stamatoudi I., Torremans P. (eds.). EU Copyright Law: A Commentary. 2nd edition. Edward Elgar Publishing, 2021, p. 339.

51 European Copyright Code. Available: https://www.ivir.nl/nl/projecten/european-copyright-code/ [last viewed 31.01.2026].

52 Lithuanian Copyright Act Art. 14(3): "The moral rights of an author of computer programs and databases may not be used in a manner which unreasonably prejudices the rights of a holder of the author's economic rights in these computer programs and databases, including the right to carry out adaptation, alteration and distribution of these works at his discretion, with the exception of the cases when such actions would be prejudicial to the author's honor or reputation".

53 Latvian Copyright Law, Art. 14(11): "The author of a computer program may not, on the basis of his or her moral rights, prohibit transformation, modification, and supplementation of the computer program as long as such use does not damage the honour or reputation of the author and also may not exercise his or her moral rights to revoke the work".

Beyond doctrinal and legislative responses, governance-oriented solutions offer a particularly promising avenue for reconciling moral rights with AI-driven language digitalization. Rather than treating moral rights as residual constraints enforced *ex post*, such approaches seek to integrate authorship interests into the institutional and infrastructural design of language resources. Government-led language initiatives may play a central role in this respect by coordinating the creation, curation, and release of language resources under transparent and legally secure conditions. Public-sector involvement can enhance legal certainty, standardise acceptable forms of attribution and transformation, and reduce reliance on fragmented and transaction-intensive private licensing. Open data policies further contribute to this objective by facilitating access to public-sector texts and publicly funded research outputs under permissive legal regimes, thereby expanding the pool of legally unencumbered language data. Taken together, these governance-oriented approaches demonstrate that moral rights need not function as obstacles to language digitalization. When embedded within coordinated legal and institutional frameworks, they can coexist with, and even reinforce, socially valuable AI-driven language development, particularly in small-language contexts.

At the same time, where national copyright laws – such as the Estonian Copyright Act – provide for an extensive catalogue of moral rights, legislative adaptation may be necessary to ensure the practical operability of such governance models. Any recalibration must, however, remain within the constraints set by the Berne Convention. Article 6*bis* of the Berne Convention establishes that moral rights are independent of economic rights and survive their transfer, which forms the doctrinal basis for treating them as non-transferable, or at least non-alienable, in most *droit d'auteur* systems. This foundational premise excludes proprietary transfer of moral rights, but does not preclude more nuanced techniques for structuring their exercise in complex exploitation contexts.

Against this background, legal literature has suggested that "[w]ith regard to all those moral rights that may become relevant to the acquirer of economic rights in the future, it is reasonable and risk-free to regulate the exercise of each individual moral right separately".[54] This proposition reflects an attempt to reconcile the enduring and personal nature of moral rights with the legitimate interests of economic right holders in legal certainty. Rather than diminishing moral rights, it points towards an *ex ante* structuring of their exercise, allowing potential conflicts to be anticipated and addressed in a differentiated and context-sensitive manner.

In this regard, the European Copyright Code, as developed by the Wittem Group, provides a useful normative reference point. Article 3.5 (Consent) of the Code states that "The author can consent not to exercise his moral rights. Such consent must be limited in scope, unequivocal and informed". The accompanying explanatory notes clarify that this provision does not permit general or blanket

[54] Rosentau M. Intellektuaalse omandi oigused infotehnoloogias. Autori isiklikud oigused [Intellectual Property Rights in Information Technology: The Personal (Moral) Rights of the Author]. Juridica, 2007, No. 9, p. 666.

waivers of moral rights. Instead, consent must relate to specific uses and be sufficiently certain, whether expressed explicitly in writing or, in appropriate cases, implicitly, where the author's intention can be clearly inferred from the contractual framework or the circumstances of the case. The explanatory notes further emphasise that written form serves as important evidence of unequivocal consent and that consent can be regarded as informed only where the author, or a duly authorised representative, has received full and meaningful information about the intended use of the work, including its manner of use and relevant contextual associations. The notes also recognise that informed consent may arise through collective negotiations conducted by representative bodies, such as authors' unions.

Overall, Article 3.5 of the European Copyright Code and its explanatory notes illustrate an approach that preserves the personal and enduring character of moral rights while allowing their exercise to be structured in a predictable and legally secure manner. Rather than neutralising moral rights, this model seeks to prevent their exercise from operating as a structural barrier to legitimate downstream uses. As such, it offers a doctrinally coherent point of reference for accommodating moral rights within governance frameworks designed to support AI-driven language digitalization, particularly in small-language environments where repeated reuse of limited textual resources is unavoidable.

Conclusions

This article has examined the interaction between moral rights and TDM in the context of AI-driven language digitalization, with a particular focus on small-language environments. The analysis confirms that, while EU copyright law has progressively facilitated text and data mining through exceptions and regulatory mechanisms primarily oriented towards economic rights, moral rights remain structurally external to both the DSM Directive and the emerging AI governance framework. This regulatory asymmetry does not eliminate moral rights, but it leaves their accommodation largely to national legal systems, thereby creating potential friction in data-intensive AI development.

The analysis demonstrates that moral rights are formally language-neutral, yet their practical relevance is context-sensitive. In small-language environments characterised by limited and non-substitutable textual resources, repeated reuse of the same works, and heightened author identifiability, moral rights – particularly the rights of attribution and integrity – acquire amplified practical significance. In such contexts, even technically non-expressive and automated processing operations associated with text and data mining may intersect with authorial interests more frequently and more visibly than in large-language settings. The Estonian, Latvian, and Lithuanian examples illustrate how extensive national catalogues of moral rights, combined with strong constitutional commitments to language and culture, intensify this interaction.

The findings further indicate that current EU-level facilitation of text and data mining operates almost exclusively through the regulation of economic rights, notably via lawful access requirements, opt-out mechanisms, and transparency obligations. Moral rights are neither harmonised nor operationalised within these frameworks. As a result, moral rights function as latent constraints whose effects emerge *ex post* and unevenly across Member States. This configuration risks undermining legal certainty in AI-driven language digitalization, particularly for actors operating in small-language environments where access to alternative datasets is limited.

At the same time, the analysis rejects the view that moral rights must necessarily operate as obstacles to language digitalization. Doctrinal examination shows that the Berne Convention establishes moral rights as independent of economic rights and enduring beyond their transfer, but it does not preclude structured approaches to their exercise. National legal practice, scholarly literature, and soft-law instruments demonstrate that moral rights can be accommodated through carefully calibrated limitations, contextual interpretation, and consent-based mechanisms that respect their personal nature while enabling socially valuable uses.

In this regard, governance-oriented approaches emerge as a particularly promising avenue for reconciliation. By integrating authorship interests into the institutional and infrastructural design of language resources – rather than treating moral rights as residual constraints enforced *ex post* – governance models can enhance legal certainty and reduce reliance on fragmented private licensing. Public-sector coordination, open data policies, and standardised attribution and transformation practices can expand the pool of legally usable language data while remaining compatible with the personal and cultural values embedded in *droit d'auteur* systems.

The European Copyright Code, together with its explanatory notes, provides a coherent normative reference point for such an approach. Its consent-based model demonstrates how the exercise of moral rights may be structured in a limited, unequivocal, and informed manner without permitting their blanket waiver or proprietary transfer. This model preserves the personal and enduring character of moral rights while preventing their exercise from functioning as a structural barrier to legitimate downstream uses, including AI-driven language digitalization.

Overall, the authors conclude that the reconciliation of moral rights with AI-driven language digitalization does not require the erosion of authorial protection, but rather its contextual recalibration. In small-language environments, where linguistic diversity, cultural preservation, and technological development intersect most acutely, governance-oriented solutions offer a viable path forward. By embedding moral rights into coordinated legal and institutional frameworks, it is possible to support both the scalable development of language technologies and the protection of the personal and cultural interests that moral rights are designed to safeguard.

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SECTION 4

LEGAL AND PRACTICAL PROBLEMS OF REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE COLLECTIVE INTERESTS OF CONSUMERS IN THE EU

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Spyridon Tsantinis, *Dr. iur., Professor*
Democritus University of Thrace, Greece

REPRESENTATIVE ACTIONS IN GREEK LAW: TRANSPOSITION OF THE DIRECTIVE AND INITIAL EXPERIENCES

Key words: Directive (EU) 2020/1828, representative actions, Greek consumer law, collective redress, qualified entities, opt-in, cross-border actions, litigation funding, procedural safeguards, settlements, injunctions, civil penalties

Summary

Directive (EU) 2020/1828 restructures EU collective consumer protection by requiring Member States to provide a "representative action" mechanism capable of producing both injunctive measures and consumer redress, while preserving national procedural autonomy within a set of minimum safeguards. The Greek transposition, as reflected in Law 5019/2023 (amending Part Eight of Law 2251/1994: "Consumer Protection Act") combines continuity with earlier association-based enforcement with significant design choices on (i) standing; (ii) the organisation and monitoring of qualified entities; (iii) the consumer participation model for redress (opt-in, including a post-judgment option); (iv) the use of a civil-penalty logic as an ancillary deterrence mechanism; and (v) a strict stance on litigation finance.

Introduction

Research questions and relevance – research structure

Directive (EU) 2020/1828[1] requires Member States to ensure the availability of a representative action mechanism for the protection of the collective interests of consumers, explicitly addressing both injunctive relief and redress within a single framework. The Directive positions representative actions as part of the Union's

[1] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1 ("Representative Actions Directive", hereafter RAD).

response to the risk that "the same unlawful practice" may harm large numbers of consumers, including in cross-border markets shaped by digitalisation.[2] While the Directive does not impose a uniform procedural model, it does specify minimum requirements concerning qualified entities, funding safeguards, information duties, and the interaction of representative actions with consumer rights derived from a broad range of EU instruments listed in Annex I.

Greece's transposition, as reflected in Law 5019/2023 is relevant for at least three reasons: First, the Greek legislator chose to locate the transposition within the existing architecture of the Consumer Protection Act (Law 2251/1994) by modernising Part Eight, rather than building a wholly separate, general collective redress code. Second, the Greek scheme emphasises a consumer-association-centred standing model, an opt-in approach for redress measures (including a "late" opt-in possibility), and a distinctive approach to deterrence (including a civil penalty mechanism).[3] Third, the Greek implementing choices adopt a notably strict position on third-party funding, which raises interpretive and policy questions when assessed against the Directive's more governance-oriented approach to funding risks.

Against that background, three tightly framed research questions are addressed:

Transposition and design choices: How do the Greek implementing provisions map onto the Directive's core concepts (qualified entities, injunctive/redress measures, safeguards, information duties, cross-border functionality)?

Continuity and change: How does the transposed regime relate – doctrinally and institutionally – to pre-existing Greek consumer enforcement and association-based collective action mechanisms?

Initial experiences: What can be said about the early implementation phase in Greece (designation practice, court readiness, emerging interpretive questions), and what cannot yet be concluded?

To ensure this presentation is coherent and self-contained, we start with a concise summary of the directive itself. This will be useful for readers and will also facilitate independent reading of this study.

Meaning of "representative actions" in the Directive and in Greek context

At EU level, RAD defines a "representative action" as an action "for the protection of the collective interests of consumers" that is brought by a qualified entity, seeking either injunctive measures, redress measures, or both.[4] The Directive thereby formalises a model in which the procedural protagonist is

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[2] Directive (EU) 2020/1828, recitals 1–5.

[3] Dionysopoulos G. The new framework of Law No. 5019/2023 concerning representative actions. In: Monthly Bulletin of the Hellenic Federation of Enterprises "Regulatory environment and Business", 2 March 2023.

[4] Directive (EU) 2020/1828, Art. 3.

not an individual consumer but a designated organisation (or public body) meeting specific independence and transparency conditions.[5]

In the Greek transposition, "representative actions" are embedded in the Consumer Protection Act's Part Eight through a new chapter that structures: (i) who may bring such actions (consumer associations meeting certain criteria); (ii) which measures may be sought (injunctive and redress); and (iii) procedural and institutional conditions, including registration and monitoring. The Greek regime can be characterized as both a continuation of association-based consumer litigation and a structural reorganisation aimed at aligning with RAD's bifurcated remedy model.[6]

Contribution and limits (especially regarding "initial experiences")

As (up to February 2026) there are no Greek judicial decisions applying the post-transposition regime, "initial experiences" are approached as early doctrinal and institutional observations grounded in statutory design and scholarly discussion rather than claims about settled practice.

1. Directive (EU) 2020/1828: Architecture and core concepts

1.1. Objectives, regulatory technique, and the "two-track" remedy model

RAD's core regulatory move is to require a representative action mechanism that can (at minimum) support two types of measures: (i) injunctive measures designed to stop or prohibit infringements, and (ii) redress measures designed to obtain remedies for consumers affected by those infringements.[7] Recital 5 frames this as a deliberate shift beyond the older injunction-focused framework in Directive 2009/22/EC, which is repealed and replaced. The Directive thereby treats collective consumer enforcement as not merely prospective (stopping unlawful conduct) but also remedial, by requiring that representative actions can result in outcomes delivering compensation, repair, replacement, price reduction, contract termination, or reimbursement (depending on the relevant substantive instrument and national implementation).

This "two-track" model is both an expansion of collective consumer enforcement and a compromise: the Directive sets minimum procedural components but leaves core choices – such as opt-in vs opt-out and details of redress distribution – to Member States.[8] This combination reflects the Directive's explicit

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[5] Directive (EU) 2020/1828, Arts. 4–6.

[6] Dionysopoulos G. 2023.

[7] Directive (EU) 2020/1828, Art. 8–9.

[8] Visscher L., Faure M. A Law and Economics Perspective on the EU Directive on Representative Actions for Consumers (Directive 2020/1828). Journal of Consumer Policy, Vol. 44, Issue 3, 2021, pp. 455–482.

balancing concern: improving access to justice while avoiding abusive litigation and "punitive damages". On a law-and-economics reading, the Directive's architecture may be understood as seeking to increase deterrence and consumer protection while controlling the risk of opportunistic litigation through governance of actors (qualified entities) and procedural safeguards.[9]

2. Scope and Annex I: Linking procedure to substantive EU consumer rights

2.1. Scope by reference to EU instruments

RAD applies to infringements of the Union law provisions listed in Annex I, encompassing a wide set of consumer-facing regimes (covering, for example, unfair terms, consumer rights, product safety, digital services, passenger rights, and GDPR insofar as it protects consumers' collective interests). Recital 15 emphasises that the Directive is "without prejudice" to these legal acts and does not replace their enforcement mechanisms; rather, it provides a procedural vehicle to protect the collective interests implicated by their infringement.

This "Annex technique" is central to understanding both EU-level design and national transposition: rather than creating a general class action for any harm, the Directive ties representative actions to a defined catalogue of EU consumer-protection norms. The Greek implementing law similarly uses annex-based references to specify the substantive perimeter of representative actions under Greek law.

2.2. "Collective interests" and the need for a representative actor

RAD's procedural logic assumes that the "collective interests of consumers" may be harmed even where individual consumer claims are low-value, dispersed, or informationally difficult to vindicate individually. The Directive therefore prioritises a representative actor model (qualified entities), rather than individual aggregation through ad hoc group formation. This is consistent with the Directive's insistence that representative actions be brought by entities meeting specified criteria of legitimacy, independence, and transparency.

[9] Visscher L., Faure M. Actions for Consumers (Directive 2020/1828). Journal of Consumer Policy, Vol. 44, Issue 3, 2021, pp. 455–482.

3. Qualified entities: Designation, independence, transparency, and monitoring

3.1. The qualified entity as the procedural "gatekeeper"

The Directive makes the qualified entity the principal gatekeeper of collective consumer litigation. Under Art. 4, Member States must ensure that qualified entities are designated for the purpose of bringing representative actions. While domestic designation may include both private organisations and public bodies, the Directive establishes a more structured regime for cross-border representative actions, in which a qualified entity designated in one Member State can bring actions in another (subject to conditions), and Member States must maintain and communicate lists of such entities.

The recitals underscore that this model is intended to enhance access to justice while controlling abuse by confining standing to entities meeting minimum governance standards. Thus, the "qualified entity" device is the Directive's primary instrument for balancing collective enforcement with restraint, effectively shifting emphasis from individual claimants to the regulation of representative organisations' legitimacy and incentives.[10]

3.2. Criteria and monitoring

Art. 4 and Art. 5 require Member States to establish criteria for designation and mechanisms for monitoring compliance, including the possibility to revoke designation where criteria are no longer met. The Directive's approach is thus not merely permissive (allowing certain entities to sue), but supervisory (requiring ongoing compliance and transparency).

A key interpretive point is that the Directive's design assumes that entity-level governance can substitute, at least partially, for US-style class certification procedures. In other words, rather than a court certifying a class through an elaborate test, the EU model often "pre-certifies" the representative through designation rules, while leaving national law to provide admissibility and procedural coordination tools.[11] Whether this approach successfully controls opportunism is a recurrent theme in the literature, especially in relation to funding and conflicts of interest.[12]

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[10] Visscher L., Faure M. Actions for Consumers (Directive 2020/1828). Journal of Consumer Policy, Vol. 44, Issue 3, 2021, pp. 455–482.

[11] Ibid.

[12] Kramer X., Tillema I. The Funding of Collective Redress Actions in the EU: Transparency and Conflicts of Interest. Revista Italo-Española de Derecho Procesal, Vol. 2, 2020 [published 2021], pp. 165–181.

4. Injunctive vs. redress measures: Functional differences and procedural implications

4.1. Injunctive measures (Art. 8)

Art. 8 requires that representative actions may seek measures to stop or prohibit an infringement, including (depending on national law) interim measures. The structure reflects continuity with earlier EU injunctive mechanisms (Directive 2009/22/EC and its predecessors), but RAD reframes injunctions as part of a broader collective redress architecture.

CJEU case law predating RAD illuminates the procedural character of injunction actions brought by consumer organisations. In Henkel, the Court classified a preventive injunction action by a consumer protection organisation seeking to prevent the use of unfair terms as a matter relating to tort/delict (for jurisdiction purposes under the Brussels Convention), explicitly recognising that such actions can aim to prevent imminent harm rather than respond only after damage occurs.[13] While Henkel is not an interpretation of RAD, it is relevant doctrinally because RAD similarly treats injunction actions as a core component of collective consumer enforcement, and because cross-border representative actions inevitably raise questions of jurisdiction and applicable law.

4.2. Redress measures (Art. 9) and consumer participation models

Art 9 requires Member States to ensure that representative actions can seek redress measures (compensation, repair, replacement, etc), subject to national procedural arrangements. However, the Directive does not mandate a single participation model; instead it explicitly allows Member States to choose an opt-in, opt-out, or mixed system, including discretion regarding the stage at which consumers may opt in or out.[14]

Recital 43 is especially explicit on this point. It states that consumers should have "adequate opportunities" to express whether they wish to be represented and to benefit from outcomes, and it describes opt-in and opt-out mechanisms as alternative tools that Member States may select "to best respond to their legal traditions". This flexibility is central to transposition analysis because it marks a deliberate regulatory choice: the EU sets minimum availability of redress but allows Member States to calibrate participation and binding effect.

From an economic and procedural perspective, opt-in/opt-out design affects both participation rates and deterrence. Opt-out may yield higher participation and stronger deterrence but may raise legitimacy concerns, while opt-in may be

[13] Case No. C-167/00 Verein fuer Konsumenteninformation v. Henkel. Court of Justice, 1 October 2002, EU:C:2002:555, [46]–[50], classification and preventive scope; para. 50 on tort/delict characterisation for preventive action.

[14] Directive (EU) 2020/1828, recital 43.

more consistent with certain procedural traditions but risks under-participation and weaker corrective effects.[15] RAD leaves this trade-off largely to national law, within the bounds of consumer information and procedural fairness requirements.

5. Safeguards: Abusive litigation, conflicts of interest, and the funding question

5.1. The Directive's "balance" framing (Recital 10)

Recital 10 articulates RAD's guiding balancing concern: improved access to justice should be matched by safeguards to avoid abusive litigation and undue burdens on traders; punitive damages should be avoided; and procedural rules on designation and funding should prevent misuse. The Directive thus conceptualises safeguards as integral to the legitimacy of collective enforcement, not as optional add-ons.

5.2. Third-party funding (Art. 10): Transparency/conflict governance rather than prohibition

RAD addresses third-party funding through Art. 10, which requires Member States to ensure that representative actions for redress measures are not influenced by funders in a manner detrimental to the collective interests of consumers, and that conflicts of interest are prevented (including where the funder is a competitor of the defendant). The Directive's technique is governance-oriented: rather than endorsing or banning funding, it requires transparency and conflict controls.

Art. 10 is indeed one of the Directive's most practically sensitive provisions. Kramer and Tillema, in particular, analyse funding as a potential enabler of collective redress but also as a source of conflicts and accountability problems, emphasising transparency and governance mechanisms to mitigate those risks.[16] The ELI Principles likewise treat third-party funding as requiring structured governance (disclosure, conflict checks, fairness), rather than as inherently illegitimate.[17] These benchmarks are relevant for evaluating national transpositions that choose either to allow funding under governance constraints or to adopt stricter stances. The Greek choice is markedly stricter than the Directive's default governance approach, a point that will be analysed in detail in the transposition section (see below).

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[15] Visscher L., Faure M. 2021, pp. 455–482.

[16] Kramer X., Tillema I. 2020 [published 2021], pp. 165–181.

[17] European Law Institute (ELI). Principles for Third Party Funding in Civil Litigation. 2024. Available: europeanlawinstitute.eu

6. Information duties and effects: Consumer awareness, deterrence, and collective impact

6.1. Informing consumers (Art. 13) and the deterrence dimension (Recital 60)

RAD includes specific requirements concerning information to consumers about representative actions, including information on final decisions and approved settlements. Recital 60 links information to both consumer empowerment and deterrence, noting reputational risks as relevant for discouraging infringements. The Directive thereby treats publicity and consumer information not merely as procedural fairness elements, but as part of the enforcement ecosystem.

6.2. Effects of decisions and the "collective interest" logic (Art. 15) – doctrinal anchors from case law

Although Art. 15 focuses on the evidentiary and legal effects of final decisions (including their potential relevance in subsequent actions), the broader collective impact logic is illuminated by CJEU case law on injunction actions in consumer law.

In Invitel, the Court held that EU law does not preclude a declaration of invalidity of an unfair term (in an injunction action brought in the public interest and on behalf of consumers by an authorised body) from producing effects with regard to all consumers who concluded contracts to which the same general business conditions apply, including consumers who were not party to the injunction proceedings, provided this is in accordance with national legislation.[18] This line of reasoning is doctrinally significant for representative actions because it supports the idea that collective consumer protection can legitimately generate effects beyond the parties formally present in proceedings – subject to national procedural design and safeguards. That logic will be relevant when analysing the Greek regime's approach to binding effect, consumer consent, and post-judgment participation.

[18] Case No. C-472/10 Nemzeti Fogyasztovedelmi Hatosag v. Invitel Tavkozlesi Zrt (Court of Justice, 26 April 2012) EU:C:2012:242, [40]–[41] (effects of declaration of invalidity in injunction action with regard to all consumers, including non-parties).

7. Cross-border dimension and the role of "qualified entities" in EU procedural coordination

RAD's cross-border architecture builds on the notion that qualified entities should be able to act beyond the state of designation, enabling a form of procedural mutual recognition for collective enforcement. The Directive also recognises that cross-border representative actions raise issues of jurisdiction and applicable law, and recital 34 specifically links the information provided by qualified entities to enabling courts to determine jurisdiction and applicable law, with explicit reference to tort-based connecting factors in cross-border contexts.

While RAD itself does not codify private international law rules, case law such as Henkel illustrates the procedural characterisation issues that cross-border injunction actions may trigger, especially where the action is preventive and aims to stop unfair terms or unlawful practices in consumer contracts. This is particularly relevant for Greece insofar as the Greek transposition includes a specific provision on cross-border representative actions and must operate within the broader EU private international law framework.

8. Greek transposition: Article-by-article and concept-by-concept analysis

8.1. Standing and the Greek model of qualified entities (Arts. 10γ–10στ; 10δ; 10ε)

Greek law operationalizes qualified-entity standing primarily through consumer associations constituted as associations under the Civil Code and established for the exclusive purpose of consumer protection. A twotier register is maintained by the General Secretariat of Commerce, including a specific subregister for entities entitled to bring representative actions. Designation as an entity entitled to bring domestic and/or cross-border representative actions is granted by the competent body of the Ministry upon application, subject to criteria including a requirement of twelve months' actual public activity and transparency through publication (notably via a website).

The statute embeds independence and transparency requirements at the level of consumer association registration (independence from suppliers; publicly available information on funding sources and governance). It also specifies permissible funding sources for associations (membership fees and contributions, grants, limited fees from represented consumers in specific actions, and certain other receipts), which is relevant when assessing the functional capacity of qualified entities in a system that relies on association-based enforcement.

8.2. Cross-border standing (Art. 10h)

Foreign qualified entities designated in other Member States may bring cross-border representative actions before Greek courts; conversely, Greek entities may litigate abroad where designated for that purpose. For proof of status, the Greek court may rely on registration in the national subregister or the Commission list referred to in the Directive, while retaining the ability to verify whether the statutory purpose justifies litigation in the particular case.

8.3. Measures: injunctive (Art. 10i) and redress (Art. 10ia)

Greek law reproduces the Directive's dual-remedy model. Injunctive measures may be temporary or definitive, may include a determination of infringement and publication/corrective statements, and do not require proof of individual consumer loss or supplier fault; nor do they require that individual consumers express willingness to be represented. In domestic representative actions, the entity may additionally request a civil penalty (as a sanction), with statutory criteria for calibration and a specific liability mechanism for manifestly unfounded sanction claims (including potential liability of the association and responsible board members).

For redress measures, Greek law enumerates remedies consistent with the Directive (compensation, repair, replacement, price reduction, contract termination, reimbursement) and permits group description without identifying each consumer at the pleading stage. Consumers may express an explicit wish to be represented, and the law also provides a structured mechanism by which consumers who did not opt in during litigation may nonetheless benefit after an irrevocable decision, through written notification to the supplier and an administrative followup channel involving the General Secretariat of Commerce. This is a distinctive operationalization of participation and enforcement, combining judicial determination with administrative facilitation of compliance.

8.4. Procedure, evidence/disclosure, interim effects, and limitation (Art. 10ib)

Jurisdiction is allocated to the multimember court of first instance at the supplier's domicile/seat, with a specific rule for broadcast advertising. The statute provides for limited evidentiary access: at the parties' request, the President may order document production pursuant to Civil Procedure Code (CPC) Art. 232, framing disclosure within existing procedural constraints rather than introducing expansive discovery.

The law also sets limitation-related effects: a representative action for cessation/prohibition must be brought within an exclusive oneyear period from the last occurrence of the unlawful conduct (subject to an "average consumer" knowledge condition), and the bringing of representative actions interrupts

limitation periods for consumers concerned. For injunctive actions, the procedure is characterised as voluntary jurisdiction with early hearing, potential provisional enforcement, and *erga omnes* effects. Final decisions from Greek courts – and, significantly, from courts or administrative authorities of other Member States – on the existence of an infringement may be used as evidence in other Greek actions for redress, under free assessment of evidence rules.[19]

8.5. Settlements/conciliation (Art. 10ic)

For redress actions, the authorised entity and supplier may jointly propose a settlement to the court. Court approval requires scrutiny (including compatibility with CPC settlement provisions and applicability of terms) and consideration of consumers' rights and interests. The settlement becomes binding on the entity, supplier, and the consumers concerned, while the statute contemplates a consumer ability to accept or refuse to be bound within parameters set by the approving decision. This reflects the Directive's insistence on court/authority control of collective settlements and consumer-protective safeguards.

8.6. Funding (Art. 10ιδ) and costs (Art. 10ie)

A salient Greek design choice appears in the enacted text: "The financing of representative actions by third parties shall be prohibited". This stands in contrast to the Directive's approach, which regulates third-party funding "where" it exists by imposing transparency and conflict control duties. Within the Greek statutory design, the financing capacity of qualified entities is therefore channelled through the association's internal funding sources (including limited fees and certain receipts) rather than external litigation finance.

On costs, the Greek statute adopts a consumerprotective rule: consumers subject to a representative action for redress/reparation do not pay legal costs, subject to an exceptional derogation where a consumer became a party and caused costs through intentional or negligent conduct. The information provisions further contemplate supplierborne costs for informing consumers, where ordered by the court and subject to proportionality limits.

8.7. Information duties and databases (Arts. 10ist; 10iz; 10z)

Qualified entities must provide website-based information about actions they decide to bring, their status, and results; they must also inform consumers

[19] Papachristou G. Directive 2020/1828/EU on representative actions. In: Studies in Honor of Professor Yianna Karympali-Tsiptsiou, Vol. 2, 2022, pp. 1323–1361. Alexandridou E. 'Directive (EU) 2020/1828 on Representative Actions: To What Extent Will EU Consumer Protection Be Improved through the New Rules of Procedural Law? 2020/1828/EU on representative actions – How is consumer protection in the EU going to ameliorate through the new procedural rules? In: Studies in Honor of Professor Yianna Karympali-Tsiptsiou, Vol. 1, 2022, pp. 1–36.

within a short period after filing so consumers may opt in to redress proceedings. Institutionally, the General Secretariat of Commerce must publish information about designated entities and general information about pending actions and decisions through a national electronic database, corresponding to the Directive's public information infrastructure. Monitoring is supported by a committee-based mechanism tasked with periodic assessment of whether designated entities continue to meet criteria.

8.8. Relationship with existing Greek legal mechanisms

The Greek transposition is not a "standalone" procedural invention; it restructures the existing collective consumer protection architecture in Law 2251/1994 and recentres collective litigation around designated consumer associations and representative actions as the primary vehicle for collective interests enforcement.[20] EU collective redress initiatives interact with national traditions of association standing and collective enforcement, and that the effectiveness of the model turns on institutional capacity and procedural feasibility rather than formal transposition alone.

8.9. Initial experiences in Greece

There is only one representative action filed after the transposition (and heard recently: January 2026).

Accordingly, early observations must remain institutionally grounded. The statute itself evidences that implementation depends on (i) active designation and monitoring of qualified entities by administrative bodies and a committee mechanism; (ii) information duties enabling consumer awareness and opt-in participation; and (iii) database publication infrastructure.

9. Comparative observations

The Directive permits Member State variation on several operational dimensions (notably consumer participation for domestic redress actions and details of procedural management), while requiring functional equivalence as to the availability of both injunctive and redress measures and cross-border access through qualified entities. Comparative academic analysis has highlighted that this design can generate uneven practical outcomes: formal availability of collective redress may coexist with limited uptake if standing is narrow, costs and funding are restrictive, or consumer participation is administratively burdensome.[21]

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[20] Alexandridou E. 2022, pp. 1–36; Papachristou G. 2022, pp. 1323–1361.

[21] Hornkohl L. The New Representative Actions Directive: A Milestone for Consumer Protection? Journal of European Consumer and Market Law (EuCML), Vol. 10, Issue 5, 2021.

From a Greece-centered perspective, two limited comparative points can be made: (1) Greece's reliance on consumer associations as the exclusive procedural "gatekeepers" is consistent with the Directive's qualified-entity model but places weight on organisational capacity and resourcing; and (2) the Greek statutory rule on third-party funding adopts a more restrictive stance than the Directive's "regulated permissibility" template, which may affect the feasible scale of complex representative actions, depending on how association funding sources operate in practice.

Evaluation and conclusions

Greek law transposes the Directive's core architecture: a qualified entity model, a dual remedial structure (injunctive and redress measures), cross-border access, and an information/database infrastructure. The statute includes several consumer-protective calibrations (no need for individual loss proof for injunctive relief; *erga omnes* effects for cessation/prohibition decisions; cost protection for consumers in redress actions; structured information duties and a mechanism for late benefit from redress decisions).

At the same time, the Greek design places strong functional demands on consumer associations and administrative bodies tasked with designation, monitoring, and information management. The prohibition on third-party funding (as expressed in the enacted text) marks a particularly consequential choice when evaluated against peer-reviewed scholarship that links collective redress effectiveness to sustainable financing and case management capacity. Given the limited post-transposition litigation practice, any judgment about uptake and impact must remain cautious. The most defensible near-term research agenda is therefore institutional: monitoring the designation pipeline, the operation of information duties and databases, and the emergence (if any) of judicial practice applying Articles 10α–10ιη in concrete consumer disputes.

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Danguole Bubliene, *Dr. iur., Associate Professor*
Vilnius University, Faculty of Law, Lithuania

Monika Sirvydyte, *PhD Candidate*
Vilnius University, Faculty of Law, Lithuania

COLLECTIVE REDRESS IN LITHUANIA: LESSONS TO BE LEARNED

Key words: collective redress, group actions, representative actions, consumer protection

Summary

This article is dedicated to analysis of the development and practical effectiveness of collective redress mechanisms in Lithuania, focusing on group actions and representative actions in the field of consumer protection. Although Lithuania has a relatively long experience with collective redress, neither mechanism has yet achieved full effectiveness in ensuring access to justice, enforcement of consumer rights, and deterrence of unlawful market practices. The article first examines group actions under the Lithuanian Code of Civil Procedure, highlighting how strict admissibility requirements, judicial caution, an exclusive opt-in model, and insufficient funding initially limited their use in practice. Subsequent reform improved the framework, particularly by extending public funding to cover litigation costs, which led to a modest increase in filed cases. However, these developments also confirmed that sustainable financing is a prerequisite for effective collective enforcement. The article then evaluates the transposition of Directive (EU) 2020/1828 on representative actions. It argues that Lithuania's regulatory choices resulted in fragmented and largely mechanical transposition. The analysis concludes that effective collective redress requires not only a legal framework but also awareness, adequate funding, appropriate procedural design, judicial acceptance, and the ability to generate meaningful deterrent effects.

Introduction

Consumer collective redress undoubtedly is one of the most effective procedural measures for fighting mass damage situations. Within the European Union, the need to strengthen the protection of consumers' collective interests has long been recognized. Nevertheless, progress in this area has been neither smooth nor straightforward. The widely known and extensively discussed Dieselgate

scandal ultimately confirmed that existing measures were insufficient and a more decisive action was required. Today, as correctly noted by Alexandre Biard-Denieul, the collective redress landscape in Europe is changing rapidly.[1]

Lithuania has a relatively long history of collective redress, which has not been shaped solely by European Union initiatives. Following numerous legislative efforts to regulate the protection of collective interests, two mechanisms of collective redress are currently in place. The first is the group action, designed to protect the same individual interests of multiple claimants. The second is the representative action, aimed at safeguarding collective consumer interests. Notwithstanding the existence of both mechanisms, neither has yet attained full practical effectiveness.

This article examines Lithuania's experience in the field of consumer collective redress, identifies the lessons that must be drawn to ensure effective protection of consumer interests, and proposes measures necessary to enhance the practical functioning of mechanisms for protecting consumers' collective interests.

1. The first attempt: Group actions in 2015

Group actions were first introduced in Lithuania with the adoption of the new Civil Procedure Code[2] in 2003. The term "introduced" should be employed with caution, as the regulation was, in substance, limited to a single sentence. It simply stated that group claims could be brought to protect the public interest. There were no procedural rules, no clear framework, and no guidance for the courts. As a result, courts refused to hear such cases, and in 2009 the Court of Appeal held that the mechanism could not be applied in practice in the absence of detailed regulation[3]. Thus, for more than a decade, group actions to protect public interest existed only on paper. This situation changed in 2015, when the legislator established procedural framework on group actions – as a general procedural tool, not limited to consumer disputes. The expectation was that this would improve access to justice for numerous small-value claims.

To be admissible, a group claim had to meet several criteria: firstly, the facts had to be similar for each claimant, and the remedy sought had to be identical; secondly, the court had to confirm that a group action was a more effective way to resolve the dispute than the individual claims; thirdly, out-of-court dispute resolution had to be attempted first; fourthly and finally, the group needed an eligible representative – either a group member, a trade union, or an association acting within its statutory objectives. The group action was (and is) designed

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1 Biard-Denieul A. Thunder Road: The Implementation of the Representative Actions Directive in Europe. Emory International Law Review, Vol. 38, No. 4, 2024, p. 765. Available: scholarlycommons.law.emory.edu/eilr/vol38/iss4/3 [last viewed 09.01.2026].

2 Lietuvos Respublikos civilinio proceso kodeksas [Code of Civil Procedure of the Republic of Lithuania]. Valstybes zinios, No. 36-1340, 2002.

3 Decision of the Court of Appeal of Lithuania of 2 June 2009 in civil case No. 2-492/2009.

as an opt-in system. At least twenty individuals must explicitly consent to join the group. Each member has the status of claimant in the procedure; therefore, they bear the risk of litigation costs. Success and contingency fees are generally permitted in Lithuania, but third-party funding was left unregulated. A further crucial factor was the absence of public funding.

Not surprisingly, when the system was evaluated in 2017, the results were disappointing. Group actions had been attempted only a few times (including one consumer case), and all were all dismissed by the courts at the initial stage.[4] Acknowledging these shortcomings, the Ministry of Justice initiated further revision in 2019.[5] The goal was to make the mechanism more attractive and feasible in practice. The amendments introduced three important improvements. First, the consumer associations were allowed to act as group representatives without requiring group members to be members of the association. Second, the admissibility test was simplified. Legal scholars criticised the requirement for plaintiffs to justify – and for courts to assess – whether a group action constituted a more appropriate procedural avenue than individual litigation, arguing that it granted courts excessively broad discretion to refuse group actions and risked undermining their practical effectiveness.[6] The legislator reacted to this criticism by removing this obligation. After the changes, the choice of procedural form to seek a remedy for the infringement of the law rests within the claimants themselves. Third, and perhaps most important improvement, – public funding was introduced in the area of consumer litigation. While consumer associations had previously been eligible to receive public funding for activities carried out in the public interest, the applicable framework did not allow such funding to be used to cover litigation costs. The new regulation addressed this gap by introducing the possibility for consumer associations to recover, at least partially, litigation costs incurred in collective proceedings.

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[4] Aiskinamasis rastas del Lietuvos Respublikos civilinio proceso kodekso 56, 93, 268, 306, 4411, 4413, 4414, 4416, 4417, 4418, 4419, 44111, 44113 ir 44116 straipsniu pakeitimo istatymo ir Lietuvos Respublikos vartotoju teisiu apsaugos istatymo Nr. I-657 12, 13, 22, 221, 222, 30 ir 34 straipsniu pakeitimo, 31, 35 straipsniu pripazinimo netekusiais galios ir istatymo papildymo 131 straipsniu istatymo projektu [Explanatory Memorandum on the Draft Law Amending Articles 56, 93, 268, 306, 4411, 4413, 4414, 4416, 4417, 4418, 4419, 44111, 44113 ir 44116 of the Code of Civil Procedure of the Republic of Lithuania and Amending Articles 12, 13, 22, 221, 222, 30 and 34, Repealing Articles 31 and 35, and Supplementing the Law on Consumer Protection of the Republic of Lithuania No. I-657 with Article 131]. Teises aktu registras. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/e1a57b60ee4a11e99ab7ff5a9ea34fcc [last viewed 09.01.2026].

[5] Lietuvos Respublikos civilinio proceso kodekso 56, 93, 268, 306, 4411, 4413, 4414, 4416, 4417, 4418, 4419, 44111, 44113 ir 44116 straipsniu pakeitimo istatymas [Law Amending Articles 56, 93, 268, 306, 4411, 4413, 4414, 4416, 4417, 4418, 4419, 44111, 44113 ir 44116 of the Code of Civil Procedure of the Republic of Lithuania]. Teises aktu registras. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/1c148180ee4911e99ab7ff5a9ea34fcc?jfwid=2571igrhx [last viewed 09.01.2026].

[6] Nekrosius V., Simaitis R., Vebraite V., Brazdeikis A. Grupes ieskinys kaip civilinio proceso spartinimo priemone [Group Claim as Means to Speed Up Civil Process]. Teise, Vol. 98, 2016, p. 23. Available: https://www.zurnalai.vu.lt/teise/en/article/view/9966 [last viewed 09.01.2026].

These improvements to the law had a visible impact – they helped to revive group actions. Since 2020, twelve group claims have been filed – four of them concerning consumer rights. Furthermore, all four relied on the newly introduced possibility of public funding.[7] This confirms the widely accepted view: without proper financing, collective redress does not function in practice. Interestingly, while contingency fees and third-party funding remain legally possible, they are not used in practice. The underlying economic reality plays a role: Lithuania is a small market, and many disputes involve very low individual losses. Combined with the opt-in model, this leaves little incentive for law firms or funders to invest in collective litigation. Recent cases illustrate this point. Since the mechanism became operational, group sizes have ranged from 38 to 346 claimants. In the well-known CityBee data breach case,[8] more than 110 000 consumers were affected by the unlawful disclosure of personal data. Nevertheless, only 346 individuals joined the group action. The Court of Appeal awarded 300 euro per claimant in non-material damages, resulting in a total award of around 100 000 euro – significant for the claimants, but not enough to attract commercial financing. Had all potential victims joined, the total amount would have exceeded 30 million euro, changing the financial dynamics of the case entirely.

Structurally, the design of group actions in Lithuania also poses challenges for judicial efficiency. The court adopts a single judgment on liability, but damages must still be individually assessed for each claimant. It is worth to note that under Lithuanian law, compensation for immaterial damage is possible only in cases provided for by statute. However, consumers enjoy a privilege to claim compensation for non-pecuniary (immaterial) damage regardless of the legal basis, whether contractual or tortious.[9] Since the legal framework does not impose restrictions, immaterial damage may also be pursued through collective redress mechanisms. This may be challenging, as awarding uniform compensation for all consumers whose rights were breached raises issues regarding the individualization of damage. A recent study commissioned by BEUC[10] indicates that courts in other jurisdictions have already recognized the generalization and standardization of immaterial damage. For example, in Germany, courts allow the award of a lump sum for the loss of control over non-sensitive personal data. In one case, a German court awarded 100 euro in compensation for immaterial damage, reasoning that,

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[7] Public information on public funding for collective litigation received by consumer organisations. Available: https://vvtat.lrv.lt/lt/veiklos-sritys-54/igaliotosioms-vartotoju-asociacijoms-teikiamas-finansavimas-201/ [last viewed 09.01.2026].

[8] Decision of the Court of Appeal of Lithuania of 18 June 2024 in civil case No. e2A-306-516/2024.

[9] Lietuvos Respublikos vartotoju teisiu apsaugos istatymas [Law on the Protection of Consumer Rights of the Republic of Lithuania]. Valstybes zinios, 1994, No. 94-1833; 2000, No. 85-2581; 2007, No. 12-488. Article 3(1)(5) of this Law establishes the general right of consumers to compensation for non-pecuniary (immaterial) damage.

[10] Rott P., Halfmeier A., Vandenbussche W., Bugatti L., Mucha J. Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe. BEUC, 2025. Available: https://www.beuc.eu/sites/default/files/publications/BEUC-X-2025-026_Study_Procedural_Rules_Impact_on_Collective_Redress_in_EU.pdf [last viewed 09.01.2026].

since data leakage inevitably leads to loss of control for all affected individuals, their damage should be treated equally unless special circumstances exist in individual cases.[11] It can indeed be agreed that making collective actions available for immaterial damage, and be it the price of generalization of compensation, seems to be the right approach.[12] Lithuanian courts follow this approach. In the already mentioned CityBee case, the Court of Appeal decided not to individualize non-material damages,[13] showing interpretative flexibility. Admittedly, although this issue was expected to be examined by the Supreme Court of Lithuania and to result in the development of relevant case law, this did not occur, as the parties concluded a settlement agreement during the cassation proceedings.[14]

Finally, judicial culture remains a relevant factor. Courts continue to demonstrate a rather cautious – sometimes overly restrictive – approach towards the admissibility of group actions. Of the five consumer-related group actions brought so far, three were refused as inadmissible at first instance, and two of these decisions were overturned on appeal (the third one was not appealed). This suggests that the collective litigation model still feels unfamiliar to Lithuanian judges and highlights the need for systematic judicial training and the sharing of good practices.

2. The second chance: Implementing the Representative Actions Directive

The adoption of the Representative Actions Directive[15] offered Lithuania an opportunity to rethink, modernise, and upgrade the existing model of collective redress. Unfortunately, the manner in which the Directive was implemented demonstrates a formal and cautious approach.

Instead of being integrated into the Code of Civil Procedure, representative actions were enacted through a separate law.[16] It should be noted that this legislative choice was approved by the Civil Procedure Code Supervisory Committee, which

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[11] Rott P., Halfmeier A., Vandenbussche W., Bugatti L., Mucha J. Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe. BEUC, 2025, p. 123. Available: https://www.beuc.eu/sites/default/files/publications/BEUC-X-2025-026_Study_Procedural_Rules_Impact_on_Collective_Redress_in_EU.pdf [last viewed 09.01.2026].

[12] Ibid., p. 125.

[13] Decision of the Court of Appeal of Lithuania of 18 June 2024 in civil case No. e2A-306-516/2024.

[14] Judgment of the Supreme Court of Lithuania of 2 July 2025 in civil case No. e3K-3-32-684/2025.

[15] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on Representative actions for the protection of the collective interests of consumers. Official Journal of the European Union, L 409, 2020, pp. 1–27.

[16] Lietuvos Respublikos civilini procesa reglamentuojanciu Europos Sajungos ir tarptautines teises aktu igyvendinimo istatymas [Law on the Implementation of European Union and International Legal Acts Regulating Civil Procedure of the Republic of Lithuania]. No. X-1809, 13 November 2008. Available: e-tar.lt/mobile/legalAct.html?actualEditionId=NgirUapcfN&documentId=TAR.68CC8934A031&lang=lt [last viewed 09.01.2026].

includes both legal scholars and judges. The decision was primarily motivated by the view that the procedural model of representative actions established by Directive 2020/1828 significantly differs from the group action model embedded in the Code of Civil Procedure.[17] In particular, the two mechanisms diverge as regards the identification of the claimant: under the Directive, consumers are not considered plaintiffs, whereas in group actions consumers themselves hold the status of claimants. Further differences concern consumer participation in proceedings, information obligations, and the allocation of procedural costs. From this perspective, the introduction of a separate legal framework was considered necessary in order to accommodate the specific features of the Directive's model. This choice was also consistent with the Lithuanian legislator's established practice of transposing EU measures in the field of civil procedure through standalone legislation rather than through amendments to the Code of Civil Procedure.

However, the transposition largely took the form of a mechanical, copy-and-paste implementation, which undermines coherence and legal certainty.[18] Moreover, the provisions of the Directive were transposed without adequately clarifying their relationship with the general procedural rules on the protection of public interest of the Code of Civil Procedure. The mere classification of representative actions as actions for the protection of the public interest[19] does not justify such a method of transposition of the Directive, particularly given that actions for the protection of the public interest themselves are not elaborated in detail in the Code of Civil Procedure and, the very concept of public interest,

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[17] Aiskinamasis rastas del Lietuvos Respublikos civilinio proceso kodekso 56, 93, 268, 306, 4411, 4413, 4414, 4416, 4417, 4418, 4419, 44111, 44113 ir 44116 straipsniu pakeitimo istatymo ir Lietuvos Respublikos vartotoju teisiu apsaugos istatymo Nr. I-657 12, 13, 22, 221, 222, 30 ir 34 straipsniu pakeitimo, 31, 35 straipsniu pripazinimo netekusiais galios ir istatymo papildymo 131 straipsniu istatymo projektu [Explanatory Memorandum on the Draft Law Amending Articles 56, 93, 268, 306, 4411, 4413, 4414, 4416, 4417, 4418, 4419, 44111, 44113 ir 44116 of the Code of Civil Procedure of the Republic of Lithuania and Amending Articles 12, 13, 22, 221, 222, 30 and 34, Repealing Articles 31 and 35, and Supplementing the Law on Consumer Protection of the Republic of Lithuania No. I-657 with Article 131]. Teises aktu registras. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/e1a57b60ee4a11e99ab7ff5a9ea34fcc [last viewed 09.01.2026].

[18] Sirvydyte M. Transposition of the EU Directive 2020/1828 on Representative Actions for Consumer Collective Interests in Lithuania. Teise, Vol. 136, 2025, pp. 115–128. https://doi.org/10.15388/Teise.2025.136.8

[19] Aiskinamasis rastas del Lietuvos Respublikos civilinio proceso kodekso 56, 93, 268, 306, 4411, 4413, 4414, 4416, 4417, 4418, 4419, 44111, 44113 ir 44116 straipsniu pakeitimo istatymo ir Lietuvos Respublikos vartotoju teisiu apsaugos istatymo Nr. I-657 12, 13, 22, 221, 222, 30 ir 34 straipsniu pakeitimo, 31, 35 straipsniu pripazinimo netekusiais galios ir istatymo papildymo 131 straipsniu istatymo projektu [Explanatory Memorandum on the Draft Law Amending Articles 56, 93, 268, 306, 4411, 4413, 4414, 4416, 4417, 4418, 4419, 44111, 44113 ir 44116 of the Code of Civil Procedure of the Republic of Lithuania and Amending Articles 12, 13, 22, 221, 222, 30 and 34, Repealing Articles 31 and 35, and Supplementing the Law on Consumer Protection of the Republic of Lithuania No. I-657 with Article 131]. Teises aktu registras. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/e1a57b60ee4a11e99ab7ff5a9ea34fcc [last viewed 09.01.2026].

as developed in case law, is periodically questioned in the doctrine.[20] Consequently, Lithuania currently operates two distinct collective redress instruments – group actions and representative actions – both of which suffer from shortcomings in regulatory design and leave gaps in legal certainty. This fragmented approach makes the system less visible and harder to navigate – instead of consolidating and strengthening the existing framework, increasing awareness, and investing in training for legal professionals, Lithuania has created yet another isolated instrument which effectiveness were questioned by the legal scholars.[21]

In terms of procedural design, representative actions largely mirror the logic of group claims. Redress actions still rely exclusively on the opt-in and, in particular, on the so-called "early opt-in" model. Although, unlike in group claims, consumers are not required to prove their individual losses, the chosen design once again prioritises procedural caution over functional effectiveness.

There is also uncertainty concerning the minimum number of represented consumers. As it was mentioned, group claims explicitly require at least 20 members, but the law remains silent regarding representative actions. Would a representative claim involving just two or three consumers be accepted? At the moment, that remains unclear. It appears that this issue will constitute one of the obstacles to the admissibility of representative actions until relevant case law is developed, since it relates to the concept of consumers' collective interests, which is crucial for the start of the procedure. The Representative Actions Directive itself does not provide a clear solution to this issue. First, the Directive defines the concept of consumers' collective interests in a very broad and ambiguous manner[22]. While this notion primarily refers to the general interest of consumers, for the purposes of redress measures, it also encompasses the interests of a group of consumers. Traditionally, the concept of collective consumer interests is understood as distinct from the mere aggregation of individual consumer interests. However, the Directive uses the term "collective interests of consumers" to cover both the general consumer interest and the aggregation of individual consumer interests when addressing the application of redress measures. Second, the Directive grants[23] Member States discretion to determine the minimum number of consumers

[20] Nekrosius V. Viesojo intereso gynimas civiliniame procese ir Konstitucinio Teismo doktrina [Protection of Public Interest in Civil Procedure and the Doctrine of the Constitutional Court]. Jurisprudencija, Vol. 19, No. 3, 2012, pp. 1101–1110. Available: ojs.mruni.eu/ojs/jurisprudence/article/view/74/70 [last viewed 31.01.2026]; Nekrosius V. Kiek viesojo intereso yra civiliniame procese? [How Much Public Interest There Is in Civil Procedure?]. In: Lietuvos baudziamosios justicijos teise: patirtis ir ateitis; Liber amicorum profesoriui Gintarui Svedui [Lithuanian Criminal Justice Law: Experience and Future; Liber amicorum for Professor Gintaras Svedas]. Vilnius: Vilnius University Press, 2024, pp. 627–628. https://doi.org/10.15388/LBJT.2024.27

[21] Sirvydyte M. Transposition of the EU Directive 2020/1828 on Representative Actions for Consumer Collective Interests in Lithuania. Teise, Vol. 136, 2025, pp. 115–128. https://doi.org/10.15388/Teise.2025.136.8

[22] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on Representative actions for the protection of the collective interests of consumers. Official Journal of the European Union, 2020, L 409, Article 3(3).

[23] Ibid., Recital 12.

concerned by a representative action seeking redress measures in order for the case to be admitted and to be heard as a representative action while at the same time imposing a limitation that such rules should not hamper the effective functioning of the procedural mechanism for representative actions (principle of effectiveness) and that such requirements must not differ from those applicable to comparable domestic representative actions (principle of equivalence). Accordingly, it follows from the text of the Directive that, concerning injunctive actions, it is not permissible to establish a minimum number of consumers concerned by a representative action, as doing so would undermine the objective of protecting the general interest of consumers. In contrast, the situation with respect to redress actions is somewhat more complicated. In Lithuania, actions for the protection of the public interest are brought under Article 49 of the Code of Civil Procedure. Such actions may be initiated by the prosecutor and other authorities empowered by law. The Code of Civil Procedure does not impose any limitation on the number of persons whose interests may be protected through actions brought in the public interest. As judicial practice demonstrates, the prosecutor may bring an action even for the protection of the interests of a single individual if the case also constitutes the defence of a public interest. Admittedly, such practice has not been observed in the field of consumer protection. Nevertheless, this suggests that even redress actions where the interests of a single consumer have been infringed could be admissible. Having regard to the types of consumer rights that may be protected, the general consumer interest may be satisfied solely by virtue of the preventive nature of such actions. Furthermore, it should be noted that a single representative action may combine both an injunctive action and a redress action. Consequently, the application of a minimum consumer threshold to one type of claim but not to the other within the same action would significantly complicate the practical application of the representative action mechanism and would further discourage its use in practice.

The Directive's implementation also introduced the provisions on third-party funding, which at first seems like progress. In reality, however, the regulation is vague, merely repeating the Directive's language. Disclosure of the existence of funding is required, but there is no obligation to disclose the funding agreement, nor does it regulate the funder's remuneration. While this flexibility protects commercial confidentiality, clearer national rules would provide legal certainty for both claimants and funders.

Public funding, as discussed earlier, has proved to be a crucial element in enabling collective enforcement in Lithuania. Nevertheless, the legislator has not strengthened or developed this mechanism further. The law also remains silent on *cy-près* solutions for unclaimed compensation, even though such mechanisms could be particularly effective in a small jurisdiction like Lithuania. Although some court fee reductions are foreseen for both group and representative claims, these measures appear largely symbolic.

To conclude, Lithuania now has a two-fold experience in collective redress: ten years with group claims, and two years with representative actions. Yet despite

various reforms, neither mechanism has fully delivered on the promise of effective access to justice; therefore we must continue to look for on how we can actually deliver this promise.

3. Looking ahead – what would make the system work?

Looking ahead, we must ask: in our efforts to avoid the perceived dangers of US-style class actions, have we unintentionally undermined the very core of the mechanism – the engine that makes collective redress function?

First, it must be acknowledged that collective redress, such as group action, has never been part of Lithuania's legal or social culture. For many years, the mechanism remained largely unknown and even today, it is still not widely recognised as an effective tool for enforcing consumer rights. Greater awareness is therefore crucial – among consumers themselves, consumer organisations, and legal professionals, including the judges. Integrating representative actions into the Code of Civil Procedure, rather than maintaining them in a separate law, could help normalise collective redress as part of mainstream civil justice instead of treating it as a marginal experiment. Since judges play a pivotal role in managing collective redress cases, it is important to pay attention to case allocation rules, to ensure a fair and balanced workload when a judge handles both individual cases and collective redress actions and to assist in organisational (technical) matters. Equally important is the need to train judges and enhance their case management skills in this context, while preserving their ability to exercise creativity and, where appropriate, explore unconventional solutions.

Second, for any collective mechanism to function, someone must have a real incentive to use it. While consumers theoretically have such an incentive, in practice, they face precisely the barriers that collective mechanisms are meant to overcome. The ability to bring group or representative actions, therefore, depends fundamentally on the financial capacity of qualified entities. Due to their non-profit nature, their funding is usually limited to membership fees, project grants, and modest state support – none of which cover litigation costs or risks. A sustainable and effective financing system is therefore essential. Lithuania could consider strengthening its framework for third-party funding and introducing *cy-près* mechanisms, whereby unclaimed compensation is directed towards consumer protection initiatives or future collective actions. This would ensure that financial resources remain within the collective enforcement ecosystem rather than reverting to defendants. Although *cy-près* may raise concerns about drifting toward punitive damages, it is important to emphasise that collective redress serves not only access to justice and effective enforcement goals but also a deterrent function. When unlawful practices yield profits exceeding the risk of liability, companies have little incentive to comply. Effective collective mechanisms shift this balance by increasing the likelihood of compliance. Properly designed *cy-près* mechanisms could therefore strengthen the enforcement of consumer law by ensuring that

businesses compensate for the harm caused by their unlawful conduct. Financial and tax incentives could also help make participation in collective litigation economically viable. For instance, profits derived from collective enforcement could be temporarily exempt from corporate income tax for law firms. Such measures would recognise the significant social value of these actions and encourage legal practitioners to engage in collective enforcement.

Finally, Lithuania's exclusive reliance on opt-in participation remains an important structural limitation. As long as consumer involvement depends on individual action, group sizes will remain small – often only a few hundred claimants, even in cases affecting tens of thousands. This makes litigation economically unattractive for lawyers and funders alike. A limited or full opt-out model would automatically include all affected consumers, dramatically increasing the number of claimants and therefore the value and viability of collective actions. In a small legal market like Lithuania, this change could make the difference between a purely symbolic mechanism and one truly capable of delivering real redress. Whether Lithuania will become a "collective redress hub" or a "collective redress dead-end" country will depend on whether the legislator is willing to further develop and improve its collective redress mechanism.[24]

Conclusions

In conclusion, the Lithuanian experience clearly shows that the mere creation of a legal framework is not sufficient. High-quality regulation is a necessary first step toward developing a system capable of delivering effective access to justice. However, collective redress becomes effective only when: (i) consumers, qualified entities and institutions are aware of the mechanism and willing to use it; (ii) qualified entities are adequately funded and supported; (iii) lawyers and funders have economic incentives to engage; (iv) courts recognise collective redress as a legitimate and practical part of civil justice; (v) the system is capable of generating deterrent effects.

Lithuania has started to build the structure of collective redress – but not yet its full functionality. The current system remains constrained by low participation, judicial caution, and insufficient financial incentives. As a result, unlawful market behaviour continues to be a rational business choice. However, the path forward is clear. A coherent, well-funded, and more accessible mechanism – potentially including elements of an opt-out regime and *cy-près* – could be an incentive to transform Lithuania's system from a symbolic gesture into a meaningful tool of access to justice, enforcement, and deterrence.

[24] Biard-Denieul A. 2024, pp. 760–761.

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Stefaan Voet, *Dr. iur., Professor*
Leuven Centre for Public Law, Belgium

Zanda Davida, *Dr. iur., Docent*
University of Latvia, Latvia

FROM BELGIUM TO LATVIA: KEY LESSONS FOR CONSUMER CLASS ACTION

Key words: class action, consumer, access to justice

Summary

Belgium has had a (consumer) class action regime since 2014. The Law of 21 April 2024 implemented the 2020 Representative Actions Directive. Although the revisions were limited, the new rules have reformed some key parts of the regime: the scope of application was extended, there are new rules on standing, opt-in after a merits decision is now the default, and some procedural rules were streamlined and improved. The situation in Latvia was completely opposite, as class action was foreign model to the Latvian legal system. The 2020 Representative Actions Directive was implemented with the amendments to the Consumer Rights Protection Law and the Civil Procedure Law, which were adopted on 14 September 2023. The authors of this paper analyse the systems of two countries – Belgium, which has a long tradition in applying class action, and Latvia, where class action has never been used in practice. Namely, an overview is given of the Belgian class action regime with particular attention to the 2024 revisions and of the Latvian class action regime with particular attention to the problems that already seem to reduce its effectiveness.

Introduction

In December 2020, the long-awaited Representative Actions Directive (RAD) was published.[1] The Directive entered into force on 24 December 2020 and

[1] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1. See Biard A., Voet S. Collective Redress in the EU: Will It Finally Come True? In: Uzelac A., Voet S. (eds.). Class Actions in Europe. Holy Grail or a Wrong Trail? Springer, 2021.

Member States have had to implement it by 25 December 2022. The RAD aims to ensure that consumers are able to protect their collective interests in the EU via representative actions. It provides that all EU countries have in place such a mechanism to boost consumer confidence, empower consumers to exercise their rights, contribute to fairer competition, and create a level playing field for traders operating in the internal market. The Directive improves consumers' access to justice while it also foresees appropriate safeguards to avoid abusive litigation.[2]

In Belgium, representative actions are not new.[3] On 1 September 2014, the Law of 28 March 2014 introducing a consumer class action in the Code of Economic Law entered into force.[4] This law introduced a representative action in Belgian law: an action brought about by a representative acting on behalf of a group of persons facing the same or similar factual and/or legal issues, who are not parties to the procedure but who are ultimately bound by the *res iudicata* effect of the final decision. In 2018, the scope of application was extended to SMEs (small and medium-sized enterprises).[5] One year and a half after the deadline, the Belgian legislator transposed the RAD with the Law of 21 April 2024.[6] Although the revisions are limited, the new rules will certainly have an impact on future class action litigation in Belgium. Moreover, the legislator took advantage of the transposition to tweak some procedural rules unrelated to the transposition. The new rules apply to procedures introduced as from 10 June 2024.

In Latvia, the transposition of the RAD was significantly delayed. However, the necessary regulatory amendments were ultimately adopted on 14 September 2023, and entered into force on October 15. The mechanism was incorporated into the existing legal framework as part of the general procedure for bringing claims, without creating a separate procedural regime. Although consumer class actions are subject to specific conditions that distinguish them from the general procedural framework – for example, the fact that only qualified entities may bring such claims – it appears that the mechanism of class action is not fully compatible with the Latvian civil procedure system. This can be explained by the fact that

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2 Recital (7) of the RAD.

3 Voet S. Class Actions in Belgium: Evaluation and the Way Forward. In: Uzelac A., Voet S. (eds.). Class Actions in Europe. Holy Grail or a Wrong Trail? Springer, 2021, pp. 131–163.

4 Loi portant insertion d'un titre 2 'De l'action en reparation collective' au livre XVII 'Procedures juridictionnelles particulieres' du Code de droit economique et portant insertion des definitions propres au livre XVII dans le livre 1er du Code de droit economique [Law Introducing a Consumer Class Action in the Code of Economic Law] of 28 March 2014, Moniteur Belge [Official Gazette of Belgium], 29 April 2014, 35201.

5 Loi portant modification, en ce qui concerne l'extension de l'action en reparation collective aux P.M.E., du Code de droit economique [Law Expanding the Scope of Application of the Class Action in the Code of Economic Law] of 30 March 2018, Moniteur Belge [Official Gazette of Belgium], 22 May 2018, 41950.

6 Loi modifiant les livres Ier, XV et XVII du Code de droit economique, et transposant la directive (UE) 2020/1828 du Parlement europeen et du Conseil du 25 novembre 2020 relative aux actions representatives visant a proteger les interets collectifs des consommateurs et abrogeant la directive 2009/22/CE [Law Transposing the Representative Actions Directive] of 21 April 2024, Moniteur Belge [Official Gazette of Belgium], 31 May 2024, 68962.

Latvia is one of the Eastern European countries which traditionally did not have class action procedures.[7] Therefore, in Latvia, the legal field of the class action has not been much researched and the fundamental studies on this matter have not been developed. Moreover, there is no case law and no significant legal literature regarding redress measures.

In this paper, we briefly re-iterate the Belgian class action framework, with particular attention to the 2024 revisions and Latvian class action framework, with particular attention to the legal problems that already seem to reduce its effectiveness.

1. Belgian class action regime

1.1. Scope of application

The 2024 revisions expand the scope of application, in the sense that the 66 Directives and Regulations that are mentioned in Annex I of the RAD are added to the Belgian list. As a consequence, it now possible to bring a class action based on violations of energy law, financial law,[8] media law and IT law[9]. It is even argued that securities class actions are now possible under the Belgian regime.[10] It can be said that the scope of application is broader than the RAD.[11] It is possible to bring actions based on infringements of competition law, although these fall outside the scope of the RAD. Moreover, in 2018, the procedure was expanded to disputes between SMEs and businesses.

Expanding the scope of application can be regarded as a positive measure to facilitate and increase collective access to justice (although the concrete impact remains to be seen, for example, in the field of financial law). On the other hand, it should be reminded that the 2013 Recommendation suggested that all Member States should have collective redress mechanisms in all areas where Union law grants rights to citizens and companies, so not only in the consumer law orbit.[12]

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[7] Uzelac A., Voet S. Collectivization of European Civil Procedure: Are We Finally Close to a (Negative) Utopia? In: Uzelac A., Voet S. (eds.). Class Actions in Europe. Holy Grail or a Wrong Trail? Springer, 2021, p. 5.

[8] For example, under the Prospectus Regulation, the Markets in Financial Instruments Directive (MiFID) or the Packaged Retail and Insurance-based Products (PRIIPs) Regulation.

[9] For example, under the Digital Markets Act, the Digital Services Act or the General Data Protection Regulation.

[10] Rasking L., Van Espen L. New law expands Belgian "class actions" framework. 7 June 2024. Available: https://www.aoshearman.com/en/insights/new-law-expands-belgian-class-actions-framework [last viewed 10.02.2026].

[11] Vandenbussche W., Hendrix G.-J. Nieuwe wet past regeling voor collectieve procedures aan. De Juristenkrant, No. 492, 2024, p. 5.

[12] Recital (7) of Recommendation of the European Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/1.

What is needed is a transsubstantive, or universal, class action regime that applies across all areas of substantive law, as is the case in the Netherlands. Sectoral regimes, like the Belgian one, are fundamentally at odds with the access to justice goal of the European policymakers.[13]

1.2. Opt-in or opt-out

Under the 2014 rules, there was no default rule in Belgium. In its certification decision, the court could freely choose between an opt-in or opt-out system. In some (limited) cases, the court was obliged to impose an opt-in system: when the class members (consumers or SMEs) were not residing in Belgium and when physical or moral damages were claimed.

These rules were revised in 2024.[14] After a certification and mandatory negotiation phase (which will be discussed hereafter), the court will decide on the merits of the case if the class action was certified and no collective settlement was reached. If redress measures are ordered and the court decides that the defendant is liable, consumers (or SMEs) who are eligible for compensation can opt in within a period of four months. They have to do so at the court clerk's office. When consumers opt in they are bound by the decision and opting in is irrevocable.

In order for class members to make an informed decision whether to opt in or not, the notification of the merits decision is crucial. This decision is published in the Official Gazette of Belgium and on the website of the Federal Public Service Economy, SMEs, Self-employed and Energy.[15] Publication takes place after the expiration of the appeal period. In exceptional cases, the court can order other forms of notice (for example, in newspapers, magazines or on websites). [16] Where the defendant has, or could readily obtain, knowledge of the identity of the class members, the court may order the defendant to inform the class members individually, at the defendant's own expense, of the decision on the merits.[17] In all circumstances, the four-month opt-in period always starts running the day after the decision was published in the Official Gazette of Belgium.

There is one notable exception to the above. When the parties reach a collective settlement, they can choose an opt-in or opt-out system.[18] Only in this context, they can go for an opt-out system, thus making collective settlements more attractive (at least for plaintiffs), since a judicial merits decision will always be followed by an opt-in system. Parties have to determine the modalities of the opt-in or opt-out

[13] Recitals (9) and (10) of Recommendation of the European Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/1.

[14] Article XVII.55/1 Code of Economic Law.

[15] Article XVII.55 Code of Economic Law.

[16] Article XVII.54, §1, 6° Code of Economic Law.

[17] Ibid.

[18] Article XVII.45, §3, 7° Code of Economic Law.

setting. However, the old rule that opt-in is mandatory when the class members (consumers or SMEs) are not residing in Belgium or when physical or moral damages are claimed, remains unabated also when there is a collective settlement.

2. Latvian class action regime

2.1. Scope of application

Under Latvian law, there is effectively no economic sector that can be considered immune from consumer class action. The Latvian legislator has adopted a broad, horizontal approach, allowing that consumer class action may be brought either for the compensation for damage caused to consumers or for the establishment and termination of the violation of consumers' rights, together with the compensation for damage caused to the consumers.[19] Consequently, the decisive precondition for the admissibility of a consumer class action is the existence of an infringement of consumer rights.

In this context, only two fundamental questions arise for bringing a claim. First, whether the existence of a consumer can be identified in the relevant legal relationship (and these relationships do not always have to be direct), and second, whether a violation of consumer rights can be established. Given that consumer rights are regulated across a wide range of legal acts and policy areas, the potential scope of consumer class action in Latvia is exceptionally extensive. Class action may be initiated in relation to infringements arising under health law, financial law, energy law, media law, IT law, competition law, and numerous other regulatory fields in which consumers are afforded statutory protection. Moreover, Latvian law does not exclude the possibility of bringing a consumer class action against a public entity, provided that such an entity, while exercising private-law functions, interacts with consumers in a manner comparable to a private market participant. This further reinforces the transsectoral nature of the Latvian class action mechanism and confirms that its scope is not confined solely to traditional consumer markets.

From the perspective of consumer protection, this wide material scope must be assessed positively. It reflects the principle of the high-level consumer protection and ensures that class action is available wherever consumer rights may be infringed. However, this expansive substantive scope is not matched by an equally comprehensive funding framework, which gives rise to significant structural tensions.

In Latvia, public funding for the preparation, pre-litigation handling, filing, and conduct of consumer class action is dependent on the budgetary resources of the Consumer Rights Protection Centre, the authority responsible for supervising

[19] Pateretaju tiesibu aizsardzibas likums [Consumer Rights Protection Law]. Latvijas Vestnesis, No. 104/105, 1 April 1999, Section 26.19

consumer protection law. In practice, this means that funding decisions are necessarily influenced by institutional competence and budgetary constraints. As a result, priority is given to cases that fall squarely within the Centre's statutory remit. By contrast, certain areas of law that are relevant for consumers, such as competition law, fall outside the Centre's competence and are instead entrusted to other authorities, for example the Competition Council. This institutional fragmentation could further limit the practical availability of funding for class actions in cross-cutting or borderline cases.

The second problem is exacerbated by the extremely limited overall funding allocated for consumer class actions. In the current year, a total of 50 000 euro has been earmarked for all stages of class action proceedings combined. This amount is manifestly insufficient, particularly when viewed against the complexity, duration, and cost-intensity of collective litigation. The inadequacy of funding is even more pronounced given that, under Latvian law, qualified entities entitled to bring consumer class action may include associations whose statutory purpose is the protection of consumer interests. Such associations are non-profit in nature, do not receive regular funding from the state budget, and generally lack independent financial resources.[20] It is therefore unrealistic to expect them to initiate and pursue class action without adequate public funding or alternative financing mechanisms. As a result, there is a clear discrepancy between the theoretically broad scope of consumer class action in Latvia and the narrowly circumscribed financial means available to give practical effect to this legal framework.

2.2. Early opt-in model

Latvia has introduced an early opt-in model for consumer class actions, a legislative choice that inherently narrows the functional scope of the mechanism. Comparative experience across EU Member States demonstrates that the early opt-in model represents the least effective and most expensive procedural design for class actions.[21] It is particularly ill-suited for cases involving large consumer groups and instead aligns structurally with matters characterised by a high degree of individualisation and a comparatively small number of claimants. Under the early opt-in mechanism, evidence must be gathered for each individual consumer's harm. This creates a disproportionately high administrative burden for qualified entities, courts, consumers, and defendants alike. Every individual loss has to be assessed separately, turning what should be a single mass-harm procedure into a multitude of small individual claims. As a result, the mechanism is neither

[20] Ministry of Economics of the Republic of Latvia. Annotation of Draft Legal Act. TAP ID 473be19bc2d9472295cf8ddf799fc285. Available: https://tapportals.mk.gov.lv/annotation/473be19b-c2d9-4722-95cf-8ddf799fc285 [last viewed 10.02.2026].

[21] For example, see CMS. European Class Action Report 2025. 29 July 2025. CMS International Law Firm. Available: https://cms.law/en/media/international/files/cms-european-class-action-report-2025 [last viewed 10.02.2026]. It should be noted that the data is likely incomplete.

procedurally economical nor substantively capable of addressing widespread consumer infringements.

Empirical data across EU jurisdictions reveal a direct correlation between the collective redress model adopted and the number of cases initiated. Member States that employ opt-out models most notably Portugal and the Netherlands[22] report significantly higher class action activity than countries with opt-in regimes. This divergence is also reflected in the experience of jurisdictions discussing the impact of different models at EU level (for example, insights summarised in communication exchanges regarding collective actions, where Member States with opt-in systems use the mechanism considerably less frequently than opt-out counterparts such as the Netherlands). This substantiates the structural premise that the very essence of a class action mechanism is to address situations where many consumers are harmed by the same unlawful practice,[23] including in market segments were harm spreads rapidly and uniformly.

Modern consumer markets – particularly digital markets – amplify the need for an effective class action system. Digitalisation enables traders to inflict identical harm on thousands or even millions of consumers almost instantaneously. In such contexts, an early opt-in model is inherently unable to ensure meaningful access to justice. Not only does it rely on individual consumer initiative, but it also produces significant underparticipation due to rational apathy, information asymmetries, and the practical burdens of formal enrolment. This mismatch is even more critical considering that EU policy documents and academic analyses consistently emphasise the need for class action instruments adapted to massscale, cross-border, and technologically facilitated infringements.

In light of the inadequate performance of opt-in models, many Member States have recently moved away from early opt-in systems, opting instead for late opt-in, opt-out, or mixed (hybrid) mechanisms that adjust to the specificities of each case. These modernised systems are empirically validated, ensure greater procedural efficiency, and reflect contemporary understandings of access to justice in mass-harm scenarios. Comparative research across Europe increasingly confirms the superiority of the opt-out model in delivering both effectiveness and proportionality in the enforcement of consumer rights.

Against this background, the Latvian legislator's decision to introduce the early opt-in model without assessing more suitable alternatives appears conceptually and empirically unfounded.[24] The legislative history indicates that the RAD's transposition was significantly delayed, suggesting that time pressure may have contributed to the adoption of a less suitable model. Additionally, the adherence to

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[22] Mucha J. Consumer Collective Redress in EU Law: Lessons from the Polish Legal System. Routledge, 2025, p. 57.

[23] Recital (1) RAD.

[24] For information on the legal situation in Latvia before the implementation of the RAD, see British Institute of International and Comparative Law. Collective Redress Latvia. Updated edition. Available: https://www.collectiveredress.org/documents/19_latvia_report.pdf [last viewed 10.02.2026].

traditional, highly individualised procedural structures embedded in the outdated Civil Procedure framework likely constrained the political willingness to consider more advanced class action mechanisms.

2.3. The loser-pays principle

In Latvian civil procedural law, the loser-pays principle[25] is firmly entrenched. This rule has also been extended by the legislature to class actions, thereby exposing qualified entities to significant financial risks. Consequently, the sole Latvian qualified entity exercises extreme caution and often refrains from initiating class actions whenever there exists even a minimal probability of divergent judicial interpretation.

As the representative of Latvia's only qualified entity, Andrejs Vanags vividly describes their position: they feel "like alchemists – perhaps the experiment will succeed, but perhaps it will explode, and we will lose our heads"[26]. In other words, an adverse judgment could financially annihilate the qualified entity, potentially rendering it incapable of continuing its operations.

While, in theory, such risks could be mitigated through insurance, this solution is illusory in practice. Given the loser-pays principle and the structural characteristics of the Latvian insurance market, it is evident that no insurer would underwrite such high and unpredictable liability.

Conclusions

The RAD has not fundamentally altered the Belgian class action regime, as most of the 2014 rules were already compatible with its framework, though targeted revisions were warranted. The expansion of the scope of application and the reform of standing rules are generally positive developments, potentially enhancing collective access to justice and fostering greater diversity among claimants. Procedural streamlining – most notably, the acceleration of the certification phase and the introduction of a default opt-in system after a merits decision – addresses some long-standing inefficiencies of the Belgian model. However, the central weakness of the system remains unresolved: funding.[27] However, in light of the article's limited scope, this issue is not analysed in the present contribution.

This article has highlighted three of the most significant shortcomings of the current Latvian class action framework; however, due to limitations of scope,

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[25] Civilprocesa likums [Civil Procedure Law]. Latvijas Vestnesis, No. 326/330, 3 November 1998, Section 41 Part 2.

[26] Interview with Andrejs Vanags, representative of Latvia's only registered qualified entity – the Latvian Consumer Protection Association (LCPA), conducted on 29 January 2026. Personal archive of Zanda Davida.

[27] For an overview, see Voet S. 2021, pp. 143–147.

several other structural and practical problems could not be addressed here. In conclusion, it is commendable that Latvia has finally introduced a class action mechanism and created a formal avenue for collective redress. Nevertheless, in our view, it would be prudent for Latvia to reexamine the suitability of its existing class action model considering domestic realities and the broader trends that have emerged across the European Union.

Comparing the Belgian and Latvian legal systems, it must be concluded that, although with some shortcomings, the Belgian approach to regulating consumer class action has been more successful. This has enabled the wider application of this institute of law in practice.

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23. Recommendation of the European Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/1.

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Viktoria Harsagi, *Dr., Professor*
Pazmany Peter Catholic University, Budapest, Hungary

THE HUNGARIAN SYSTEM OF COLLECTIVE REDRESS AFTER RAD

Key words: collective redress, consumer protection, Hungary, representative actions, RAD

Summary
The paper presents the development of collective redress in Hungary. The issue of representative action is given great emphasis, especially how the RAD has been implemented and what cases have already been brought before Hungarian courts based on the new law.

Introduction

The aim of the paper is to present, within the context of the development history of collective redress, how representative action was incorporated into the Hungarian consumer protection and the collective redress system. The study particularly addresses the implementation of the RAD and the cases that have already been brought before Hungarian courts based on the new regulation. The author analyses the topic using historical and systematic methods, and also touches on the existing judicial practice.

1. Situation before the new Hungarian Code of Civil Procedure

Prior to the entry into force of the new Hungarian Code of Civil Procedure (1 January 2018), multi-party litigation in Hungary was for a long time characterized by the application of sporadic and typically sectoral regulation, which meant that regulation covered only specific areas of law, such as consumer protection, equal opportunity, equal treatment, competition law, environmental protection, animal welfare and protection against unfair standard contract terms and conditions.

Moreover, it did not take the form of class actions or group litigation in the sense applied in the common law countries or in other European Union

countries, but was merely an *actio popularis*. In the forms of public interest litigation at that time, principally the following persons, organisations and authorities could bring a case before the courts: public prosecutors, NGOs, private interest groups, ministers, town clerks and other authorities (e.g. the Hungarian Competition Authority).[1] A major change was brought in 2013 by an Act that guarantees for the Hungarian National Bank the right to bring an action to enforce the civil law claims of consumers.[2]

Consequently, before the new Code of Civil Procedure (HCCP) in 2018, collective redress mechanisms in Hungary were limited to a certain narrow area. In addition to this, the joinder of parties or joinder of actions could provide a solution for the enforcement of claims, or there was the possibility of resorting to the substantive legal instrument of assignment.[3] However, these solutions may also give rise to numerous difficulties that may hinder collective claim enforcement.

The experiences of the past decades (the rather serious environmental pollution cases and the increasing number of consumer protection problems) urged Hungarian specialists as well to reconsider the adequacy of the present legal regulations regarding collective redress.[4] Although regulation has become differentiated and its scope has also changed slightly, the objective scope of

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[1] Aleku M. A Pp. jogalkalmazoi tapasztalatai – egy specialis perbeli resztvevo szemszogebol [Experiences of legal practitioners on the Code of Civil Procedure – from the perspective of a special litigant]. Eljarasjogi Szemle [Procedural Law Review], No. 3, 2018, pp. 5–8; Gelencser D. Kozerdeku igenyervenyesites Magyarorszagon I. – a gyakorlat szemszogebol [Public interest claims enforcement in Hungary I. – from a practical perspective]. Eljarasjogi Szemle, No. 3, 2016, pp. 31–45; Gelencser D. Kozerdeku igenyervenyesites Magyarorszagon II. – a gyakorlat szemszogebol [Public interest claims enforcement in Hungary II. – from a practical perspective]. Eljarasjogi Szemle [Procedural Law Review], No. 4, 2016, pp. 25–37; Kengyel M., Harsagi V. Hungary – Civil Law. In: Eliantonio M. et al. (eds.). Standing up for Your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) before the EU and Member State Courts. Cambridge/Antwerp/Portland: Intersentia, 2013, p. 332; Harsagi V. The Need for Further Development of Collective Redress in Hungary. In: Harsagi V., van Rhee C. H. (eds.). Multi-party Redress Mechanisms in Europe: Squeaking Mice? Cambridge-Antwerp-Portland: Intersentia, 2014, pp. 172–173.

[2] Harsagi V. Kollektiver Rechtsschutz – Ungarn und der Einfluss der Europaeischen Entwicklung [Collective redress – Hungary and the influence of European developments]. In: Schulze G. (ed.). Europaeisches Privatrecht in Vielfalt geeint – Der modernisierte Zivilprozess in Europa / Droit prive europeen: l'unite dans la diversite – Le proces civil modernise en Europe [European private law united in diversity – The modernized civil procedure in Europe]. Muenchen: Sellier, 2014, pp. 221–223.

[3] Nagy Cs. I. A csoportos igenyervenyesites lehetosegei es gazdasagtana a magyar jogban [The possibilities and economics of group litigation in Hungarian law]. Jogtudomanyi Kozlony [Legal Journal], No. 3, 2011, pp. 163–174.

[4] Cf. Udvary S. Pro actione collectiva. Budapest: Patrocinium, 2015; Harsagi V. The Need for Further Development of Collective Redress in Hungary. In: Harsagi V., van Rhee C. H. (eds.). Multi-party Redress Mechanisms in Europe: Squeaking Mice? Cambridge: Intersentia, 2014, pp. 171–185; Harsagi V. Deficiencies of collective redress in Hungary and recommendations for codification. In: Fankhauser R., Widmer Luchinger C., Klinger R., Seiler B. (eds.). Das Zivilrecht und seine Durchsetzung. Zurich: Schulthess Juristische Medien AG, 2016, pp. 201–215; Harsagi V. Quo Vadis Collective Redress? Hungarian Aspects. In: Festschrift fuer Professor Nikolaos K. Klamaris – Essays in Honour of Professor Nikolaos K. Klamaris. Athens; Thessaloniki: Sakkoulas Publications, 2016, pp. 343–355.

the current system of rules relating to coordinated actions is also restricted. Therefore, the regulation retains its sectoral nature for the future, as well.

During the codification of Hungarian procedural law, which started in 2013,[5] Working Committee No. 3 on the codification of civil procedural law named "Parties and Other Persons Involved in the Action, Collective and Public Interest Claims" and headed by the author – established pursuant to Government Decision No. 1267/2013. (V. 17.) on the codification of civil procedural law – drew up its detailed recommendations concerning collective redress (as part of the Expert Proposal[6] submitted to the Minister of Justice on 30 October 2015).[7] The proposal elaborated by the Working Committee, applying a more sophisticated approach, chose the solution regarded rather rare even in Europe to amalgamate the two models (the opt-in and opt-out models), based on which the system of actions brought in the public interest would be supplemented by two types of procedure. Finally, it was not the above solution that was submitted to the Parliament, but a lot more restrained version elaborated in the Ministry of Justice with unprecedented swiftness, which resembles the proposals of the expert committee only in traces and completely differs from the proposed version with regard to its core concept. Therefore, the system of rules intended to be introduced in the wake of this in the new Code of Civil Procedure (Act CXXX of 2016) adopted in 2017 and entered into force in 2018 is also characterized by a limited objective scope, consequently, the sectoral character has been preserved with regard to the future, as well.

2. The new Code of Civil Procedure (HCCP): Updating the rules of *actio popularis* and introducing a new mechanism

In the field of *actio popularis*, the new HCCP – following the Expert Proposal[8] – merely undertook to elaborate the general rules, however, it left

[5] Varga I. Identification of Civil Procedure Regulatory Needs with a Comparative View, ELTE Law Journal, No. 1, 2014, pp. 135–163; Varga I., Mernyei A. The Initial Steps Towards the New Code of Civil Procedure in Hungary, International Journal of Procedural Law, Vol. 4, No. 2, 2014, pp. 1–4.

[6] Varga I., Eless T. (eds.). A polgari perjogi kodifikaciorol szolo 1267/2013. (V.17.) Korm. hatarozat altal elkesziteni rendelt munkabizottsagi szakertoi javaslat normaszoveg- es indokolas tervezete [Draft of the norm and explanatory statement elaborated by the working committee in its expert proposal commissioned by Government Decision No. 1267/2013 (V.17.) Korm. on the codification of civil procedural law] (30 October 2015).

[7] Harsagi V. Combining Opt-in and Opt-out Systems? Expert Proposal for the Hungarian Regulation of Collective Redress. ELTE Law Journal, No. 2, 2016, pp. 25–52.

[8] Harsagi V. Kollektiv igenyervenyesites – Altalanos indokolas a kollektiv igenyervenyesiteshez [Collective redress – General justification for collective redress]. In: Varga I., Eless T. (eds.). Szakertoi Javaslat az uj polgari perrendtartas kodifikaciojara [Expert Proposal for the codification of the new Code of Civil Procedure]. Budapest: HVG-Orac, 2016, pp. 753–754.

the existing sectoral regulatory system in a basically intact form.[9] It lays down common procedural rules relating to the earlier rules of the so-called public interest lawsuit (*actio popularis*) that used to exist already earlier, but typically in a scattered and uncoordinated form, and consolidates them, thereby providing them with a framework and alleviating the task of the applier of the law, by reducing to some extent the existing scattered and confusing character of the regulation. On the other hand, another chapter (XLIII) of the HCCP contains the new rules of coordinated actions that are to be introduced and may serve as an instrument for the enforcement of aggregated private interests.

Public interest litigation in Hungary has several subtypes, but they all share the common characteristic that filing this kind of action is possible only on the basis of statutory authorization; therefore, only organisations and persons specified by law are entitled to bring such an action. The person authorised to file a public interest action does not sue for her or his own benefit. The law lays down the violation of which rights and the enforcement of which claims may give rise to the institution of a public interest action.[10]

The single sentence of Section 571 of the HCCP does not provide a definition for public interest actions. According to the explanatory notes to the bill, the absence of such a definition may be traced back to fact that the authorization to bring an action is of "wide-ranging character" (extends to numerous areas of law), due to which it is not expedient to create a uniform definition. According to the summary contained in the explanatory notes, the wide-ranging character may be seized in the following: on the one hand, the circle of those authorized to bring an action may be rather diverse, and on the other hand, public interest actions include such actions "that are aimed at a declaratory judgment or the development of the law, while others – based on authorization granted by statute – may be suitable even to enforce monetary claims."

The coordinated action introduced by the new HCCP is of opt-in character, also having regard to Commission Recommendation 2013/396/EU (11 June 2013). In this respect (but not with regard to the details, cf. Chapter II entitled "Evaluation of the regulatory system of coordinated actions") and in defining a minimum threshold for the number of claimants, it has followed those contained in the Expert Proposal,[11] in other words, the Act prescribes a group consisting of minimum ten claimants. The essence of the new action is best expressed

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[9] Cf. Udvary S. Kozerdekbol inditott per [Public interest litigation]. In: Wopera Z. (ed.). Kommentar a polgari perrendtartasrol szolo 2016. evi CXXX. torvenyhez [Commentary on Act CXXX of 2016 on the Code of Civil Procedure]. Budapest: Magyar Kozlony Lap- es Konyvkiado Kft. [Hungarian Gazette Newspaper and Book Publishing House Ltd.], 2017, pp. 879–880.

[10] Kecskes L., Wallacher L. A csoportos jogervenyesites formai a valasztottbiraskodas kereteben a magyar jogban [Forms of group legal enforcement within the framework of arbitration in Hungarian law]. In: Kecskes L., Lukacs J. (eds.). A valasztottbirok konyve [The Book of Arbitrators]. Budapest: HVG-Orac, 2012, p. 283.

[11] Harsagi V. Tarsult perles [Coordinated Actions]. In: Varga I., Eless T. (eds.). Szakertoi Javaslat az uj polgari perrendtartas kodifikaciojara [Expert Proposal for the codification of the new Code of Civil Procedure]. Budapest: HVG-Orac, 2016, pp. 766–783.

in the provisions of Section 583 of the HCCP: at least ten or more claimants may enforce one or several rights the content of which is identical regarding all claimants ("representative right") in a coordinated action, provided that the facts underlying the representative right are the same as to substance with respect to all claimants ("representative facts") and the court permits bringing a coordinated action.[12]

In the coordinated action elaborated by the legislator the members of the group are easily identifiable individually (their persons are specified). Individual claim enforcement, however, does not utilize the resources of the court system with due effectiveness, therefore it is reasonable to deal with these claims in the frames of one procedure. As a result, a decrease is expected, for example, in the costs of evidence. According to the general explanation to Bill No. T/11900 on the Code of Civil Procedure, coordinated actions have been designed for cases "where intervention by public authority (e.g. prosecutor, authorities) is not justified by a public interest, but because of the large number and similarity of the claims collective adjudication of the claims provides benefits regarding efficiency."[13] A coordinated action is basically distinguished from a joinder of parties by the fact that the claimants quasi waive their right to designate an individual legal representative or participate in the trial or carry out procedural acts individually. The group formed this way has one representative, "it speaks with one voice". The essence of the coordinated action lies in "gathering into a bunch" and coordinating the cases.

The group is formed based on the opt-in system, in other words, a claimant may only become a member of the group based on his or her express declaration to that effect. It is up to each party concerned to decide whether to enter the coordinated action. Adjudication in the frames of a coordinated action takes place upon application, there is no possibility for ex officio classification as a coordinated action or for joining individual cases to the coordinated action.

According to the explanatory notes to the Bill, "while in the *actio popularis* the action is brought without a decision to this effect by the holder of the substantive right (which is substantially justified by the fact that bringing the action primarily serves a significant public interest), the coordinated action achieves the purpose of procedural economy while the parties' right of disposition is fully maintained."[14]

Although it is the representative claimant's privilege to initiate classification as a coordinated action, it is the court that must decide on the question of permitting the coordinated action, therefore it is the court that makes the final decision on

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[12] Udvary S. Tarsult per [Coordinated Actions]. In: Wopera Z. (ed.). Kommentar a polgari perrendtartasrol szolo 2016. evi CXXX. torvenyhez [Commentary on Act CXXX of 2016 on the Code of Civil Procedure]. Budapest: Magyar Kozlony Lap- es Konyvkiado Kft. [Hungarian Gazette Newspaper and Book Publishing House Ltd.], 2017, pp. 889–893.

[13] III. "Az uj torvenyi szabalyozas legfontosabb ujitasai" c. (III. sz.) fejezetenek 9. pontja [Point 9 of Chapter (III) entitled "The Most Important Innovations of the New Statutory Regulation"].

[14] T/11900. szamu torvenyjavaslat indokolasa (2016 szeptember) Altalanos indokolas "Az uj torvenyi szabalyozas legfontosabb ujitasai" c. (III. sz.) fejezetenek 9. pontja [Explanatory Notes to Bill No. T/11900 (September 2016) General Explanation, Point 9 of Chapter (III) entitled "The Most Important Innovations of the New Statutory Regulation"].

classification. Although group members may be considered parties to the action, their procedural rights are limited. Regardless of the number of individuals involved in the coordinated action, each procedural act is to be completed only once during the action, which serves not only the interests of the claimants, but also those of the defendant.

At least ten or more claimants may enforce one or several rights the content of which is identical regarding all claimants ("representative right") in a coordinated action, provided that the facts underlying the representative right are the same as to substance with respect to all claimants ("representative facts") and the court permits bringing a coordinated action. A coordinated action may only be brought in the following cases: *a)* for the purpose of enforcement of claims arising from consumer contracts; *b)* in labour disputes; or *c)* for the enforcement of financial claims or damages stemming from health impairment resulting directly from unforeseeable environmental pollution caused by human acts or omissions. [HCCP, Section 583]. One is to regard as a consumer any natural person acting for purposes which are outside his trade, business or profession [HCCP, Section 7(5); Hungarian Civil Code, Section 8:1(1)].

The aim of opt-in type procedures would be – based on the foreign experiences – to ensure a fast, effective and proportional method for the resolution of cases where the extent of the individual damage is so large that it would justify bringing an individual action but due to the number of claimants and the nature of arising questions of law and fact these cases cannot be managed satisfactorily within the frames of individual lawsuits. However, on review of the objective scope of coordinated actions it may be concluded that while in the case of claims stemming from health impairment related to work or resulting directly from environmental pollution an opt-in system may be effective due to the above, in the majority of consumer cases – owing to the lack of incentive – the coordinated action, foreseeably, will not provide a satisfactory procedural framework.

Bill No. T/11900 in its original form (September 2016) restricted the objective scope to the enforcement of claims stemming from a consumer contract and to labour disputes specified in Chapter XXXIX of the Bill. In the text of the Act one may witness a significant expansion of the objective scope, which expansion may be welcomed, but probably it will not be sufficient. For that matter, this change resulted from modifying proposals from the Commissioner of Fundamental Rights and from the Deputy-Commissioner for Fundamental Rights and Ombudsman for Future Generations. Thus, the objective scope of the regulation adopted extends to a specific group of claims resulting from environmental pollution, but unfortunately, even after these changes it still does not cover all areas that would require regulation.[15]

In the explanatory notes to Sections 583–585 of Bill No. T/11900, the legislator explains the limited objective scope as follows: "The Bill does not render it possible to enforce rights in a coordinated action in all cases, only in

[15] Udvary 2017, (see fn. 12), pp. 892–893.

the case of legal disputes relating to consumer contracts and labour disputes. This limited scope is explained by the fact that typically it is in consumer and labour disputes that rights protection could be prevented without the benefits of efficiency ensured by collective redress, since probably no individual lawsuit would be brought." This reasoning is not really consistent (especially if compared with the later expansion of objective scope), since the types of cases falling within this scope may be rather diverse with regard to the value of the individual claims, they show no homogeneity in this regard, therefore they cannot be dealt with uniformly.

3. The system after RAD

The Act CLV of 1997 on Consumer Protection introduced a new chapter "Representative actions for the protection of the collective interests of consumers" (§38). The conditions imposed on the qualified entities essentially repeat those set out in RAD. The Minister responsible for consumer protection shall decide on the designation as a qualified entity. The following shall be entitled to bring a domestic representative action under this Act:

a) the consumer protection authority,
b) the public prosecutor,
c) the National Bank of Hungary, and
d) any central government administrative body, (autonomous state administrative body and independent regulatory body) whose tasks include the protection of consumer rights (based on the provisions of RAD).

Upon request of the given entity, the entity may be designated as a qualified entity on a case-by-case basis to initiate a specific domestic representative action (if the entity meets the conditions for designation as a qualified entity as provided for in the Consumer Protection Act). Qualified entities designated in advance in another Member State may bring a cross-border representative action before the Hungarian courts.

Qualified entities shall be entitled to initiate the following measures:

a) measures aimed at terminating the infringement; and
b) measures aimed at remedying the infringement.

The qualified entity may also initiate that the undertaking ensure the appropriate publicity of the court's decision on the merits by publishing a notice at its own expense. The court shall decide on the text of the notice and the manner of publication. Publication shall be understood as publication in a national daily newspaper and via the internet.

A lawsuit initiated on the basis of a representative action shall be conducted in accordance with the rules of the Civil Procedure Code concerning lawsuits initiated in the public interest (*actio popularis*). No lawsuit shall be initiated after the expiry of three years from the occurrence of the infringement – or if a shorter period of limitation for civil claims of consumers is established by law.

In their action, the qualified entities may also request the following as measures to terminate the infringement:

a) a court finding that the infringement has occurred, and
b) the cessation of the infringing practice and the prohibition of the infringer from further infringement.

The qualified entity shall not be obliged to prove, in order to support the application for an injunction to terminate the infringement:

a) the actual disadvantage or damage suffered by the individual consumers affected by the infringement; and
b) the imputability of the conduct demonstrated by the undertaking.

The qualified entity may only bring a representative action for an injunction to terminate the infringement if it has previously consulted with the enterprise. If the enterprise fails to terminate the infringement within fourteen days of receipt of the request for conciliation, the qualified entity may bring a representative action. If conciliation is unsuccessful and the qualified entity brings a representative action, it must attach to the claim a document on the attempt at conciliation and its delivery, with which it certifies that it attempted conciliation.

If the consumer does not have a habitual residence in Hungary, the *res judicata* effect of a judgment issued in a lawsuit initiated in the public interest shall only extend to this consumer if he expressly declares this with regard to the given representative action.

The *res judicata* effect of a claim adjudicated on the basis of a representative action shall not affect the consumer's right to enforce a claim that he is entitled to on other legal grounds but that is not the subject of the adjudicated representative action.

If the court's judgment, in addition to establishing the fact of the infringement, also obliges the enterprise to fulfil a specific claim, the enterprise shall be obliged to satisfy the claim of the consumer belonging to the affected group of entitled persons according to the judgment in accordance with the judgment. In the absence of voluntary fulfilment, the entitled consumer may request the enforcement of the judgment in court. The court shall examine the consumer's entitlement in the procedure for issuing the enforcement order based on the conditions specified in the judgment.

If a representative action for redress is financed by a third party, it must be ensured that the financing by a third party with an economic interest in the initiation of the representative action for redress or in the outcome of the proceedings initiated by the representative action does not influence the proceedings other than the protection of the collective interests of consumers. For the purposes:

a) decisions taken by qualified entities in the framework of the proceedings initiated by the representative action, including decisions on settlements, shall not be unduly influenced by a third party in a manner detrimental to the collective interests of consumers affected by the representative action;

b) a representative action may not be brought against an enterprise that is a competitor of the provider of the financing or against an enterprise with which the provider is in a dependent relationship.

The qualified entities shall submit a financial overview to the Minister responsible for consumer protection, listing the financial resources used to support the representative action.

The Minister responsible for consumer protection may, on the basis of his/her examination, oblige the qualified entity concerned to refuse or change the financing in the given case or may withdraw the qualified entity's right to bring an action in respect of the given representative action. The Minister responsible for consumer protection shall communicate this decision to the court.

The refusal of the qualified entity's right to bring an action in respect of a specific representative action shall not affect the consumer's right to assert individual claims.

The qualified entities shall provide information on their websites:

a) about the representative actions and public interest actions that they have decided to bring before the court;
b) the status of the proceedings initiated; and
c) the outcome of the proceedings.

The Minister responsible for consumer protection shall provide general information on the website of the consumer protection authority on ongoing and adjudicated representative actions.

4. Case law related to RAD

4.1. Case Alza[16]

In this case the plaintiff (the public prosecutor) filed a lawsuit against the defendant (Alza.hu Kft.), in the Budapest Metropolitan Court in order to protect the collective interests of consumers. The defendant provided consumers with on-site collection of products ordered in its online store operated under the name alza.hu on the website https://www.alza.hu/ and in its stores. According to the defendant's general terms and conditions, the consumer is obliged to pay a delivery fee depending on the weight for the personal collection of the ordered goods in the store. The only exception to this is if the consumer orders goods that are otherwise available in the store at the place of collection. If the product is not available at the given collection point and the defendant transports it from another warehouse to the collection store, the consumer must pay the delivery fee. According to the plaintiff, the defendant's procedure is unfair because the consumer can only obtain the product at the defendant's registered office or

[16] Fovarosi Torvenyszek [Metropolitan Court of Budapest], 19.G.42.845/2023.

premises if, in addition to the purchase price of the product, he or she also pays the shipping costs that would otherwise be borne by the defendant.

The prosecutor requested the defendant to be ordered as a measure to terminate the infringement to cease its infringing practice and to bear the cost of delivery to the store in the event of personal product collection in the future and to prohibit the defendant from charging for delivery costs in the event of personal product collection in its stores, and as a measure to remedy the infringement to be ordered by the defendant to refund the service that was not provided, i.e. the amount paid by the consumer for the personal product collection, to those consumers who paid the unlawfully charged fee from 28 July 2023 and who prove this in the manner specified in the judgment. The plaintiff requested the defendant to be ordered to publish a notice in the event of a judgment obligation. The prosecutor filed this claim on 7 December 2023 at the Metropolitan Court. The prosecutor's claim was rejected by the court, against which the prosecutor appealed. The prosecutor's claim was rejected by the second-instance court with finality, against which the prosecutor filed a request for review before the Curia (Supreme Court).[17]

4.2. Case Magyar Cinema[18]

The plaintiff (the public prosecutor) brought an action against the defendant (I.T. Magyar Cinema Moziuzemelteto es Filmforgalmazo Kft.) before the Metropolitan Court in order to protect the collective interests of consumers. The defendant is a business company engaged in the business of screening films, which sells its cinema tickets not only at its ticket offices and vending machines, but also online.

In the case of online purchases, the defendant charges consumers a "convenience fee" of 120 Hungarian forints (ca. 0.30 euro) per ticket in addition to the ticket price. According to the case law of the ECJ, a condition requiring the consumer to pay a fee related to the conclusion of a contract is contrary to the requirement of good faith if it creates a significant inequality in the rights and obligations of the parties, because the fee is not the consideration for the service actually provided and the costs incurred in connection with it. According to the plaintiff's position, the sale of one's own ticket is part of the conclusion of the contract, as the consumer is entitled to watch only the screening in exchange for the ticket. The defendant makes the ticket available to the consumer after payment of the purchase price, therefore payment of the purchase price and receipt of the ticket are necessary components of the purchase of a cinema ticket. Ticket sales on the Internet, i.e. online contract conclusion, do not include any additional services, but are only one of the special ways of concluding a contract. Therefore,

[17] The official website of the Prosecutor's Office publishes the lawsuits initiated by the prosecutors. The status of the cases can be found here, provided for law researchers and practitioners. This information is available in Hungarian here: https://ugyeszseg.hu/allampolgaroknak/ugyintezes/fogyasztovedelem/fogyasztovedelmi-keresetek/ [last viewed 16.03.2026].

[18] Fovarosi Torvenyszek [Metropolitan Court of Budapest], 19.G.40.266/2024/2023.

charging a separate cost, i.e. a convenience fee, when providing one's own service, i.e. online ticket sales, is unfair.

In its action, the plaintiff requests that the defendant be ordered as a measure to terminate the infringement to cease its infringing practice and to refrain from applying the convenience fee payable by consumers when purchasing tickets online, to prohibit the defendant from applying the convenience fee payable by consumers when purchasing tickets online and as a measure to remedy the infringement to order the defendant to refund the amount paid by consumers as a convenience fee when purchasing tickets online from 7 November 2023 to those consumers who have paid the unlawfully charged fee and who prove this in the manner specified in the judgment. The plaintiff also requested that the defendant be ordered to publish a notice in the event of an injunction.

The public prosecutor filed the action on 2 February 2024. The prosecutor-plaintiff's claim was rejected by the court, against which the public prosecutor appealed. The second-instance court rejected the claim with finality, against which the plaintiff filed a review application addressed to the Curia. The plaintiff's review application filed against the final judgment rejecting the claim was rejected by the Curia. The prosecutor-plaintiff filed a complaint of legal uniformity with the Curia against the ruling.[19]

Conclusions

The Directive on Representative Actions did not bring about a revolutionary change in the legal environment in Hungary. In essence, it did not introduce a new procedure. The legislator placed it within the framework of the already existing *actio popularis*, which technically happened by almost literally incorporating the text of the Directive into the Hungarian Consumer Protection Act and supplementing it with some detailed rules. As for practice, two cases were initiated by prosecutors, but both proved unsuccessful because the courts rejected them.

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[19] Fovarosi Torvenyszek [Metropolitan Court of Budapest], 19.G.40.266/2024/2023.

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Laura Ervo, *Dr. iur., Professor, Vice-Dean*
Faculty of Law, University of Helsinki, Finland

Nelly Lofroth, *LL.M. Candidate*
Faculty of Law, University of Helsinki, Finland

FROM SYMBOL TO SUBSTANCE – RETHINKING COLLECTIVE REDRESS IN FINLAND

Key words: collective redress, the Representative Actions Directive, consumer protection

Summary

This article examines the evolution, limitations and recent developments of collective redress mechanisms in Sweden and Finland, highlighting how the EU's Representative Actions Directive has begun reshaping the Nordic landscape. Sweden introduced a broad class action system in 2003, permitting public, private and organisational actions across nearly all civil matters. Despite initial expectations of frequent use, the system has produced relatively few cases, though many pursued actions have succeeded.

Finland, by contrast, adopted a far narrower model. After years of hesitation, it enacted the Act on Class Actions in 2007, allowing only public class actions brought exclusively by the Consumer Ombudsman and limited to consumer disputes under an opt-in model. This cautious approach reflected concerns about potential abuse, a strong tradition of ombudsman-based dispute resolution, and scepticism toward perceived US-style litigation. As a result, Finnish class actions have remained largely theoretical, with no cases filed in nearly two decades.

The article then turns to contemporary challenges in consumer protection and administrative fairness. Payment ethics in Finland have deteriorated, illustrated by Finnair's repeated delays and rejections of compensation claims for cancelled flights. Despite EU rules requiring reimbursement within seven days, Finnair imposed a two-month claim deadline unsupported by law. The Consumer Ombudsman initiated Finland's first representative action before the Market Court, but the court declared the primary claim inadmissible and dismissed the secondary claim, focusing narrowly on industry practice rather than on consumer harm. Additional concerns have arisen from administrative compensation processes in the wellbeing services sector, where vulnerable patients face evidentiary burdens they cannot meet, inconsistent reasoning and cost-saving incentives that undermine fairness. Cases involving lost property, unexplained depreciation and aggressive debt collection practices reveal structural weaknesses in administrative accountability.

Against this backdrop, the EU's Representative Actions Directive (2020/1828) emerges as a potentially corrective force. The directive grants designated qualified entities the right to bring representative actions across a wide range of consumer-related fields, including data protection, financial services, travel, energy and telecommunications. Finland implemented the directive in 2023 through new legislation expanding the scope of class actions, broadening standing to include qualified organisations, regulating third-party funding and establishing frameworks for cross-border actions. Representative actions differ from traditional class actions by emphasising injunctive and redress measures, broader subject-matter coverage and full cost-shifting rules, signalling a more robust enforcement mechanism.

The Finnair case demonstrates the practical relevance of the new system: within two years of implementation, the Consumer Ombudsman has already used the representative action mechanism to challenge systemic practices. The directive's broader scope and stronger institutional design may help address structural imbalances in consumer markets and overcome the limitations of Finland's traditional class action regime. Overall, the article argues that EU-driven reforms have introduced a more effective and accessible model of collective enforcement, better suited to contemporary market conditions and consumer protection needs.

Introduction

Collective redress has long occupied an ambivalent position within the Nordic legal tradition. While Sweden adopted a broad and ambitious class action model as early as 2003, Finland proceeded with markedly greater caution, ultimately enacting a narrowly framed Act on Class Actions in 2007 that has remained largely unused in practice. The contrast between the two systems reflects deeper structural and cultural differences: Sweden embraced a model permitting public, private and organisational actions across a wide range of civil matters, whereas Finland restricted standing exclusively to the Consumer Ombudsman and limited the mechanism to consumer disputes under an opt-in framework. As a result, the Finnish class action regime has remained "largely devoid of practical substance" and has produced no cases in nearly two decades, despite persistent academic debate and criticism of its limited scope.

Recent developments, however, suggest that the Nordic landscape is undergoing significant transformation. Deteriorating payment ethics, increasingly complex consumer markets and growing concerns about administrative fairness have exposed structural weaknesses in traditional ombudsman-based enforcement. The Finnair compensation controversy – Finland's first representative action brought before the Market Court[1] – illustrates how systemic practices can undermine consumer rights even in highly regulated sectors.[2] At the same time,

[1] Notice of the Finnish Consumer Ombudsman: Finnair hylkaa korvausvaatimukset myohastyneina ilman patevaa perustetta – kuluttaja-asiamies hakee kieltoa markkinaoikeudelta [Finnair rejects compensation claims as time-barred without valid grounds – Consumer Ombudsman seeks a prohibition from the Market Court], 19.3.2025. Available in Finnish: https://www.kkv.fi/ajankohtaista/tiedotteet/finnair-hylkaa-korvausvaatimukset-myohastyneina-ilman-patevaa-perustetta-kuluttaja-asiamies-hakee-kieltoa-markkinaoikeudelta/ [last viewed 17.12.2025].

[2] The Finnair case will be discussed in greater detail in chapter 3.1.

cases arising from the wellbeing services counties reveal troubling inconsistencies in administrative decision-making, evidentiary burdens and institutional incentives.

Against this backdrop, the European Union's Representative Actions Directive (EU) 2020/1828 has emerged as a potentially corrective force. By expanding standing to qualified entities, broadening the substantive scope of collective enforcement and strengthening procedural tools such as injunctive and redress measures, the directive challenges the long-standing Nordic assumption that informal, consensus-oriented mechanisms suffice to protect collective interests. Finland's 2023 implementation of the directive marks a decisive shift from symbolic to substantive collective redress, signalling a new era in which EU-driven procedural harmonisation may reshape national enforcement cultures.

1. Historical background – a careful start

In Sweden, the class action system has been in force since 2003. The system encompasses a broad range of group actions: in principle, all civil cases falling within the jurisdiction of the general courts are covered.[3] In addition, claims for environmental damage fall within the jurisdiction of specialised environmental courts.[4] Public, private and organisational group actions are recognised and permitted. The original policy objective of the Swedish reform, however, has not been realised. The initial expectation of approximately twenty class actions per year has instead resulted in a significant number of cases being dismissed, withdrawn or concluded through settlement or arbitration. It should nevertheless be noted that a considerable proportion of the cases that were pursued were successful for the claimants.[5]

By contrast, the scope of collective actions in Finland has been significantly more limited than in Sweden. Following the Nordic Council's proposal to explore the introduction of class action procedures into national legislation, preparatory work on collective litigation commenced in Finland.[6] The adaptation of the system into Finnish legislation remained under consideration for an extended period without concrete results. Despite earlier setbacks, the Act on Class Actions (444/2007) entered into force on 1 October 2007. This development was largely attributable to the government's cautious and information-based legislative

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[3] Gunnervald M. Grupptalan [Class Action]. Sodertorn: Domarbloggen, 2019. Available in Swedish: https://www.domarbloggen.se/grupptalan/ [last viewed 15.12.2025].

[4] The Swedish Group Proceedings Act (2002:599) section 2(3).

[5] Lindblom P. H. Lagen om grupprattegang – bakgrund och framtid [The Group Proceedings Act – Background and Future]. Uppsala: Svensk Juristtidning, No. 2, 2005.

[6] Lappalainen J., Hupli T. Ryhmakanne [The Class Action]. In: Prosessioikeus [Procedural Law]. Helsinki: Alma Talent, 2021, pp. 1283–1285.

approach, combined with an explicit effort to draw lessons from the Swedish experience.[7]

Under the act, only public group actions were permitted. Moreover, standing to bring such an action was vested exclusively in the Consumer Ombudsman. Meanwhile, the Swedish act allowed all three forms of class action. The Swedish model, however, is based exclusively on an opt-in mechanism, which today can be regarded as an unnecessary limitation.[8] Although the Finnish act formally existed, it has remained largely devoid of practical substance. Its scope was confined to consumer disputes; only public actions were admissible, and participation is still today based solely on an opt-in system. Finland's notably cautious approach to collective litigation may be explained by concerns relating to potential abuse of the system, as well as by an emphasis on consensus-oriented solutions in the design of the group action regime.[9]

Finland and Sweden have a long-standing tradition of ombudsmen and dispute resolution boards that issue recommendations concerning individual disputes.[10] The board does not issue legally binding decisions, but rather non-binding recommendations that are generally followed in practice. Traditionally, this system, which is also free of charge for consumers, has functioned effectively, and compliance with the board's recommendations has earlier been high.[11]

Nevertheless, the Consumer Ombudsman has had the possibility to bring mass complaints before the Consumer Complaints Board. One example is the case against Peab Oy.[12] In that instance, the Consumer Disputes Board rejected the Consumer Ombudsman's class complaint against the construction company Peab Oy. The complaint concerned the marketing of newly constructed housing,

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7 Ervo L. Group Actions in East-Nordic Legal Culture. In: Uzelac A., Voet S. (eds.). Class Actions in Europe: Holy Grail or a Wrong Trail? Ius Gentium: Comparative Perspectives on Law and Justice, Vol. 89. Cham: Springer, 2021, p. 178.

8 Ervo L. Opt-In is Out and Opt-Out is in. In: Hess B., Bergstrom M., Storskrubb E. (eds.). EU Civil Justice: Current Issues and Future. Oxford: Hart Publishing, 2016, pp. 185–200.

9 Ervo L. 2021, p. 178.

10 Ervo L., Persson A. H. The Finnish and Swedish legislation in the light of the ADR-directive: boards and ombudsmen. In: Lein E., Fairgrieve D., Otero Crespo M., Smith V. (eds.). Collective redress in Europe: why and how? London: British Institute of International and Comparative Law, 2015, pp. 455–478.

11 Ervo L. The Impact of the Directive on Representative Actions for the Protection of the Collective Interests of Consumers on the East-Nordic Countries' Legislation. Madrid: Revista Italo-Espanola de Derecho Procesal, No. 2, 2020, pp. 143–146. Stakeholders also raised the issue in 2016 that the Finnish Competition and Consumer Authority had not been focusing on issues that are important for the national economy and desired to change that. See Huomo T., Kallio J., Kleemola J. Kilpailu- ja kuluttajaviraston arviointi [Assessment by The Competition and Consumer Authority]. Tyo- ja elinkeinoministerion julkaisuja TEM raportteja [Publication of Ministry of Employment TEM reports], No. 4, 2016, pp. 15–16.

12 E.g. in 2016 a mass complaint was made against the electric company Caruna due to unreasonable tax increases. The Consumer Complaint Board was able to lower the tax, thus making the price of electricity more reasonable. Decision of the Finnish Consumer Complaint Board KKV/207/14.08.01.05/2016. Available in Finnish: https://www.kkv.fi/paatokset/kuluttaja-asiat/kuluttaja-asiamiehen-ratkaisut/kkv-207-14-08-01-05-2016/ [last viewed 19.12.2025].

particularly the information provided regarding maintenance charges. The housing costs borne by residents turned out to be higher than initially estimated. In its decision, the Consumer Complaints Board emphasised that the financing plan constituted only an estimate and therefore could not be regarded as fully binding.[13]

Given the traditionally significant role of boards in Scandinavia in facilitating access to justice in an efficient and cost-effective manner without recourse to litigation, Sweden has likewise established its own dispute resolution body. Class complaints have been possible in Sweden since 1991, before the National Board for Consumer Disputes (ARN). The Consumer Ombudsman, and in the second instance also associations representing consumers or wage earners, may initiate a class complaint before the ARN. This mechanism is not based on an opt-in model; rather, the board's recommendation applies to all consumers who have identical claims against the same trader arising from the same factual and legal grounds.[14]

It has nevertheless been argued that group action mechanisms are incompatible with Nordic legal traditions on the basis of being too closely aligned with the US model of litigation. Some commentators have gone so far as to suggest that extensive use of collective actions could endanger national competitiveness in international markets due to the risk of systemic abuse.[15] The concerns were subsequently subjected to critical scrutiny by Professor Per Henrik Lindblom, who demonstrated in his extensive monograph that class actions are capable of fitting within the Scandinavian legal order.[16] This line of criticism played a decisive role in shaping Finland's cautious approach to collective litigation.

As a result of this approach,[17] class actions have remained, for the most part, merely a theoretical legal remedy, primarily discussed in academic literature rather than applied in practice. The Finnish Consumer Ombudsman has also faced considerable criticism for the absence of class actions, to which the ombudsman has responded by asserting that class actions are simply not necessary – the mere

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[13] Decision of the Finnish Consumer Disputes Board of 15 May 2012, case No. 1070/81/11. Available in Finnish: https://www.kuluttajariita.fi/paatokset/ryhmavalitus-uusista-asunto-osakkeista-annetut-vastike-ja-vesimaksutiedot/ [last viewed 18.04.2026].

[14] See Lindblom P. H. Grupptalan i Sverige [Group Action in Sweden]. Stockholm: Norstedts Juridik, 2008, p. 251.

[15] Hodges C. The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe. Oxford: Hart Publishing, 2008, p. 68. On the critical aspects, see the collected work by Oker-Blom M. Behovet av grupptalan – en argumentativ ovning [The Need for Class Actions – An Argumentative Exercise]. Tidskrift utgiven av Juridiska Foreningen i Finland, No. 1, 2006, pp. 86–107 and Pennanen M. Ryhmakanteen perusoikeusnakokulmia [Fundamental Rights Perspective on Class Actions]. Helsinki: Edilex 2005. Available: https://www-edilex-fi.libproxy.helsinki.fi/artikkelit/2687.pdf [last viewed 13.05.2026], pp. 7–10.

[16] Lindblom P. H. Grupptalan: Det anglo-amerikanska class action institutet ur svenskt perspektiv [Group Action: The Anglo-American Class Action System from a Swedish Perspective]. Stockholm: Norstedts Juridik, 1989.

[17] Valimaki M. Uusi ryhmakannelaki – eras lainsaadantopoliittinen seikkailu [The New Group Action Act – A legislative and political venture]. Lakimies, No. 1, 2008, pp. 15–17.

possibility of a class action has encouraged parties to seek alternative forms of dispute resolution, thereby rendering actual class action proceedings superfluous.[18]

The lack of case law, combined with limited public information about the class action system, may nevertheless constitute a threat – or at least a significant impediment – to the development and effective application of the mechanism. Based on existing Nordic experience, the process of forming a group capable of initiating a class action typically takes approximately two years. The process appears excessively complex and time-consuming, particularly in situations where the individual financial interest involved is low.[19]

Given the limited awareness about the system, the high threshold for its use and the absence of an opt-out mechanism, it is hardly surprising that no class action cases have been recorded since the introduction of the Finnish class action regime, even though the legislation has been in force for almost two decades.

2. Current situation – payment ethics deteriorate

The current situation in the eastern Nordic countries is far from satisfactory. In Finland, although the Consumer Ombudsman has taken a more active role and issued increasingly clear statements, the broader culture has shifted, and payment practices have deteriorated. A prominent illustration of this development is provided by the state-majority-owned airline company Finnair.

2.1. Finnair and the compensation controversy

In 2024, the Finnish Consumer Ombudsman received multiple complaints concerning Finnair's delayed payment of compensation for cancelled flights. Finnair was found to have breached Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004, which establishes common rules on compensation and assistance to passengers in the event of denied boarding, cancellation or lengthy flight delays and repeals Regulation (EEC) No 295/91, particularly Articles 5(1)(a) and 8(1)(a). The Consumer Ombudsman nevertheless decided not to pursue further investigation at that stage on the grounds that there were no longer indications of ongoing delays in refunds.[20]

However, already in the autumn of 2024, the Consumer Ombudsman again criticised Finnair for continuing to postpone compensation payments

[18] Molsa A. Ryhmakannelaki jaanyt kuolleeksi kirjaimeksi [The Finnish Group Action Act has remained a dead letter], Yle Uutiset, 24.02.2010. Available in Finnish: https://yle.fi/a/3-5515563 [last viewed 17.12.2025].

[19] Similar thoughts and experiences can be found in the Nordic report: TemaNord 2006:583, Consumers' right of action in antitrust cases: Current problems and future solutions.

[20] Decision of the Finnish Consumer Ombudsman KKV/568/14.08.01.05/2024. Available in Finnish: https://www.kkv.fi/paatokset/kuluttaja-asiat/kuluttaja-asiamiehen-ratkaisut/takaisinmaksuaika-lentolipun-hinnan-palautustilanteissa/ [last viewed 17.12.2025].

for cancelled flights. Finnair stated on its website that compensation payments were taking on average, between two and four weeks, despite the statutory time limit of seven days.[21] In addition, Finnair rejected passengers' compensation claims as time-barred without providing valid justification. Finnair unilaterally imposed a two-month time limit for submitting compensation claims following flight cancellations or delays. This two-month deadline is not supported by Finnish law, EU law or the case law of the Finnish Supreme Court.[22] Nonetheless, Finnair continued the practice throughout 2025. As a result, the Consumer Ombudsman sought an order from the Market Court prohibiting Finnair, subject to a conditional fine of 300 000 euro, due to refusing passengers' compensation claims on unclear grounds. It constituted the first collective redress action ever brought by the Consumer Ombudsman before the Market Court in Finland.[23]

In a recent judgment[24] the Market Court held that the time-limit practice applied by Finnair in the processing of standard compensation claims, which formed the basis for the Consumer Ombudsman's primary prohibition claim, did not constitute a contractual term falling within the scope of the Unfair Contract Terms Directive. Furthermore, the court found that Finnair's practice could not be regarded as unfair within the meaning of Chapter 3, Section 1(1) of the Consumer Protection Act. On this basis, the Consumer Ombudsman's primary prohibition claim, brought under the Act on Representative Actions, was declared inadmissible as falling outside the scope of application of that Act.[25] The Market Court further concluded that no evidence had been presented to demonstrate that the two-month time limit applied by Finnair materially deviated from industry practice or was disproportionate in relation to consumer protection time limits.[26] Accordingly, the primary prohibition claim was declared inadmissible, and the secondary

[21] Notice of the Finnish Consumer Ombudsman: Finnair ei palauttanut lippurahoja lakisaateisessa ajassa – ei antanut sitoumusta kuluttaja-asiamiehelle lain noudattamisesta jatkossakaan [Finnair did not return the money from the flight tickets within the statutory time – did not provide the Consumer Ombudsman with an undertaking to comply with the law going forwards], 01.10.2024. Available in Finnish: https://www.kkv.fi/ajankohtaista/tiedotteet/finnair-ei-palauttanut-lippurahoja-lakisaateisessa-ajassa-ei-antanut-sitoumusta-kuluttaja-asiamiehelle-lain-noudattamisesta-jatkossakaan/ [last viewed 17.12.2025].

[22] Notice of the Finnish Consumer Ombudsman: Finnair hylkaa korvausvaatimukset myohastyneina ilman patevaa perustetta – kuluttaja-asiamies hakee kieltoa markkinaoikeudelta [Finnair rejects compensation claims as time-barred without valid grounds – Consumer Ombudsman seeks a prohibition from the Market Court], 19.03.2025. Available in Finnish: https://www.kkv.fi/ajankohtaista/tiedotteet/finnair-hylkaa-korvausvaatimukset-myohastyneina-ilman-patevaa-perustetta-kuluttaja-asiamies-hakee-kieltoa-markkinaoikeudelta/ [last viewed 17.12.2025].

[23] Ibid.

[24] Judgment of the Finnish Market Court, MAO:206/2026. Available in Finnish: https://www.markkinaoikeus.fi/fi/index/paatokset/markkinaoikeudellisetasiat/mao2062026.html [in the wording of 20.04.2026].

[25] Judgment of the Finnish Market Court, MAO:206/2026, para. 21.

[26] Judgment of the Finnish Market Court, MAO:206/2026, paras. 54–56.

prohibition claim was dismissed. The Consumer Ombudsman has indicated that the possibility of an appeal is under consideration.[27]

The judgment is, from a consumer protection standpoint, deeply disappointing. It is especially striking that the Act on the Limitation of Debts (728/2003) was not addressed at any point in the decision, notwithstanding the fact that this legislation governs, inter alia, the general limitation period applicable to debt claims.[28] The issue at hand is not expressly regulated by EU law or Finnish domestic law. Only one judgment by the Finnish Supreme Court addresses the matter, stating merely that, as a general rule, a complaint or compensation claim "must be made to the airline within a reasonable amount of time".[29] It begs the question, how can Finnair decide the limitation period on its own, and what is their decision based on? Regardless, the Market Court did not, in substantive terms, take a position on whether Finnair's practices are harmful to consumers. Instead, it confined its analysis to a comparison between Finnair's conduct and that of other major commercial operators.

In addition to rejecting and delaying the payment of compensation claims, Finnair also unilaterally discharged fixed compensation by issuing vouchers rather than making cash payments. The same practice was applied in cases where passengers sought reimbursement for accommodation and meals they had paid for out of pocket, notwithstanding that Finnair was obliged under EU law to provide such compensation. In those situations, passengers were neither consulted nor afforded the opportunity to request compensation in cash. The Consumer Ombudsman considered this practice unlawful, emphasising that compensation in the form of vouchers requires the passenger's consent. Following negotiations between the Consumer Ombudsman and Finnair, this latter practice was subsequently discontinued.[30]

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[27] Notice of the Finnish Consumer Ombudsman: Markkinaoikeus: Finnairin kaytanto hylata vakiokorvausvaatimuksia myohastyneina ei ole lainvastainen [Market Court: Finnair's practice of rejecting standard compensation claims as late is not unlawful], 17.04.2026. Available in Finnish: https://www.kkv.fi/ajankohtaista/tiedotteet/markkinaoikeus-finnairin-kaytanto-hylata-vakiokorvausvaatimuksia-myohastyneina-ei-ole-lainvastainen/ [last viewed 20.04.2026].

[28] The Act on the Limitation of Debts section 4. The general limitation period for a debt is three years from the specified date, if the limitation period has not been interrupted before that.

[29] Judgment of the Finnish Supreme Court, KKO 2021:69. Available in Finnish: https://korkeinoikeus.fi/fi/index/ennakkopaatokset/kko202169.html [in the wording of 20.04.2026].

[30] Notice of the Finnish Consumer Ombudsman: Kuluttaja-asiamies vie Finnairin pitkittyneet rahanpalautusajat markkinaoikeuteen – lahjakorttikaytantojen korjaamisesta sopu [Consumer Ombudsman takes Finnair's prolonged refund times to Market Court – agreement reached on correcting voucher practices], 09.04.2026. Available in Finnish: https://www.kkv.fi/ajankohtaista/tiedotteet/kuluttaja-asiamies-vie-finnairin-pitkittyneet-rahanpalautusajat-markkinaoikeuteen-lahjakorttikaytantojen-korjaamisesta-sopu/ [last viewed 15.04.2026].

2.2. Welfare governance in question

The other example concerns an action research case involving a small compensation claim brought against a wellbeing services authority.[31] In this case, an elderly and frail patient was transported by ambulance to an emergency department and changed into hospital-issued clothing, after which all personal garments disappeared. A nursing note recorded the following day stated that the storage basket located under the patient's bed was empty. Despite this contemporaneous documentation, the administrative decision issued by the Wellbeing Services County of Southwest Finland concluded that it had not been demonstrated that the disappearance of the clothing resulted from staff action or negligence. The burden of proof was placed on the patient or the patient's representative, even though the patient was incapacitated and the institution exercised full control over the patient's belongings throughout the relevant period.

A central point of dispute concerned the valuation of the missing items. The claimant reported the estimated value of the clothing at the time of disappearance, rather than the original purchase price. Nevertheless, the administrative decision applied depreciation to those already adjusted values without providing any reasoning for doing so. The rectification request explicitly challenged this approach and argued that compensation should reflect the current value of the items being used. However, the rectification process failed to address the arguments. Instead, the revised decision largely reproduced the content of the original decision almost verbatim, including extensive standardised passages that bore no relevance to the specific circumstances of the case. The reasoning did not respond to the claimant's arguments or questions or to the identified ambiguities, nor did it explain why depreciation had been applied. Partial compensation was granted solely on grounds of reasonableness, based on the assumption that the patient could not have arrived at the hospital without clothing, despite the fact that liability was formally denied.

The deficiencies of the administrative process were further illustrated when the claimant sought clarification directly from the legal counsel whose name appeared in the rectification decision. The initial email enquiry received no response. After approximately four months, a reminder was sent, resulting in a brief reply stating only that there was nothing to add to the decision already issued and that any further challenge would need to be pursued by bringing a civil claim before the district court. No explanation was provided regarding the legal reasoning, the unanswered questions or the issues raised in the rectification request.

This sequence of events reflects a broader institutional attitude in which even legally justified compensation claims may be denied for cost-saving reasons. The approach apparently relies on the assumption that individuals will not pursue

[31] Wellbeing Services County of Southwest Finland (Varha), Official Decision, VARHA/5047/03.02.02.00/2025.

litigation, particularly where the monetary value of the claim is low relative to the effort and resources required to initiate court proceedings. Within such a system, incremental denials of small claims may cumulatively generate financial savings for the institution, even where the practice raises serious concerns regarding legality, fairness and the treatment of vulnerable patients.

The Wellbeing Services County of Southwest Finland has also issued payment reminders concerning alleged invoices dating back several years to the relatives of deceased patients, even where no invoice had previously been sent or received. According to a statement by the Finance Director of the Wellbeing Services County of Southwest Finland, the collection of such invoices had been delayed, and it was possible that some recipients of the collection notices had not received the original invoices.[32] Several relatives have stated that they did not receive the original invoices despite repeatedly requesting them. In such cases, it has been extremely difficult, if not impossible, to determine the basis of the claimed debt, particularly where the billing breakdown consists solely of a laconic reference to a "healthcare equalisation fee". Furthermore, the debt collection agency has allowed recipients only a few weeks to pay invoices that may amount to tens of thousands of euros.[33]

Taken together, the cases illustrate structural tensions between formal administrative processes and the practical realities of emergency care. They demonstrate the difficulties associated with evidentiary requirements in situations where the institution has exclusive control over a patient's property and the patient is unable to participate in safeguarding it. More broadly, they raise fundamental questions concerning responsibility, documentation practices and the fairness of administrative decision-making in contexts involving vulnerable individuals, as well as the systemic incentives that may shape institutional responses to compensation claims.

3. EU as a changing tool

Bearing in mind the clearly unfavourable shift in the culture surrounding class actions, the question arises of whether the European Union could function as a corrective force in the Nordic context. Regardless of the answer, the EU adopted the Representative Actions Directive (EU) 2020/1828,[34] which

[32] Hjelt Y., Hirvonen H. Turkulainen Hannu Lahti sai yli 17 000 euron karhukirjeen hyvinvointialueelta – han ei edes tieda, mita lasku koskee [Turku resident Hannu Lahti received a recovery demand of over 17 000 euro from the wellbeing services county – and he does not even know what the bill relates to]. Yle, 27.10.2025. Available in Finnish: https://yle.fi/a/74-20189963 [last viewed 20.04.2026].

[33] Hirvonen H. Varha karhuaa tuhansia euroja kuolleilta – jarkyttynyt omainen: "En pysty makamaan" [Varha is demanding thousands of euros from deceased persons – shocked relative: "I cannot pay."]. Yle, 28.10.2025. Available in Finnish: https://yle.fi/a/74-20190787 [last viewed 20.04.2026].

[34] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

introduced significant changes to the regulation of collective enforcement and established a new procedural instrument: representative action.

The directive confers upon designated qualified entities the right to bring representative actions against traders who infringe on EU legislation protecting the collective interests of consumers. In Finland, the designation of qualified entities falls within the competences of the Ministry of Justice. The scope of the directive is considerably broader than that of traditional class action legislation. It enables qualified entities to initiate representative actions not only within the confines of general consumer law but also in such sectors as data protection, financial services, travel and tourism, energy and telecommunications.[35]

The most significant differences between traditional class actions and collective redress mechanisms concern funding arrangements, representation and the nature of the claims. External funding is permitted to cover litigation costs in collective redress actions, whereas far stricter rules apply to class actions. Moreover, representative actions primarily emphasise injunctive and redress measures, aiming to compel traders to cease unlawful or unfair practices and to remedy their consequences. Class actions, by contrast, have traditionally focused more narrowly on the pursuit of monetary compensation.[36]

Prior to implementation of the directive, Finnish legislation governing injunctive and redress measures was fragmented and incomplete. Notably, the Consumer Ombudsman held an exclusive monopoly on standing to bring class actions. In addition, there was no legislative framework governing third-party funding, and the scope of protection was largely confined to traditional consumer relationships. As a result, areas like environmental damage and data protection infringements fell outside the effective scope of collective enforcement.

The Representative Actions Directive was implemented in Finland in 2023 through the adoption of the Act on Representative Actions for Injunctive Measures (1101/2022) and the Act on Designating Consumer Collective Interest Organisations as Qualified Entities (1102/2022). In addition, the Act on Class Actions was amended. The legislative reform introduced five principal changes: (1) the scope of application of the Class Action Act was extended; (2) standing to bring class actions was broadened; (3) provisions were introduced concerning the designation of organisations as qualified entities and the conditions for such designation; (4) rules were established for entities designated as qualified entities in cross-border representative actions brought in other EEA states; and (5) provisions were adopted governing the funding of redress measures.[37]

The scope of the Class Action Act is defined in section 1 of the act. Following the reform, it now extends to disputes concerning the conduct of issuers of

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[35] The Representative Actions Directive clause (13).

[36] The Act on Representative Actions for Injunctive Measures (1101/2022), sections 1, 8 and 10.

[37] Hallituksen esitys eduskunnalle kuluttajien yhteisten etujen suojaamiseksi nostettavia edustajakanteita koskevan direktiivin taytantoonpanoa koskevaksi lainsaadannoksi [Government Proposal to Parliament for the implementation of the Directive on representative actions for the protection of the collective interests of consumers], 111/2022 vp, pp. 33–34.

securities, as regulated by the Securities Markets Act (495/1989), as well as the conduct of parties involved in public takeover bids. Furthermore, standing to bring class actions was extended beyond the Consumer Ombudsman to include other qualified organisations. To this end, the wording of section 4 of the act was amended to confer standing upon qualified entities.[38]

In addition, an entirely new legislative framework was adopted to regulate qualified entities, namely the Act on Qualified Consumer Organisations. This act also contains provisions governing the designation of qualified entities for the purpose of bringing cross-border representative actions in other EEA states, a novel feature within the Finnish legal system. The Act on Representative Actions for Injunctive Measures likewise constitutes new legislation, codifying the substantive and procedural requirements laid down in the directive.

Conclusions

The amendments to the Group Actions Act and related legislation resulted from the EU Representative Actions Directive, which required Member States to introduce new and more effective mechanisms for collective redress. The directive acted as the immediate trigger for national legislative reform and provided the framework for restructuring the Finnish system.

The Group Actions Act was amended so that, in addition to the Consumer Ombudsman, a registered association promoting the common interests of consumers and designated as a qualified entity can bring an action on behalf of consumers who had suffered losses. The scope of the Act was expanded in line with the directive so that, beyond traditional consumer protection infringements, group actions could be brought in matters concerning, for example, data protection, financial services, transport, or electronic communications.[39]

The Act on the Designation of Consumer Organisations as Qualified Entities was applied to the designation of registered associations as qualified entities entitled to bring representative and group actions. The Act set out the conditions that an association had to meet to be designated as a qualified entity. These requirements ensured that representative and group actions were brought only to safeguard the common interests of consumers and to secure the effective enforcement of consumer rights. This prevented unfounded or malicious actions. The Ministry of Justice designates qualified entities.[40]

To ensure that associations had a practical opportunity to bring group action, external funding was permitted to cover litigation costs. Strict conditions

[38] This includes the Consumer Ombudsman, for they are named in section 4a of the act as a qualified entity, therefore not limiting the jurisdiction of the Consumer Ombudsman.

[39] Government Proposal 111/2022.

[40] Ibid.

were imposed on such funding to prevent unfounded litigation and to safeguard consumer rights.[41]

The introduction of the directive gave group litigation in Finland greater momentum and substantive content. The directive functioned not only as a legal instrument but also as a catalyst for cultural and institutional change. EU-level tools were necessary for reshaping national practices, especially in legal systems where collective redress had traditionally played a limited role. By harmonising minimum standards and strengthening enforcement, the directive reinforced the position of consumers and encouraged national actors to adopt more robust mechanisms for collective protection. In this sense, the directive contributed to a broader shift towards a more proactive and assertive enforcement culture in Finland.

Such collective enforcement power was genuinely needed, even in the Nordic countries, where payment discipline and compliance with legal obligations had visibly weakened. Regulatory requirements were not followed consistently unless sufficiently concrete and effective tools existed to ensure compliance. This development was reflected in the declining adherence to the recommendations of the Consumer Disputes Board. Earlier, approximately 75% of recommendations were followed,[42] but the most recent data indicated a compliance rate of only 65%[43]. At the same time, the share of cases in which traders did not report at all whether they had complied with the recommendation increased sharply.[44] This lack of reporting undermined transparency and suggested a broader weakening of commitment to voluntary disputeresolution mechanisms.

The directive therefore played a structural role: it not only provided mechanisms for collective redress but also supported a transformation of national legal culture towards more consistent compliance with obligations and more

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[41] Government Proposal 111/2022.

[42] Luukkonen I. Kuluttajariitalautakunnan toiminnan kehittamistarpeet: Selvityshenkilon raportti [Needs for developing the operations of the Consumer Disputes Board: Report by the Special Rapporteur]. Helsinki: Oikeusministerion julkaisuja, Selvityksia ja ohjeita, 2024:4, p. 99. Available in Finnish: https://julkaisut.valtioneuvosto.fi/server/api/core/bitstreams/e9c91115-58e5-4e60-8c62-dec8957b586d/content [last viewed 26.04.2026].

[43] The Consumer Dispute Board. Kuluttajariitalautakunnan toimintakertomus 2025 – Kuluttajien oikeusturvan takaaminen ratkaisupyyntojen maaran kasvaessa [Annual Report 2025 of the Consumer Disputes Board – Ensuring Legal Protection for Consumers Amid Increasing Claims], 30.03.2026. Available in Finnish: https://www.kuluttajariita.fi/ajankohtaista/tiedote-ja-uutisarkisto/kuluttajariitalautakunnan-toimintakertomus-2025-kuluttajien-oikeusturvan-takaaminen-ratkaisupyyntojen-maaran-kasvaessa/ [last viewed 26.04.2026] and The Consumer Dispute Board. Sahkoyhtiot eivat noudata suosituksia [Electricity companies fail to comply with recommendations]. Available in Finnish: https://www.kuluttajariita.fi/ajankohtaista/tiedote-ja-uutisarkisto/sahkoyhtiot-eivat-noudata-suosituksia/ [last viewed 26.04.2026].

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credible enforcement. In this way, EUlevel instruments strengthened the capacity of national systems to respond to emerging enforcement gaps and to maintain trust in the functioning of consumer markets. This kind of collective power is genuinely needed to protect the rights of the weaker parties and of consumers in practice, ensuring that legal entitlements were not merely formal but also enforceable in realworld market conditions.

For too long, the legislative framework had been substantively comprehensive, yet the practical tools necessary for its enforcement had been insufficient. This imbalance had weakened payment discipline and reduced the willingness of companies and even public authorities to comply with their obligations in concrete cases. Strengthening collective mechanisms therefore addressed not only structural deficiencies but also a broader erosion of compliance culture.

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34. The Consumer Disputes Board. Kuluttajariitalautakunnan toimintakertomus 2025 – Kuluttajien oikeusturvan takaaminen ratkaisupyyntojen maaran kasvaessa [Annual Report 2025 of the Consumer Disputes Board – Ensuring Legal Protection for Consumers Amid an Increasing Volume of Claims], 30 March 2026. Available in Finnish: https://www.kuluttajariita.fi/ajankohtaista/tiedote-ja-uutisarkisto/kuluttajariitalautakunnan-toimintakertomus-2025-kuluttajien-oikeusturvan-takaaminen-ratkaisupyyntojen-maaran-kasvaessa/ [last viewed 26.04.2026].
35. The Consumer Disputes Board. Sahkoyhtiot eivat noudata suosituksia [Electricity companies fail to comply with recommendations], 4 May 2024. Available in Finnish: https://www.kuluttajariita.fi/ajankohtaista/tiedote-ja-uutisarkisto/sahkoyhtiot-eivat-noudata-suosituksia/ [last viewed 26.04.2026].

SECTION 5

PUBLIC LAW IN THE MODERN WORLD

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Michal Patryk Sadlowski, *PhD*
University of Warsaw, Poland

THE DRAFTING AND ADOPTION OF THE 1952 CONSTITUTION OF THE POLISH PEOPLE'S REPUBLIC AND THE PHENOMENON OF CONSTITUTIONAL DISORIENTATION

Key words: Polish People's Republic, the Constitution of the Polish People's Republic of 1952, Stalinism, constitution, constitutional disorientation

Summary

The purpose of this article is to present the process of drafting and preparing the Constitution of the Polish People's Republic of 1952 within the context of the nationwide public debate conducted in early 1952. The drafting process was entirely prepared, controlled, and implemented by the communist authorities of the Polish state, who portrayed the newly adopted constitutional framework as a historic breakthrough. In official discourse, the Constitution of the Polish People's Republic was presented as the first genuinely democratic, socially progressive, and socially just constitution in the history of Poland. At the same time, however, the drafters deliberately refrained from incorporating clearly defined rights and legally enforceable guarantees, including specific social entitlements or explicit limitations on working time. These circumstances gave rise to what may be described as a state of constitutional disorientation. Such disorientation likely contributed to the widespread perception among the population that the constitution functioned primarily as a political and propaganda instrument rather than as a normative legal act endowed with binding force. Ultimately, this process deepened the degradation of legal culture within Polish society and the Polish state in the aftermath of the Second World War.

Introduction

The Constitution of the Polish People's Republic,[1] modelled on the Stalin Constitution of 1936,[2] was adopted by the Legislative *Sejm* on 22 July 1952 and was formally repealed only on 17 October 1997.[3] Its fundamental character, however, underwent a profound transformation in 1989,[4] when it lost its communist-socialist and authoritarian foundations. Nevertheless, in comparison with earlier Polish constitutions, the 1952 Constitution remained in force for an exceptionally long period. The period from 1952 to 1989 encompassed as many as 37 years of the most recent history of the Polish state in the 20th century. Moreover, despite the post-1989 transformation of the Polish legal system towards democratization and the establishment of the rule of law, the non-democratic legacy of this period – epitomized by the 1952 Constitution – continues to exert a tangible influence on Polish society, including its attitudes toward law and state institutions.

On the one hand, both Polish and international scholarship widely acknowledge that Polish constitutionalism is characterized by a long and distinguished tradition.[5] On the other hand, although this observation may be somewhat controversial and necessarily simplified, the practical experience of constitutional governance in Poland's modern history has been considerably shorter and less stable. For instance, the Constitution of 3 May 1791 remained in force only briefly.[6] Similarly, the constitutions of the Duchy of Warsaw (1807) and the Kingdom of Poland (1815) operated under conditions of limited or non-existent sovereignty and applied only to parts of Polish territory. The constitutions of interwar Poland were of great importance for the rebirth of the Polish state and nation; however, they also reveal a problem of constitutional durability. The democratic March Constitution of 1921 remained effectively in force only until 1926, whereas from 1935 onward the Polish state operated under a constitutional framework of a distinctly authoritarian

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1 The Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952, Dz.U. 1952 No. 33 poz. 232. Available: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19520330232 [last viewed 05.02.2026].

2 Zakrzewska J. The Rights and Liberties in People's Poland: Some Remarks. Contemporary Central & East European Law, No. 1–4(81–84), 1989, pp. 4-5; Sokolewicz W. Konstytucja PRL po zmianach z 1976 r. [The Constitution of the Polish People's Republic after the 1976 Amendments]. Warszawa: Panstwowe Wydawnictwo Naukowe, 1978, pp. 47–48.

3 The Constitution of the Republic of Poland of 2 April 1997. Available: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19970780483 [last viewed 05.02.2026].

4 The Act of 29 December 1989 Amending the Constitution of the Polish People's Republic. Available: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19890750444 [last viewed 05.02.2026].

5 Wagner W. J. The New Constitution of Poland. The American Journal of Comparative Law, Vol. 2, Issue 1, 1953, pp. 59–60. https://doi.org/10.2307/837996; Brzezinski M. F. Constitutional Heritage and Renewal: The Case of Poland. Virginia Law Review, Vol. 77, No. 1, 1991, pp. 49–50; Gwizdz A., Zawadzki S. Constitutional Law. In: Kurowski L. (ed.-in-chief). General Principles of Law of the Polish People's Republic. Warsaw: Polish Scientific Publishers, 1984, pp. 11–12.

6 Wagner W. J. May 3, 1791, and the Polish Constitutional Tradition. The Polish Review, Vol. 36, No. 4, 1991, pp. 383–395; Hillar M. The Polish Constitution of May 3, 1791: Myth and Reality. The Polish Review, Vol. 37, No. 2, 1992, pp. 185–207.

character.[7] Furthermore, there is an ongoing scholarly dispute regarding the extent to which the provisions and principles of the March Constitution of 1921 retained legal force in the years 1944–1952. Likewise, the Constitution of the Republic of Poland of 1935, on the basis of which the Polish authorities in exile continued to operate, was, in a broad and practical sense, replaced within the territory of Poland by the emerging communist legal order. Against this background, the experience of the Constitution of the Polish People's Republic appears both prolonged and, from a contemporary perspective, relatively recent. Even if one considers solely the period from 1952 to 1989, the constitution remained formally in force for thirty-seven years, making it one of the longest-lasting constitutional frameworks in modern Polish history. Accordingly, an examination of the history of this legal act is not merely of historical significance but also of practical importance, as it facilitates a deeper understanding of contemporary societal attitudes toward law and the state.

The issue of constitutional validity over such an extended period is, however, exceptionally broad in scope. Accordingly, this article concentrates on a single selected aspect: the process of drafting and adopting the Constitution of the Polish People's Republic, with particular emphasis on the nationwide constitutional debate conducted in early 1952. This stage is of fundamental importance for understanding the character of the constitution as both a legal and political instrument, as well as its perception among the population. The course of the constitutional process, especially during the first months of 1952, clearly illustrates the manner in which the communist authorities conceptualized the role of the constitution within the political system. At the same time, it reveals the difficulties encountered by society in comprehending or accepting the intentions and policies of the authorities of People's Poland.

1. The role of the Communist Party in drafting the Constitution

Beginning his analysis of the Constitution of the Polish People's Republic, the American legal scholar Stephen Gorove wrote in 1954 that:

> *differences between the constitutions of Western democracies and communist-made constitutions are not confined to differences as to where the supreme formal authority rests or should reside, or how the executive and the judicial power should be exercised, or how the economic structure of the state should be organized; the two types of constitutions also embody fundamental differences as to their very meaning and general objective.*[8]

[7] Harley J. H. The New Polish Constitution. The Slavonic and East European Review, Vol. 15, No. 43, 1936, pp. 135–138.

[8] Gorove S. The New Polish Constitution. Washington University Law Review, Issue 3, 1954, p. 263.

According to Gorove, in contrast to Western constitutionalism, the constitutional documents of East-European communist-dominated states were not regarded as the supreme law of the land.[9] Their interpretation and application were subordinated to governmental power rather than entrusted to an independent judiciary.[10] As a result, no genuine constitutional limitation on state authority could exist, making it impossible to speak of limited government or constitutionalism in the Western democratic sense under a communist system of governance.[11] Moreover, constitutions enacted under communist regimes were conceived not as stable and enduring normative frameworks, but rather as temporary instruments reflecting existing socio-political conditions and intended to be replaced at successive stages of the transition toward a socialist–communist society.[12] For this reason, one of the principal architects of the 1952 Constitution of the Polish People's Republic, Stefan Rozmaryn, maintained that the primary social function of a socialist constitution was "to express and consolidate the new political and socio-economic order established as a result of the revolution."[13] The constitution was thus intended to entrench the order introduced through the revolution, understood as the transfer of power to the people.[14] Effective decision-making authority, however, was concentrated within the innermost circle of the Communist Party and operated largely outside the formal constitutional framework.[15] Consequently, the drafting of a constitution – being one of the key instruments of authority in a communist state – had to remain the exclusive competence of the very source of power itself, namely the Party.

In the case of Poland, the very postulate of adopting a new constitution for the Polish state – one that would, first and foremost, replace the pre-war Constitution of the Republic of Poland of 1935, and more broadly, the entire constitutional legacy of the interwar period – was articulated by Polish communists already during the Second World War.[16] Subsequently, this postulate was reiterated in the principal constitutional acts of the Polish state from 1944 onward. Pursuant

[9] Gorove S. The New Polish Constitution. Washington University Law Review, Issue 3, 1954, p. 263.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] Rozmaryn S. Konstytucja jako ustawa zasadnicza Polskiej Rzeczypospolitej Ludowej [The Constitution as the Basic Law of the Polish People's Republic]. Warszawa: Panstwowe Wydawnictwo Naukowe, 1967, p. 9.

[14] Ibid.

[15] Gidynski J. The Relation of the Polish Communist Party to the Constitution of the Polish People's Republic. The Polish Review, Vol. 21, No. 1/2, 1976, p. 53; Cieplak T. N. Some Distinctive Characteristics of the Communist System in the Polish People's Republic. The Polish Review, Vol. 19, No. 1, 1974, pp. 41–44.

[16] Sadlowski M. P. Konstytucja kwietniowa z 1935 roku w politycznych narracjach i nauce w pierwszych latach Polski Ludowej [The April Constitution of Poland of 1935 in Political Narratives and in Science in the Early Years of the People's Poland]. Miscellanea Historico-Iuridica, Vol. 24, No. 2, 2025, pp. 129–134. https://doi.org/10.15290/mhi.2025.24.02.06

to the so-called Small Constitution of 1947,[17] the Legislative *Sejm* established under its provisions was entrusted with the task of drafting and adopting the constitution of the new Polish state. Nevertheless, it was the communist party that exercised exclusive and decisive influence over the process of creating the new constitution.[18]

Consequently, the Polish communists commenced concrete work on the draft of the Constitution of the Polish People's Republic initially within special commissions established by the Secretariat of the Central Committee of the Polish United Workers' Party.[19] These commissions held 33 meetings between 21 June 1949 and 12 March 1951.[20] Subsequent work was conducted within the framework of the Political Bureau of the Central Committee of the Polish United Workers' Party.[21] Nevertheless, efforts were made to create formal appearances of a bottom-up process in the drafting of the new constitution. By virtue of the Constitutional Act of 26 May 1951 on the procedure for the preparation and adoption of the Constitution of the Polish People's Republic, a special body – the Constitutional Commission – was established, entrusted with the task of preparing a "draft Constitution of the Polish People's Republic."[22] Pursuant to Article 5 of that Act, the Commission was required to prepare a preliminary draft of the Constitution and to promulgate it for the purpose of conducting a nationwide public discussion, during which citizens were invited to submit proposals, amendments, and comments. On the basis of these submissions, the Commission was to prepare the final draft of the Constitution and submit it to the Legislative *Sejm* by the end of 1951. However, by virtue of the Constitutional Act of 15 December 1951,[23] the deadline for the Constitutional Commission to submit the draft Constitution to the Legislative *Sejm* was extended by four months. The term of office of the Legislative Sejm was likewise extended by six months. On 23 January 1952, the Constitutional Commission adopted a resolution concerning the nationwide discussion of the draft Constitution of the Polish People's Republic.

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[17] The Constitutional Act of 19 February 1947 on the System of Government and the Scope of Competence of the Supreme Organs of the Republic of Poland. Available: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19470180071 [last viewed 05.02.2026].

[18] Garlicki L. Polskie prawo konstytucyjne. Zarys wykladu [Polish Constitutional Law. An Outline of the Course]. Warszawa: Liber, 2010, pp. 16–17.

[19] Rybicki M. Geneza i przygotowanie Konstytucji PRL z 1952 roku [The Origins and Drafting of the Constitution of the Polish People's Republic of 1952]. Dzieje Najnowsze, Vol. XV, No. 4, 1983, p. 97.

[20] Ibid.

[21] Ibid., p. 110.

[22] The Constitutional Act of 26 May 1951 on the Procedure for the Preparation and Adoption of the Constitution of People's Poland. Dz.U. nr 33 poz. 255, 1951. Available: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19510330255 [last viewed 06.02.2026].

[23] The Constitutional Act of 15 December 1951 Amending the Time Limit for the Preparation of the Draft Constitution and Extending the Term of the Legislative Sejm. Dz.U. nr 1 poz. 1, 1952. Available: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19520010001 [last viewed 06.02.2026].

2. The nationwide debate on the draft Constitution of the Polish People's Republic of 1952

To a considerable extent, both the reasons for initiating this debate and, above all, its objectives corresponded to those underlying the discussion of the Stalin Constitution in 1936.[24] In particular, the debate was treated as an instrument of indoctrination, political mobilisation, as well as a means of monitoring social moods and assessing the population's loyalty to the authorities.[25]

An important source illustrating this attitude is the document titled "Instruction for the Provincial, District, and Municipal Committees on the Nationwide Discussion of the Draft Constitution of the Polish People's Republic," issued by the Central Committee of the Polish United Workers' Party on January 27, 1952[26]. Referring to the words of the then leader of the Polish communists, Boleslaw Bierut, the Instruction stated that the primary aim of the nationwide debate was to raise the class and national consciousness of the "working masses" Thus, the essence of the discussion was defined not as the number of proposed amendments, but rather as:

> *the effectiveness of the awareness-raising and educational campaign, explaining to the broadest masses of the nation the content and historical significance of the Constitution.*[27]

The first recommendation of the Instruction, which party activists were to follow in carrying out this awareness-raising (propaganda) campaign, stated:

> *… Focus the attention of society on the key issues of the Constitution; ensure that the discussion does not stray into formal-legal matters or purely local, narrowly defined community issues. While not avoiding answers to local questions or immediate grievances, the discussion should be cantered on the main topic and maintained at a high political and ideological level…*[28]

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[24] Velikanova O. Konstitutsiia 1936 goda i massovaia politicheskaia kul'tura stalinizma [The 1936 Constitution and the Mass Political Culture of Stalinism]. Moskva: Novoe Literaturnoe Obozrenie, 2021, pp. 141–146,

[25] Ibid., Sadlowski M. P. Postulaty dotyczace ochrony zdrowia oraz emerytur i rent w ogolnonarodowej dyskusji nad projektem konstytucji PRL w 1952 r. Analiza wybranych przykladow [Demands Concerning Healthcare Protection as well as Pensions and Disability Benefits in the Nationwide Debate on the Draft Constitution of the Polish People's Republic in 1952: An Analysis of Selected Examples]. UR Journal of Humanities and Social Sciences, Vol. 37, No. 4, 2025, pp. 153–154. https://doi.org/10.15584/johass.2025.4.8

[26] Instruction for the Voivodeship and County / Municipal Committees on the Nationwide Discussion of the Draft Constitution of the Polish People's Republic," Archiwum Akt Nowych (Central Archives of Modern Records), Warsaw, Polish United Workers' Party, Central Committee (hereafter: Instruction). Polska Zjednoczona Partia Robotnicza, Komitet Centralny w Warszawie – "Instrukcja dla KW, KP /KM/ w sprawie ogolnonarodowej dyskusji nad projektem Konstytucji Polskiej Rzeczypospolitej Ludowej", sygn. 2/1354/0/1.8.1/237.VIII.154, k. 1–6 (Instrukcja).

[27] Ibid., k. 2.

[28] Ibid.

During the discussions on the draft constitution, citizens were strictly prohibited from criticising the political system or the structure of government. It appears, however, that the authorities permitted comments and suggestions relating to social matters. In other words, political questions were excluded from debate, whereas social issues remained open to discussion. Nevertheless, in practice a fundamental discrepancy emerged between the objectives of the authorities and the legal and civic consciousness of the population, as well as its expectations.

An important source concerning the course of the nationwide debate on the draft Constitution of the Polish People's Republic is the document entitled "Information: The Course of the Nationwide Discussion on the Draft Constitution of the Polish People's Republic from 11 February 1952 to 28 April 1952."[29] This document was prepared by the Reporting Section of the Organisational Department of the Central Committee of the Polish United Workers' Party. It consists of seven reports describing the progress of the debate during the aforementioned period. A characteristic feature of these reports is that generally free criticism of the draft by members of the public was classified as "hostile activity". In Information No. 1, dated 11 February 1952, it was noted that in the Lublin region peasants remained passive in the debate and were primarily concerned with the issue of property. This constitutes one of the earliest indications that the introduction of the new constitution was perceived by peasants chiefly through the prism of maintaining private ownership of land. At the same time, however, excessively pro-Soviet proposals were deemed radical, or "sectarian"[30] Such proposals included, for example, replacing the state emblem with the hammer and sickle, changing the national flag to red, incorporating into the constitution the concept of the dictatorship of the proletariat, or explicitly recognising the right to anti-religious propaganda.[31]

However, from the perspective of grassroots criticism of the draft, "Information No. 7 of 28 April 1952" is of particular significance[32] In the chapter entitled "The Activity of the Enemy," it was stated that "enemy propaganda intensified during the second phase of the discussion on the draft Constitution".[33] The principal directions of the hostile narrative were identified as follows:

- narratives asserting that Poland was not a sovereign state and that the Constitution had been imposed by Moscow, with this state of affairs allegedly perpetuated by the presence of Soviet troops in Poland;

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[29] Informacja. Przebieg ogolnonarodowej dyskusji nad projektem Konstytucji Polskiej Rzeczypospolitej Ludowej, Archiwum Akt Nowych w Warszawie, Polska Zjednoczona Partia Robotnicza. Komitet Centralny, sygn. 237/VIII – 147 [Information: The Course of the Nationwide Discussion on the Draft Constitution of the Polish People's Republic", Archiwum Akt Nowych (Central Archives of Modern Records), Warsaw, Polish United Workers' Party, Central Committee, ref. No. 237/VIII–147].

[30] Ibid., p. 6.

[31] Ibid.

[32] Ibid., p. 80.

[33] Ibid., p. 100.

- narratives claiming that the discussion on the draft Constitution was pointless, and that submitting amendments was likewise meaningless, as such actions would have no real significance or impact;
- the position of the Polish Episcopate with respect to the draft, which was alleged to constitute a source of "social demagoguery." In this regard, it was stated that "the enemy seized upon the demand to introduce into the Constitution the right to an eight-hour working day, the situation of pensioners, etc.";
- "attempts at hostile diversion under the guise of approving the discussion," including, for example, the proclamation of slogans such as: "The Constitution rightly prohibits religious instruction in schools" or "we should adopt the Stalinist Constitution in its entirety."[34]

Elaborating on the foregoing issues, it was indicated that the "enemies of the people's authority," in their propaganda, "exploited the current difficulties in supply, disparities in leave entitlements, and differences in provision and remuneration among particular groups of employees."[35] Comments alleging that the Constitution failed to guarantee the eight-hour working day were likewise classified as hostile activity.[36] This was so notwithstanding the fact that, for example, at the Machine Tool Factory in Pruszkow, one of the engineers pointed out that such a right was expressly provided for in the Stalinist Constitution.[37] Calls for the constitutional guarantee of the right to strike, as provided for in the "constitutions of capitalist countries," were likewise regarded as provocative statements.[38] In response, the conclusions drawn at this stage of the discussion on the draft included, inter alia, the following assessment:

> *In the first phase of the discussion, excessive emphasis was placed on the issue of the rights guaranteed in the draft Constitution, with insufficient attention devoted to the obligations arising from those rights.*[39]

This comment may be interpreted to mean that the generally formulated constitutional norms, which were presented as significant achievements, encountered strong criticism in the course of actual public debate. Within this critical framework, it was argued that the constitutional provisions did not guarantee the effective realization of social and labour rights. The critical voices

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[34] Informacja. Przebieg ogolnonarodowej dyskusji nad projektem Konstytucji Polskiej Rzeczypospolitej Ludowej, Archiwum Akt Nowych w Warszawie, Polska Zjednoczona Partia Robotnicza. Komitet Centralny, sygn. 237/VIII – 147 [Information: The Course of the Nationwide Discussion on the Draft Constitution of the Polish People's Republic", Archiwum Akt Nowych (Central Archives of Modern Records), Warsaw, Polish United Workers' Party, Central Committee, ref. No. 237/VIII–147], p. 100.

[35] Ibid., p. 101.

[36] Ibid., p. 100.

[37] Ibid., pp. 101–102.

[38] Ibid., p. 102.

[39] Ibid.

that emerged during the discussion indicate that the population clearly recognized the general and abstract character of many constitutional formulations, which in turn gave rise to concerns as to whether the constitution would provide any genuine legal guarantees.

This latter issue was articulated particularly clearly in the debate concerning the regulation of pensions and disability benefits in the draft Constitution of the Polish People's Republic (PRL).[40] Such an observation may be interpreted to suggest that the broadly formulated constitutional norms – presented as notable achievements – encountered substantial criticism in the course of actual public debate. Within this critical discourse, it was argued that the constitutional provisions failed to guarantee the effective implementation of social and labour rights. The critical voices expressed during the discussions indicate that the public clearly perceived the general and abstract nature of many constitutional formulations, which in turn generated concerns as to whether the constitution would provide any genuine legal safeguards.

This latter issue emerged with particular clarity in relation to the provisions on pensions and disability benefits in the draft Constitution of the Polish People's Republic.[41] Both organizations representing pensioners and disability beneficiaries, as well as individual citizens, pointed out that the wording of Art. 60 of the draft constitution did not establish genuine social rights with regard to pensions and disability benefits.[42]

Conclusions

The process of drafting, adopting, and subsequently applying – or failing to apply – the 1952 Constitution provides the basis for several general conclusions.

First, from the perspective of Polish society, the constitution was perceived as a legal and political instrument imposed from above, enacted by state authorities rather than constituted through a genuine democratic process. This perception contributed to the emergence of a widespread conviction that individual or collective civic participation was inconsequential, and that the creation of law occurred through opaque and inaccessible mechanisms beyond public influence.

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[40] Informacja. Przebieg ogolnonarodowej dyskusji nad projektem Konstytucji Polskiej Rzeczypospolitej Ludowej, Archiwum Akt Nowych w Warszawie, Polska Zjednoczona Partia Robotnicza. Komitet Centralny, sygn. 237/VIII – 147 [Information: The Course of the Nationwide Discussion on the Draft Constitution of the Polish People's Republic", Archiwum Akt Nowych (Central Archives of Modern Records), Warsaw, Polish United Workers' Party, Central Committee, ref. No. 237/VIII–147], p. 104.

[41] Sadlowski M. P. Postulaty dotyczace ochrony zdrowia oraz emerytur i rent w ogolnonarodowej dyskusji nad projektem konstytucji PRL w 1952 r. Analiza wybranych przykladow [Demands Concerning Healthcare Protection as well as Pensions and Disability Benefits in the Nationwide Debate on the Draft Constitution of the Polish People's Republic in 1952: An Analysis of Selected Examples], op. cit., p. 160.

[42] Ibid., pp. 155–160.

Second, both the procedure of adoption and the substantive provisions of the constitution served as instruments of political mobilization. Notwithstanding the formal constitutional framework, effective decision-making power remained concentrated within the ruling party, thereby limiting the practical significance of constitutional institutions.

Third, these circumstances gave rise to what may be described as a state of constitutional disorientation. On the one hand, the communist authorities persistently emphasized the adoption of the constitution as a major political and legal achievement,[43] portraying it as the most modern, just, and progressive constitution in the history of Poland.[44] Also within constitutional law theory, the supremacy of the constitution was emphasized.[45] On the other hand, the communist authorities of Poland at the time, including the drafters of the Constitution, deliberately avoided incorporating clearly defined rights and legally enforceable guarantees, including specific social entitlements and explicit limitations on working hours.

Fourth, this constitutional disorientation likely fostered among the population the perception that the constitution functioned primarily as a political and propaganda instrument rather than as a normative legal act. In doing so, the authorities themselves contributed to the erosion of the constitution's status as the supreme and genuinely binding source of law within the state legal order. All of this, especially in the aftermath of the Second World War, had a negative impact on civic consciousness and, more broadly, weakened or undermined the existing societal potential for developing an awareness that relations within the state and society ought to be grounded in a democratic, clear, and just legal order.

Finally, the presence of critical voices in public discourse, as well as demands for the actual implementation of the social rights formally proclaimed in the Constitution, demonstrates that a segment of Polish society – despite the progressing totalitarianisation of the political system – retained an awareness of its legal rights and displayed a willingness to articulate and assert such claims. In this respect, the debate revealed that the communist authorities had failed to bring about the complete civic degradation of Polish society. Accordingly, the process surrounding the implementation of the communist Constitution in Poland in 1952, and above all the debates accompanying it, particularly the critical responses expressed by Polish society, may likewise be regarded as part of the history of the twentieth-century European legal tradition, especially insofar as it reflected

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[43] Krzysztofek-Strzala K. Selected Fundamental Rights in the Polish Constitution of 1952. Krakowskie Studia z Historii Panstwa i Prawa, Vol. 18, Issue 3, 2025, pp. 339–340. https://doi.org/10.4467/20844131KS.25.022.22152

[44] Jedrychowski S. Konstytucja wyzwolonego narodu [The Constitution of a Liberated Nation]. In: Z problemow Konstytucji Polskiej Rzeczypospolitej Ludowej. Zbior artykulow. Materialy dla prelegentow. Warszawa: Wydzial Propagandy KC PZPR, 1952, p. 35.

[45] Zomerski W. From the Facade to Solid Foundation? The Evolution of the Polish Constitutional Law Discourse in years 1944–1989. In: Komarek J., Aasa B., Ban M., Krajewski M. (eds.). European Constitutionalism the Other Way Round. From the Periphery to the Centre. Cambridge University Press, 2026, p. 335. https://doi.org/10.1017/9781009604093.018

attempts to challenge the fictitious character of communist legal solutions. This issue, however, requires further scholarly investigation, including comparative research into the implementation of analogous constitutions in other Central and Eastern European states after the Second World War.

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Raimondas Andrijauskas, *Master of Law (PhD student)*
Mykolas Romeris University, Lithuania

IN SEARCH OF A BALANCE: PERSONAL DATA PROTECTION DURING EXTRAORDINARY SITUATIONS

Key words: personal data protection, extraordinary situations, proportionality principle

Summary

The Charter of Fundamental Rights of the European Union recognises the protection of personal data as a fundamental right (Article 8). Recent extraordinary situations in Europe – including the migration and refugee crisis, terrorist attacks, the COVID-19 pandemic, and the war in Ukraine – have prompted EU Member States to adopt emergency measures relying extensively on digital technologies, such as real-time facial recognition systems, contact-tracing and location-tracking applications, and large-scale health data processing mechanisms.

While these measures are frequently justified by urgent public-interest objectives, they raise serious concerns regarding their legality, necessity, and proportionality. Emergency responses are often characterised by accelerated decision-making, limited ex ante impact assessments, and reduced public scrutiny, increasing the risk that temporary measures may outlast the extraordinary situations that justified their adoption. As a result, such practices may lead to disproportionate interferences with the fundamental right to personal data protection, particularly affecting vulnerable or marginalised groups.

This research examines the relationship between extraordinary legal regimes and personal data protection within EU Member States. It addresses the challenges of assessing the proportionality of emergency data processing measures, noting that systematic judicial analysis in this area remains limited. By analysing decisions of constitutional and administrative courts concerning extraordinary data processing measures challenged by individuals or political actors, the study identifies emerging judicial standards for reviewing governmental actions that restrict the right to personal data protection.

The research contributes to both academic discourse and practical governance by proposing a framework for safeguarding core data-protection principles during crises. By synthesising judicial reasoning and best practices derived from case law, it offers guidance for ensuring that emergency measures remain lawful, proportionate, time-limited, and respectful of the essence of fundamental rights.

Introduction

The protection of personal data has gradually evolved into a core element of European constitutionalism. Although the European Economic Community was originally conceived as a project of economic integration, the expansion of European Union (EU or Union) competences and the increasing impact of EU law on individuals revealed the necessity of recognising and safeguarding fundamental rights within the Union's legal order. This evolution culminated in the adoption of the Charter of Fundamental Rights of the European Union[1] (the Charter), which acquired binding legal force with the entry into force of the Treaty of Lisbon[2] in 2009.

The Treaty of Lisbon introduced major changes to the EU's legal architecture, most notably by elevating the Charter to constitutional status.[3] Among the rights enshrined in the Charter, the right to the protection of personal data occupies a distinctive position. Article 8 explicitly recognises data protection as an autonomous fundamental right, closely linked to, yet distinct from, the right to respect for private and family life. The constitutionalisation of data protection reflects the growing importance of information processing in modern societies and the corresponding risks posed by technological developments.

This constitutional commitment has been repeatedly tested during extraordinary situations. Successive crises – including migration and refugee movements, terrorist attacks, the COVID-19 pandemic, and the war in Ukraine – have prompted Member States to invoke emergency powers and to deploy digital technologies for surveillance, monitoring, and control. Although such measures are frequently justified by urgent public-interest objectives, they intensify the tension between effective crisis management and the protection of fundamental rights. Despite their effectiveness in addressing crises, these tools often escape ordinary legal scrutiny and lack systematic evaluation or sunset clauses, raising concerns about their long-term effects on privacy and data protection.[4] What is at stake is not merely administrative discretion but the constitutional integrity of liberal democracy within EU Member States. As Bruce Ackerman observed, modern democracies increasingly deploy emergency powers not solely to repel threats but to reassure citizens of the state's capacity to act.[5] This "reassurance function" alters the constitutional balance: governments feel compelled to display visible

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1 Charter of Fundamental Rights of the European Union. Proclaimed in Nice on 07.12.2000 [in the wording of 01.12.2009].

2 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. Signed in Lisbon on 13 December 2007 [in the wording of 1 December 2009].

3 European Union Agency for Fundamental Rights. Handbook on European Data Protection Law – 2018 edition. Vienna: European Union Agency for Fundamental Rights (FRA), 2018, pp. 28–29.

4 European Parliament. The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU, pp. 2–5. Available: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651343/IPOL_BRI(2020)651343_EN.pdf [last viewed 03.11.2025].

5 Ackerman B. The Emergency Constitution. Yale Law Journal, Vol. 113, No. 5, 2004, p. 1037. https://doi.org/10.2307/4135710

control – often through technological or surveillance measures – even when the necessity for such control is ambiguous or temporary.

Against this background, the central question addressed in this research is how the right to personal data protection can be preserved during extraordinary situations without undermining the capacity of states to respond effectively to crises. By examining constitutional principles, EU legal standards, and judicial practice, this study seeks to identify criteria for assessing the proportionality and legality of emergency data-processing measures.

1. Constitutional nature and features of extraordinary measures

European constitutional systems, deeply rooted in the Western legal tradition inherited from the ancient Roman Republic, recognise extraordinary measures as a temporary deviation from ordinary governance, permissible only under strict and clearly defined conditions. The very concept of *extraordinaria potestas* – exceptional authority granted in times of crisis – originated in Roman constitutional thought, where the dictatorship was conceived as a limited and temporary institution, activated solely to restore the normal legal order.[6]

This historical paradigm profoundly influenced later Western constitutional developments, including those of EU Member States, in which the principles of temporality, legality, proportionality, and restoration of normality continue to guide the design and application of emergency legal regimes. However, as societies and democratic governance evolved, the interpretation of these principles has become more nuanced: contemporary constitutional systems increasingly emphasise human rights safeguards, parliamentary oversight, and judicial review as integral components of lawful emergency governance, thereby adapting the ancient Roman legacy to the requirements of modern constitutional democracy.[7] European constitutional systems recognise extraordinary measures as a temporary deviation from ordinary governance, permitted under strict conditions. Their main features are, as follows:

1.1. Existence of grounds for introduction of extraordinary situation – clearly identified threat

Extraordinary legal regimes may be introduced only in the presence of a clearly defined and legally recognised threat to the constitutional order, public security, or national safety. Such measures must rest upon an explicit constitutional or statutory basis specifying the nature of the threat and the authority competent to declare the emergency. For instance, Article 144 of the Constitution of the Republic of

[6] Lintott A. The Constitution of the Roman Republic. Oxford: Oxford University Press, 1999 (reprinted 2009), pp. 96, 229.

[7] Ackerman B. A. 2004, pp. 1046–1056.

Lithuania authorises the declaration of a state of emergency in peacetime when necessary to safeguard the constitutional order or public peace.[8] Similarly, Art. 62 of the Constitution of the Republic of Latvia provides for the proclamation of a state of emergency in situations of internal insurrection or threat to the existing political system.[9] In the same vein, Art. 35 and 91 of the German Basic Law (*Grundgesetz*) empower the federal authorities to take special measures in cases of internal unrest or natural disasters.[10]

Most modern constitutions of EU Member States contain analogous provisions, reflecting a shared European constitutional tradition in which extraordinary powers are justified only by the existence of a concrete and imminent threat, and their activation is subject to strict substantive and procedural safeguards.[11]

1.2. Discretionary power to declare an extraordinary situation

Constitutions generally vest the competence to declare a state of emergency or other extraordinary legal regime in specific state authorities, most commonly the head of state, the government, or the national parliament.[12] The exercise of this discretionary power is not absolute but is constrained by the principles of separation of powers and constitutional checks and balances. Accordingly, the declaration of an extraordinary situation must comply with substantive and procedural safeguards, including the requirement of a formal legal act, parliamentary authorisation or confirmation, and, in some systems, subsequent judicial review to ensure that the declaration is both lawful and proportionate to the circumstances prompting it.

1.3. Entity granted powers to apply extraordinary measures

Once an extraordinary legal regime has been lawfully declared, specific governmental authorities are entrusted with the implementation of extraordinary measures within the scope defined by the constitution or enabling legislation. In

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[8] The Constitution of the Republic of Lithuania. Available: https://www.lrs.lt/home/Konstitucija/Constitution.htm [last viewed 03.11.2025].

[9] The Constitution of the Republic of Latvia. Available: https://saeima.lv/en/about-saeima/work-of-the-saeima/constitution/ [last viewed 03.11.2025].

[10] Basic Law for the Federal Republic of Germany. Available: https://www.gesetze-im-internet.de/englisch_gg/ [last viewed 03.11.2025].

[11] European Parliamentary Research Service. States of Emergency in Response to the Coronavirus Crisis: Normative Response and Parliamentary Oversight in EU Member States during the First Wave of the Pandemic, EPRS Study PE 659.385, pp. 16–24. Available: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf [last viewed 03.11.2025].

[12] Bellenghi G. The European Parliament's Proposal for an EU State of Emergency Clause: A Comparative and Constitutional Analysis. Croatian Yearbook of European Law & Policy, Vol. 20, No. 1, 2024, p. 9. https://doi.org/10.3935/cyelp.20.2024.586

practice, this often has direct implications for data protection: once an emergency is declared, new data-collection or surveillance measures may be introduced without ordinary legislative scrutiny, expanding executive control over information systems.[13] Such empowerment reflects the functional necessity of ensuring an effective state response to exceptional threats; however, it simultaneously raises profound concerns regarding the principles of legality, proportionality, and oversight.

1.4. Suspension of ordinary law and limited protection of rights

Extraordinary legal regimes may entail the temporary suspension or derogation of certain provisions of ordinary law, including the limitation of individual fundamental rights. Such measures, however, must remain strictly consistent with constitutional principles and particularly with the principle of proportionality as embedded in both national constitutional traditions and EU law. While the suspension of ordinary legal norms may be justified by the imperative of addressing a grave and immediate threat, it does not authorise the abrogation of fundamental rights or the displacement of the rule of law. The European Convention on Human Rights[14] (Art. 15) and the Charter (Art. 52) establish that any such derogation must be necessary, proportionate, and preserve the essence of the protected rights.

Similarly, national constitutions often allow temporary suspension or restriction of privacy and data-protection guarantees. For example, emergency data-retention laws adopted during the COVID-19 crisis enabled authorities to track citizens' movements or health data. However, even in these circumstances, the core (essence) of fundamental rights must remain protected – a principle confirmed by the Court of Justice of the European Union (CJEU) in La Quadrature du Net (2020).[15]

1.5. Temporary nature of the extraordinary situation

A defining characteristic of any extraordinary legal regime is its inherently temporary nature. Emergency measures must be strictly time-bound, justified solely for the duration of the exceptional threat, and terminated once the conditions necessitating their adoption cease to exist. This principle reflects one of the central tenets of constitutional democracy: that extraordinary powers are exceptional

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[13] Porcedda M.-G. On the Compatibility of Pandemic Data-Driven Measures with the Right to Data Protection: A Review of 'Under-the-Radar' Measures Adopted in Ireland to Contain COVID-19. Northern Ireland Legal Quarterly, Vol. 73, No. 2, 2022, pp. 310–340. https://doi.org/10.53386/nilq.v73i2.962

[14] European Convention on Human Rights. Signed in Rome on 4 November 1950 [in the wording of 1 June 2010].

[15] CJEU judgment of 6 October 2020 in joined cases No. C-511/18, C-512/18 and C-520/18 La Quadrature du Net and Others.

by design and must not evolve into a permanent mode of governance.[16] This temporal element is crucial for data protection: data-collection and surveillance measures must expire once the emergency ends, with deletion of personal data and restoration of full legal safeguards.[17]

The temporary character of emergency measures also implies their reversibility – that is, the restoration of ordinary legal order, institutional checks, and full enjoyment of fundamental rights. As such, temporality operates as both a procedural safeguard and a substantive constitutional guarantee against the normalisation of extraordinary powers.

2. Extraordinary situations and data protection risks

Extraordinary situations amplify the tension between efficiency and human rights. Such situations impose urgency, largescale impact, and often require rapid deployment of technical or organisational solutions. Member States across the EU – during the COVID-19 pandemic for example – introduced contact-tracing apps, location-based mobility tracking systems and large scale data-sharing arrangements (including between public bodies and telecom operators) to stem contagion. However, the European Parliament's briefing on the impact of COVID-19 measures noted that many Member States resorted to emergency powers and "digital and big-data processing measures" with potential implications for privacy and data protection.[18]

These Member States' responses, whilst understandable from a public-health or security perspective, pose serious risks for personal data protection: mass collection of data, surveillance by design, bypassing of prior impact assessment, lack of public consultation, and insufficient exit or "sunset" clauses. Scientific analyses emphasise that data processing measures deployed under crisis conditions frequently conflict with the general principles of data protection[19] – such as purpose limitation, data-minimisation, transparency and accountability – all of which are core to the General Data Protection Regulation (GDPR)[20] and the Charter.

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[16] Ackerman B. A. 2004, p. 1045.

[17] European Data Protection Board. Statement on the data protection impact of the interoperability of contact tracing apps of 16 June 2020, pp. 4–5. Available: https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_statementinteroperabilitycontacttracingapps_en_0.pdf [last viewed 03.11.2025].

[18] European Parliament. The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU, pp. 1–2. Available: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651343/IPOL_BRI(2020)651343_EN.pdf [last viewed 03.11.2025].

[19] Newlands G., Lutz C., Tamo-Larrieux A., Fosch Villaronga E., Harasgama R., Scheitlin G. Innovation under Pressure: Implications for Data Privacy During the Covid-19 Pandemic. Big Data & Society, Vol. 7, No. 2, 2020, pp. 6–8. https://doi.org/10.1177/2053951720976680

[20] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Available: https://eur-lex.europa.eu/eli/reg/2016/679/oj/eng [last viewed 03.11.2025].

For example, in the Irish context Porcedda's study shows that "under-the-radar" data-driven measures (thermal scanner guns, self-check forms, vaccine information systems) partly failed to comply with the right to data protection because they lacked systematic strategy, transparency, or sunset provisions.[21] Newlands et al. noted that rushed implementation leads to function creep: data initially collected for public-health purposes may later serve law-enforcement.[22] Such developments erode the principle of purpose limitation enshrined in Article 5(1)(b) GDPR.

In addition, the judicial review of COVID-19 related measures in EU Member States provides a valuable empirical basis for analysing how constitutional courts and supreme jurisdictions have balanced emergency powers against fundamental rights, particularly the rights to privacy and personal data protection. The COVID-19 Litigation Database[23] (an open-access repository of case law developed by the University of Trento and the World Health Organisation) offers an extensive collection of such judgments across Europe. According to this database, 25 decisions from various EU Member States' constitutional and supreme courts address privacy and data-protection issues arising during the pandemic. It should be noted, however, that this figure is not exhaustive, as not all Member States are equally represented and certain national decisions remain unpublished or unreported. A quantitative overview of these decisions reveals that in 10 out of 25 cases (approximately 40%), the courts concluded that governmental measures adopted under the state of emergency unlawfully restricted the fundamental rights to privacy or personal data protection.

This finding indicates a significant risk that extraordinary situations and the exercise of extraordinary powers – particularly when implemented through digital surveillance, health data collection, or mobility tracking – may undermine constitutional guarantees of data protection and private life. It also highlights a broader tension within European constitutionalism: although emergency measures are intended to protect public safety and security, they frequently test the resilience of the rule of law and the application of the proportionality principle in safeguarding individual rights. Accordingly, this underscores the need to develop a Governance Framework for Safeguarding Data Protection in Extraordinary Situations.

3. Legal framework: Fundamental rights, GDPR and proportionality

Under EU law, the right to data protection is a qualified right: it may be limited but only subject to the conditions set out in Article 52(1) of the Charter – limits must be: (a) provided by law, (b) pursue a legitimate aim, (c) be necessary

[21] Porcedda M.-G. 2022, pp. 333–334.

[22] Newlands G. et al. 2020, p. 2.

[23] Available: https://www.covid19litigation.org/case-index [last viewed 03.11.2025].

and proportionate, and (d) respect the essence of the right. As European Data Protection Board noted in various documents relating to COVID-19 pandemic measures, even during emergencies the essence of the right under Article 8 of the Charter must be preserved.[24] Such approach was further elaborated in EUCJ jurisprudence, e.g. in La Quadrature du Net case.

In such context, as relates to personal data protection essence, the GDPR provides specific mechanisms – including general principles for processing of personal data (Art. 5), requirements for lawfulness of personal data processing (Art. 6 and 9), obligation to perform data protection impact assessment (DPIA) (Art. 35). The need for DPIAs is highlighted in various documents, such as European Data Protection Board guidelines 04/2020.[25] Thus, the legal framework in extraordinary situations must reconcile three dimensions: (i) the urgent public interest; (ii) the fundamental right to data protection; and (iii) state accountability and oversight.

4. Emerging standards

Case law from EU Member States, data protection supervisory authorities and academic commentary illustrate emerging standards. For instance, the European Data Protection Board in its guidance on location-data and tracing apps stressed that restrictions on rights must (i) be based on law, (ii) pursue a legitimate aim, (iii) be necessary and proportionate, and (iv) include safeguards and a sunset clause.[26] The European Commission's communication on apps supporting the fight against COVID 19 pandemic emphasised interoperability, data-minimisation, voluntary participation and limited retention.[27]

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[24] For example, European Data Protection Board & European Data Protection Supervisor. Joint Opinion 1/2022 on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic of 14 March 2022. Available: https://www.edpb.europa.eu/system/files/2022-03/edpb-edps_1-2022_joint_opinion_extension_of_covid_certification_regulation_en.pdf [last viewed 03.11.2025].

[25] European Data Protection Board. Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak of 21 April 2020. Available: https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf [last viewed 03.11.2025].

[26] European Data Protection Board. Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak of 21 April 2020. Available: https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf [last viewed 03.11.2025].

[27] Communication from the European Commission. Guidance on Apps Supporting the Fight against COVID-19 Pandemic in Relation to Data Protection (2020/C 124 I/01). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0417(08)#ntr1-CI2020124EN.01000101-E0001 [last viewed 03.11.2025].

From these and other analyses[28] the following emerging standards can be derived for data-processing in extraordinary situations: (a) lawfulness and legal basis (extraordinary measures must be grounded in law and clearly defined; application of *lawfulness, fairness and transparency* principle); (b) legitimate aim (the emergency measure addresses a genuine extraordinary situation objective, e.g., epidemic control, migrant and refugee control, etc.; application of *purpose limitation* principle); (c) necessity and proportionality (the data-processing must be strictly limited to what is required; application of *data minimization* principle); (d) time-limitation / sunset clause (extraordinary data-processing measures should expire once the official extraordinary situation ends; application of *storage limitation* principle; (e) transparency and accountability (affected individuals should have information and rights of redress); (f) safeguards for vulnerable groups (additional protections for disadvantaged or marginalised populations); and (g) independent review and oversight (judicial or administrative review mechanisms must be accessible).

5. Governance framework for safeguarding data protection in extraordinary situations

Drawing on judicial reasoning and academic analysis, a constitutional-compliance framework can be developed to ensure that emergency measures involving data processing remain lawful, proportionate, and temporary. The framework may be structured around three principal phases: declaration, application, and termination and restoration.

5.1. Declaration phase

At the outset, it is essential to verify the legal and factual grounds for declaring an official extraordinary situation and to ensure that the nature and scope of the threat are clearly defined. Only constitutionally authorised bodies should be empowered to proclaim such an extraordinary situation, consistent with the principle of legality and separation of powers. Even under conditions that restrict regular parliamentary activity, mechanisms of legislative oversight must remain operational to guarantee democratic accountability.

5.2. Application phase

During the implementation of extraordinary measures, it must be ensured that only duly empowered entities exercise extraordinary powers and that these powers are applied strictly within their constitutional and statutory limits. The principle of proportionality requires that all measures affecting personal

[28] For example, Porcedda M.-G. 2022, pp. 310–340.

data be preceded, where feasible, by a rapid DPIA and a human-rights impact assessment. In addition, the deployment of technical and organisational safeguards – such as pseudonymisation, encryption, restricted data access, and real-time auditing mechanisms – is indispensable to minimise intrusiveness and ensure accountability.

5.3. Termination and restoration phase

The temporality of extraordinary regime must be guaranteed through the inclusion of explicit time limits and sunset clauses, after which the extraordinary measures automatically cease to apply. Upon termination of the official extraordinary situation, authorities must ensure the full restoration of ordinary data-protection guarantees, including the erasure or anonymisation of data collected exclusively for extraordinary purposes. This phase symbolises the return to constitutional normality and reaffirms that extraordinary powers are exceptional by design and non-permanent in nature.

Conclusions

1. Extraordinary situations represent a critical stress test for constitutional democracies and their commitment to fundamental rights. This research demonstrates that the right to personal data protection, as enshrined in Article 8 of the Charter, remains fully applicable even under conditions of emergency. While EU law allows for limitations on this right, such limitations must strictly comply with the principles of legality, necessity, proportionality, and respect for the essence of the right.
2. The analysis of constitutional and administrative case law from EU Member States reveals that emergency data processing measures are particularly vulnerable to disproportionality. Courts have repeatedly identified deficiencies related to insufficient legal bases, overly broad data collection, lack of time limits, and inadequate safeguards. These findings confirm that extraordinary circumstances do not justify the suspension of constitutional standards, but rather require their careful and context-sensitive application.
3. On the basis of judicial practice and academic analysis, this research proposes a governance framework structured around the phases of declaration, application, and termination of extraordinary measures. Such a framework emphasises the importance of *ex ante* assessment, ongoing oversight, and effective restoration of ordinary legal order once the crisis subsides. By embedding data protection considerations into each phase of emergency governance, Member States can ensure that crisis responses remain both effective and constitutionally compliant.
4. Ultimately, safeguarding personal data protection during extraordinary situations is not an obstacle to effective governance but a prerequisite for

maintaining public trust, democratic legitimacy, and the rule of law in times of crisis.

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12. Constitution of the Republic of Lithuania. Available: https://www.lrs.lt/home/Konstitucija/Constitution.htm [last viewed 03.11.2025].
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21. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. Signed in Lisbon on 13 December 2007 [in the wording of 1 December 2009].

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Alexander Vashkevich, *Dr., Professor*
European Humanities University, Lithuania

BELARUSIANS IN EXILE: INTERPLAY BETWEEN EU LAW AND NATIONAL LEGISLATION IN LITHUANIA AND POLAND

Key words: Belarusians in exile, Lithuania, Poland, EU migration law

Summary

The article examines the challenges faced by Belarusians in exile, focusing on the interaction between EU migration law and national legislation in Lithuania and Poland. Its primary aim is to clarify the concept of "Belarusians in exile", analyse the legal consequences of Belarus's denial of consular services abroad, and assess how host states have responded to these challenges. The study relies on the doctrinal method combined with empirical legal scholarship.

The author conceptualizes "Belarusians in exile" as a politically displaced group forced to leave Belarus due to repression, human rights violations, or fear of persecution. This notion extends beyond ordinary migration and encompasses several legal categories: refugees under the 1951 Refugee Convention, beneficiaries of subsidiary protection under EU law, asylum seekers with pending applications, persons under humanitarian or temporary national protection regimes, and politically exiled migrants residing abroad without international protection status. Although these groups differ in legal standing, they share vulnerabilities stemming from the political nature of their displacement. Importantly, the author proposes a practical criterion for distinguishing politically exiled individuals from labour migrants – namely, the presence or absence of travel to the Republic of Belarus – arguing that individuals who genuinely fear persecution are unlikely to seek re-entry into their country of origin.

As a case study, the article analyses the 2023 Belarusian presidential decree depriving citizens abroad of access to consular services, including passport issuance and essential civil documentation. The author argues that this policy deliberately targets political exiles and produces severe consequences, such as obstacles to legal residence, employment, education, healthcare, freedom of movement, and risks of de facto statelessness, including for children born abroad. The decree is assessed against international human rights standards and found to be incompatible with them.

The article then evaluates the responses of Poland and Lithuania as key host states for Belarusian exiles. Both countries have introduced humanitarian visas, residence permits on humanitarian grounds, and alternative travel documents to mitigate the effects of Belarus's

consular restrictions. While these measures improve access to lawful residence and protection, gaps remain, particularly regarding identity documentation and the limited validity of travel documents.

In conclusion, the author proposes legislative and administrative reforms, including extending the validity of travel documents, recognizing them as identity documents, accepting expired Belarusian passports alongside residence permits, and implementing relevant Council of Europe recommendations, while emphasizing the need for proportionate security assessments based on reliable evidence.

The passport is the noblest part of a human being.
/B. Brecht/

Introduction

After the brutal suppression exerted by the authorities upon the peaceful protests triggered by widespread falsifications during the presidential elections in August 2020[1], a significant number of Belarusian citizens were forced to leave the country. According to various estimates, their number ranges from 300 000 to 900 000 people. The evaluation of Parliamentary Assembly of the Council of Europe testifies that up to 500 000 Belarusians have left the country after August 2020[2]. A distinct social group has emerged in the EU countries neighbouring Belarus – Belarusians in exile. The first academic articles and books devoted to the philosophical and political-science analysis dedicated to the phenomenon of the peaceful protests of 2020 in Belarus are beginning to appear[3], alongside a growing body of policy papers addressing specific challenges faced by Belarusians in exile. However, this issue has not yet received systematic scholarly consideration from a legal perspective. This article attempts to partially fill this gap.

The purpose of this article is to conceptualize and clarify the widely used concept of "Belarusians in exile", to demonstrate-using the denial of consular services as an example-the problems faced by this group, to examine how these issues are addressed in Lithuania and Poland, and to propose measures for improving legislation in this field. The study relies on the doctrinal method combined with empirical legal scholarship.

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1 Benedek W. OSCE Rapporteur's Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus. 2020. Available: https://www.osce.org/sites/default/files/f/documents/2/b/469539.pdf [last viewed 03.08.2025].

2 Belarusians in exile: An overlooked issue addressed by the Parliamentary Assembly, 21 January 2023. Available: https://pace.coe.int/news/8955/belarusians-in-exile-an-overlooked-issue-addressed-by-the-parliamentary-assembly [last viewed 03.08.2025].

3 Shchyttsova T. Solidarity of the Shaken. On the Collective Subject of the Belarusian Revolution of 2020. Ibidem Press, 2026; Korosteleva E., Petrova I., Kudlenko A. (eds.). Belarus in the Twenty-First Century Between Dictatorship and Democracy. Routledge, 2023.

1. Conceptualizing the notion of "Belarusians in exile"

In legal and policy discourse concerning Belarusians residing abroad, numerous sources-including resolutions of the European Parliament[4], documents of the Parliamentary Assembly of the Council of Europe,[5] as well as analyses conducted by non-governmental organizations[6], think-tanks,[7] and individual scholars[8] employ the collective designations "Belarusians in exile" or "exiled Belarusians." Which specific categories of individuals are covered by this notion and how to distinguish them from persons not belonging to this category, for example, from a migrant worker? The answer to this question has not only theoretical but also important practical significance. The expression "Belarusians in exile" refers to individuals of Belarusian nationality or origin who have been forced to leave Belarus (or have chosen to remain abroad) primarily due to political repression, human rights violations, or well-established fear of persecution by the current authorities. It is more than a neutral demographic or migration term. It carries a strong political, legal, and moral dimension, implying that these people are not simply migrants seeking better economic conditions, but members of a politically displaced community whose departure is directly linked to the absence of democracy and the suppression of fundamental freedoms in their home country.

In a legal and sociopolitical sense, this notion encompasses several categories:

a) Refugees (1951 Convention Relating to the Status of Refugees)
The primary category applicable to many Belarusians in exile is that of refugees under Article 1A(2) of the 1951 Convention Relating to the Status of Refugees[9], as incorporated into EU law through Directive 2011/95/EU (Qualification Directive)[10]. This category includes

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[4] See, for instance: European Parliament resolution of 3 April 2025 on the immediate risk of further repression by Lukashenka's regime in Belarus – threats from the Investigative Committee. Available: https://www.europarl.europa.eu/doceo/document/TA-10-2025-0063_EN.html [last viewed 03.08.2025].

[5] "The Luxembourg Solutions": outcomes and perspectives. Council of Europe, 2024.

[6] See, for example: Briefing: Belarusian Students in Exile: Challenges and Solutions for advocacy. 24 June 2024. European Students' Union. Available: https://esu-online.org/briefing-belarusian-students-in-exile-2024/ [last viewed 03.08.2025].

[7] Kolarz S. Belarusians in Exile: Countries of the EU, Council of Europe Seek to Support Repressed Abroad. The Polish Institute of International Affairs. Bulletin, No. 193 (2501), 30 December 2024. Available: https://pism.pl/publications/belarusians-in-exile-countries-of-the-eu-council-of-europe-seek-to-support-repressed-abroad [last viewed 03.08.2025].

[8] Shadurski V. Where Does Belarus Go from Here? In: Korosteleva E., Petrova I., Kudlenko A. (eds.). Belarus in the Twenty-First Century Between Dictatorship and Democracy. Routledge, 2023, p. 193. https://doi.org/10.4324/9781003311454-16

[9] Convention relating to the Status of Refugees of 28 July 1951. Available: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees [last viewed 30.01.2026].

[10] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). OJ L 337, 20.12.2011, pp. 9–26.

opposition activists and protest participants, journalists, human rights defenders, lawyers, civil servants dismissed or prosecuted for political reasons, individuals charged or convicted in politically motivated criminal proceedings. From a legal perspective, this group enjoys the strongest international protection, including non-refoulement, residence rights, and access to social and economic rights in host states.[11] During the period from 2021 to April 2025, 930 citizens of Belarus were granted asylum in the Republic of Poland.[12] More than 1000 Belarusian citizens were applying for the refugee status in Lithuania in 2020–2024.[13] As of 1 August 2025, 1093 citizens of Belarus lived in Lithuania based on humanitarian reasons.[14]

b) Beneficiaries of Subsidiary Protection (EU Law)
Some Belarusians may not meet the strict persecution threshold of the Refugee Convention but nonetheless face real risk of serious harm if returned. These individuals may fall under subsidiary protection pursuant to Article 15 of the EU Qualification Directive.[15] Relevant risks include torture or inhuman or degrading treatment, arbitrary detention following return, punishment under broadly framed "extremism"[16] or public order laws. This category reflects an EU-specific expansion of international protection, grounded in human rights law (notably Articles 2 and 3 ECHR), and has been particularly relevant in states applying differentiated protection statuses to Belarusian applicants. During the period from 2021 to April 2025 10 042 people were granted subsidiary protection status in Poland.[17]

c) Asylum Seekers (Pending Status)
Many Belarusians in exile are still legally classified as asylum seekers, meaning individuals who have applied for international protection but whose claims have not yet been finally determined. While formally temporary, this category is legally significant: asylum seekers are

[11] Zimmermann A., Einarsen T. (eds.), Herrmannn F. M. (assist. ed.). The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary, 2nd edition. Oxford University Press, 2024, pp. 1036–1269.

[12] Raport dot. obywateli Bialorusi [Report on Belarusian citizens]. Available: https://www.gov.pl/web/udsc/raport-dot-obywateli-bialorusi [last viewed 30.01.2026].

[13] Migration Department under the Ministry of the Interior of the Republic of Lithuania. Migration Yearbook 2024. Vilnius, 2025, p. 68.

[14] Imigrantai Lietuvoje. 2025 m. rugsejo 1 d. duomenys [Immigrants in Lithuania. Data as of 1 September 2025]. Available: https://migracija.lrv.lt/public/canonical/1759209566/1460/imig-2025-09.pdf [last viewed 10.12.2025].

[15] See footnote 10.

[16] Belarus misuses counter-terrorism and anti-extremism legislation to stifle dissent: UN expert. Available: https://www.ohchr.org/en/press-releases/2023/10/belarus-misuses-counter-terrorism-and-anti-extremism-legislation-stifle [last viewed 10.12.2025].

[17] Raport na temat obywateli Bialorusi (wg stanu na 30 kwietnia 2025 r.) [Report on Belarusian citizens (as of 30 April 2025)]. Available: https://www.gov.pl/web/udsc/raport-dot-obywateli-bialorusi [last viewed 30.01.2026].

protected against refoulement during the procedure, their rights and restrictions are governed by the EU Asylum Procedures Directive[18] and Reception Conditions Directive[19]. As of today, more than 1000 citizens of Belarus are still waiting for the decision on their refugee status in Poland.[20]

d) Persons under Temporary or Humanitarian Protection Regimes
Some EU Member States, including Poland and Lithuania have granted Belarusians residence on humanitarian grounds, outside the classic asylum framework. These include: humanitarian visas, national protection statuses, tolerated stay or discretionary leave to remain. For example, pursuant to Article 348 of the Law on Foreigners, a foreign national shall be granted a residence permit in the Republic of Poland on humanitarian grounds where an obligation to return would require return solely to a state in which, within the meaning of the European Convention on Human Rights, the individual's right to life, liberty, or personal security would be endangered; the individual would face torture or inhuman or degrading treatment or punishment, forced labour, deprivation of the right to a fair trial, or punishment without a legal basis; where such return would infringe the individual's right to respect for private or family life under the same Convention; or where it would violate the rights of the child as defined in the Convention on the Rights of the Child in a manner posing a serious risk to the child's psychophysical development.[21]

e) Politically Exiled Migrants without International Protection Status
This is a distinct and legally vulnerable group consists of Belarusians who left due to political pressure, repression, or well-considered fear, but reside abroad under ordinary migration regimes (work, study, entrepreneurship). It is highly likely that the number of such individuals significantly exceeds the number of persons who have been granted asylum or other forms of international protection. According to the opinion poll of 2023 for the vast majority of Belarusians staying in Poland, constituting 86%, the main reason to leave their country was

[18] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). OJ L 180, 29.06.2013, pp. 60–95.

[19] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). OJ L 180, 29.06.2013, pp. 96–116.

[20] W 2025 roku o ochrone miedzynarodowa w Polsce wystapilo blisko 3 tys. Bialorusinow [In 2025 nearly 3000 Belarusians applied for international protection in Poland]. Available: https://mostmedia.pl/nowosci/w-2025-roku-o-ochrone-miedzynarodowa-w-polsce-wystapilo-blisko-3-tys-bialorusinow/ [last viewed 10.12.2025].

[21] Act on Foreigners of the Republic of Poland, Dz. U. 2025 poz. 1079. Available: https://dziennikustaw.gov.pl/DU/2025/1079 [last viewed 10.12.2025].

the fear of repression.[22] According to a sociological study conducted by the National Bank of Poland in 2025, 52% of Belarusian citizens, when asked about their reasons for coming to Poland, cited political motives – namely, fear of repression.[23]

In practice, when issuing documents regulating permission to stay in the country and deciding about possible deportation, the state authorities of Lithuania and Poland face the challenge of distinguishing such individuals from labour migrants. It may be argued that an important criterion in this regard is the presence or absence of travel to the Republic of Belarus. If a person fears persecution in their country of citizenship, it is logical to assume that such a person will not seek to enter that country. Persons who obtained the status of international protection. will behave in the same way, otherwise such a right may be lost.[24]

2. The decree as a case study of legal and administrative hardships faced by Belarusians in exile

The Decree of the President of the Republic of Belarus No. 278 "On the Procedure of Issuing Documents and Performing Actions" was officially enacted on 6 September 2023.[25] The decree's preamble says that it is aimed at "further improving" and "optimizing" the work of diplomatic missions and consulates. In reality, one cannot but agree with the opinion of five UN Special Rapporteurs: "it is part of a deliberate policy to punish Belarusian exiles, including human rights defenders, journalists and members of the opposition for their perceived political disloyalty".[26]

Firstly, consulates will no longer issue or renew passports for citizens of the Republic of Belarus. This can now only be done within the territory of the Republic of Belarus. Belarusians in exile who wish to obtain or exchange their passports must either enter the country, exposing themselves to a real risk of torture, inhuman or degrading treatment or punishment, and denial of a fair trial,

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[22] Mazurkiewicz L., Sygnowski G. Belarusian Emigration in Poland – Opinions, Attitudes, Dilemmas. Opinion poll report for the Mieroszewski Centre. Warsaw, 2023, p. 13.

[23] Dudek B., Strzelecki P. Sytuacja zyciowa i ekonomiczna imigrantow z Bialorusi w Polsce w 2025 r. Raport z badania ankietowego. Warszawa [The life and economic situation of immigrants from Belarus in Poland in 2025. Survey report], Warsaw, 2025.

[24] O'Sullivan M. Legal Note on the Cessation of International Protection and Review of Protection Statuses in Europe. Revised note. European Council on Refugees and Exiles, April 2025. Available: https://ecre.org/wp-content/uploads/2025/04/ECRE_Legal-Note-17_Cessation-of-International-Protection-and-Review-of-Protection-Statuses-in-Europe.pdf [last viewed 23.10.2025].

[25] Decree of the President of the Republic of Belarus No. 278 "On the procedure for issuing documents and performing actions". 4 September 2023. Available: https://pravo.by/document/?guid=12551&p0=P32300278 [last viewed 10.12.2025].

[26] Belarus: Presidential decree denying consular services puts Belarusians abroad at risk. Available: https://www.ohchr.org/en/press-releases/2023/09/belarus-presidential-decree-denying-consular-services-puts-belarusians [last viewed 15.11.2025].

or be forced to refuse to obtain a passport, which entails a number of negative legal consequences. These include difficulties with legalizing their stay in the country where they live, accessing banking services, finding employment, enrolling in educational institutions, and accessing medical care. Citizens without passports lose their right to freedom of movement. Their right to enter into a number of transactions is restricted.

Secondly, the decree introduces a rule whereby a large number of documents required by citizens in their daily lives, including abroad, can only be obtained by submitting an application in person in Belarus or by their representative on the basis of a power of attorney issued in the Republic of Belarus. Such documents inter alia include duplicates of civil statute certificates, duplicates of an educational certificates and annexes to them, reference notes from the civil status records (on the civil status record, on the absence of a record of marriage etc.). The inability to obtain these documents (even through their representative) makes it extremely difficult to enrol in educational institutions or to confirm one's qualifications[27], to register a marriage, and so on. The decree carries potential risks of statelessness in the longer term not only for Belarusians in exile but also for their children born outside Belarus in a violation of their fundamental right to nationality and principle of the best interests of children.

Depriving citizens of access to consular services and turning them into de facto stateless persons is by no means a new invention. Authoritarian and totalitarian regimes learn from each other and act in similar ways. Interestingly, several similar cases involving the refusal to issue passports to citizens of Uruguay who stayed abroad due to political persecution were considered by the UN Human Rights Committee as early as in 1983.[28] In 1999 this body of international experts adopted General Comments 27, devoted to the freedom of movement, which proclaims that "the issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere. It is no justification for the State to claim that its national would be able to return to its territory without a passport"[29]. Moreover, the principle of proportionality has to be respected by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided. One can

[27] Briefing: Belarusian Students in Exile: Challenges and Solutions for advocacy. 24 June 2024. European Students' Union, pp. 2–3. Available: https://esu-online.org/briefing-belarusian-students-in-exile-2024/ [last viewed 03.08.2025].

[28] See, for example: UN HRC. Communication No. 77/1980, Samuel Lichtensztejn v. Uruguay. 31 March 1983. GAOR 38th Session Supp 40, 166; UN HRC Communication No. 106/1981, Pereira Montero v. Uruguay, 31 March 1983. GAOR 38th Session Supp 40, 186; UN HRC Communication No. 108/1981, Varel Nunez v. Uruguay, 22 July 1983. GAOR 38th Session Supp 40, 225.

[29] Human Rights Committee, General Comment 27, Freedom of movement (Art. 12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

evaluate independently whether the reasons provided by Belarusian authorities are persuasive: they claim that "Belarus had been forced to scale down foreign consular operations due to economic pressure placed on it by Western countries".[30]

Due to their geographical location, Poland and Lithuania have become the countries that have accepted the largest number of Belarusians persecuted for participating in peaceful protests. These states have taken a number of legal measures that have significantly facilitated the process of legalising refugees and have become a response to the Belarusian authorities' policy of refusing consular services to their own citizens. Both countries introduced and expanded the issuance of national humanitarian visas (type D) to Belarusian citizens fleeing political repression. In Poland, humanitarian visas were issued on the basis of Article 60(1)(23) of the Act of 12 December 2013 on Foreigners, which allows entry and stay where required by the interest of the Republic of Poland or international obligations, and were operationalised by decisions of the Minister of Foreign Affairs and consular practice.[31] In August 2020, the Lithuanian government opened a so-called humanitarian corridor for Belarusians in risk. They were given a Schengen visa and once in Lithuania, were able to apply for asylum or for a national visa that allows them to work.[32] These regimes provided Belarusians with a lawful entry channel and constituted the primary legal gateway to subsequent residence permits and protection mechanisms in both states. In 2023, Lithuanian Parliament adopted an amendment to the Law on the Legal Status of Foreigners that permits the issuance of temporary residence permits valid for three years for persons under specific humanitarian grounds (including those persecuted for political reasons).[33] At the same time, Poland adopted legal norms according to which Belarusian citizens may apply for a Polish travel document for foreigners under preferential conditions. They are exempt from the fee for the issuance thereof and they do not have to prove that they cannot obtain a passport from the Belarusian consulate (which is normally a requirement).[34]

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[30] Experts of the Committee on the Elimination of Racial Discrimination Welcome Belarus' Strategies to Promote Interethnic Peace, Ask About the Stripping of Citizens' Nationality and the Dissolution of Ethnic Minority Associations. Available: https://www.ungeneva.org/en/news-media/meeting-summary/2024/08/experts-committee-elimination-racial-discrimination-welcome [last viewed 11.01.2026].

[31] See footnote 21.

[32] Lithuania grants 507 visas to Belarusians fleeing repressions. Available: https://www.lrt.lt/en/news-in-english/19/1258023/lithuania-grants-507-visas-to-belarusians-fleeing-repressions#:~:text=Lithuania%20has%20granted%20a%20total,requests%20at%20a%20border%20checkpoint [last viewed 11.01.2026].

[33] Amendments to the Law on the Legal Status of Foreigners. Lithuania. Available: https://www.e-tar.lt/portal/en/legalAct/26bb8760a62c11eea5a28c81c82193a8 [last viewed 11.01.2026].

[34] Regulation of the Minister of Internal Affairs and Administration of 28 June 2023 on nationalities whose holders are entitled to apply for a Polish travel document for a foreigner under the conditions specified in Article 252a(1) of the Act on Foreigners. Available: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20230001247 [last viewed 14.01.2026].

Conclusions

In order to improve the legal and factual situation of Belarusians in exile it is proposed:

1) to amend Art. 253(2) of the Polish Act on Foreigners by extending the validity period of the Polish travel document for a foreigner from one year to at least three years; in this context, it would be advisable to take into account the best practices of the Republic of Lithuania, where persons holding a residence permit who are unable to obtain a travel document from their country of nationality are issued a Lithuanian travel document for the entire period of validity of their residence permit;[35]
2) to amend the Polish Act on Foreigners by introducing an explicit provision recognizing the travel document for a foreigner as a document certifying the identity of a foreigner, which may therefore be used for all administrative and private-law purposes;
3) alternatively, to introduce a uniform administrative practice allowing expired Belarusian passports, when presented together with a valid residence permit, to be accepted as sufficient proof of identity;
4) to implement the recommendations of the Parliamentary Assembly of the Council of Europe contained in Resolution 2499 (2023), as well as the related instruments elaborated by the Congress of Local and Regional Authorities of the Council of Europe.[36]

At the same time prior to the issuance of residence permits, Polish and Lithuanian authorities should conduct clear, reliable, and proportionate security assessments of Belarusian citizens based on the evaluation of the applicant's political activities, professional history, and any connections to Belarusian repressive structures. In this regard independent evidence provided by human rights organisations, civil society actors, or international NGOs monitoring political persecution in Belarus is of particular importance.

[35] I want to get a travel document. Foreign passport. Available: https://www.migracija.lt/noriu-gauti-kelion%C4%97s-dokument%C4%85 [last viewed 14.01.2026].

[36] Policy brief for local and regional leaders. When passports become weapons: Local authorities' response to transnational repression against Belarusians abroad. 29 October 2025, Strasbourg. Available: https://rm.coe.int/blr-policy-brief-transnational-repression-against-belarusians-abroad/4880291da4 [last viewed 14.01.2026]; Explainer / Q&A: Supporting Belarusian Residents. When passports become weapons: Local authorities' response to transnational repression against Belarusians abroad. 29 October 2025, Strasbourg. Available: https://rm.coe.int/blr-explainer-q-a-transnational-repression-against-belarusians-abroad/4880291da3 [last viewed 11.01.2026].

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34. Raport na temat obywateli Bialorusi (wg stanu na 30 kwietnia 2025 r.) [Report on Belarusian citizens (as of 30 April 2025)]. Available: https://www.gov.pl/web/udsc/raport-dot-obywateli-bialorusi [last viewed 30.01.2026].
35. Regulation of the Minister of Internal Affairs and Administration of 28 June 2023 on nationalities whose holders are entitled to apply for a Polish travel document for a foreigner under the conditions specified in Article 252a(1) of the Act on Foreigners. Available: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20230001247 [last viewed 14.01.2026].
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Dovile Sagatiene, *Dr. iur.*
Mykolas Romeris University, Lithuania

EUROPEAN COURT OF HUMAN RIGHTS AS NUREMBERG FOR THE SOVIET CRIMES IN THE BALTIC STATES?[1]

Key words: international crimes, European Court of Human Rights (ECtHR), Baltic historical cases, Soviet crimes, Soviet occupation, war crimes, genocide, legal accountability, Ukraine, Russian aggression

Summary

The paper examines how European Court of Human Rights (ECtHR) jurisprudence in Baltic Soviet-era cases has contributed to the development of legal accountability for international crimes, first established at the Nuremberg Tribunal (NT) after WWII.

From 2004 onward, several landmark cases from Estonia, Latvia, and Lithuania challenged domestic prosecutions of Soviet perpetrators under Article 7 of the European Convention on Human Rights (the principle of legality). These cases forced the ECtHR to confront broader legal and political issues, including the illegality of the Soviet occupation, denial of Soviet crimes, and the interpretation of genocide under international law. Beyond questions of legality, the Baltic historical cases played a significant role in shaping post-World War II legal and political understandings, particularly regarding state identity and the right to exist. This article explores how these precedents inform contemporary discussions on state responsibility and justice in the context of Russia's aggression against Ukraine.

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Introduction

The Russian aggression in Ukraine has highlighted the need for justice on several fronts, as numerous international crimes and atrocities are being committed daily. In 1945, the crime of aggression was prosecuted for the first time in history at the Nuremberg Tribunal (NT), and the promise was then to criminalise aggression in order to prevent future wars. While the NT established a foundational framework for the prosecution of core international crimes, subsequent developments in international law have shifted accountability mechanisms towards fragmented institutional regimes. Despite the arrest warrant issued by the International Criminal Court (ICC)[2] for Russian President Vladimir Putin in March 2023, prospects to successfully prosecute Russia for both the crime of aggression and for other international crimes in Ukraine remain dim due to various reasons, including a lack of jurisdiction of the ICC specifically with respect to aggression.[3]

However, the ICC is not the only international legal body addressing international crimes; with nearly 60 years of continuous legal practice, the European Court of Human Rights (ECtHR, established in 1959) has also dealt with numerous cases related to genocide, crimes against humanity, and war crimes.[4] Although the role of the ECtHR is not specifically to try individuals for international criminal offences, it may pronounce itself on legal issues relevant to the aforementioned core international crimes because it has jurisdiction over the 46 state parties to the European Convention on Human Rights (ECHR), against whom proceedings may be initiated for human rights violations as a result of those international crimes. This occurs most commonly in the context of examination

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[2] Rome Statute of the International Criminal Court. Adopted 17 July 1998; entered into force 1 July 2002.

[3] Established on the 1st of July 2002 pursuant to the Rome Statute, the ICC (seated in the Hague, The Netherlands) is considered to be a major step toward international justice. The ICC is an intergovernmental organisation and international tribunal, and is the first and only permanent international court with jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. ICC has powers to investigate any act of genocide, war crime, or crime against humanity committed on the territory of Ukraine. However, the ICC cannot exercise its jurisdiction in relation to the crime of aggression if said act of aggression is committed by a state that is not party to the statute of the court, unless the UN Security Council specifically refers the matter to it. Since Russia has not ratified that statute, and would exercise its veto in the Security Council against a referral, the ICC cannot, as things presently stand, investigate crimes of aggression against Ukraine. The ICC is distinct from the International Court of Justice (established in 1945 and based in The Hague, The Netherlands), an organ of the United Nations that hears disputes between states.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms. Signed in Rome on 4 November 1950; The ECtHR, based in Strasbourg, France, is an international court of the Council of Europe (CoE), and which has ultimate authority to interpret the 1950 European Convention on Human Rights (ECHR). All of the CoE's 46 member states are contracting parties to the ECHR, and thus under the jurisdiction of the ECtHR, too.

of the compatibility of domestic legal proceedings with Article 7 of the ECHR.[5] Furthermore, the ECtHR was the first international judicial institution to rule against Russia following its invasion of Ukraine, ordering "interim measures" that included immediate cessation of attacks on civilians and civilian objects.[6]

This ruling was far from the first time the ECtHR has been involved with international crimes in the eastern European region. After numerous failed attempts to achieve at least symbolic justice for the Soviet victims from the USSR successor state – the Russian Federation – all three Baltic states eventually turned to the ECtHR, where Baltic memories of crimes during their Soviet occupations (1940–1941, 1944–1990) were introduced to the uninformed Western public. This article examines ECtHR jurisprudence arising from Baltic cases concerning Soviet-era prosecutions in Estonia, Latvia, and Lithuania after 1990. The first individual criminal cases regarding historical Soviet-perpetrated crimes within the Baltic states (hereinafter: Baltic historical cases) reached the ECtHR in 2004. These were the cases of Penart v. Estonia,[7] and Kolk and Kislyiy v. Estonia,[8] followed by the landmark judgment in the case of Kononov v. Latvia,[9] and two rulings concerning Lithuania in 2015 and 2019: Vasiliauskas v. Lithuania,[10] and Drelingas v. Lithuania.[11] The applicants (six in total) in all of those cases complained of violations of their rights conferred by Article 7 ECHR, asserting

[5] Article 7 of ECHR (No punishment without law): 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.

[6] Crawford J. Ukraine vs. Russia: What the European Court Of Human Rights Can (And Can't) Do. 7 April 2022. Available: https://www.justiceinfo.net/en/90187-ukraine-russia-european-court-of-human-rights-can-do.html [last viewed 06.01.2026]; Tropin Z. ECHR ruling confirms Russian invasion of Ukraine began in 2014. 14 February 2023. Available: https://www.atlanticcouncil.org/blogs/ukrainealert/echr-ruling-confirms-russian-invasion-of-ukraine-began-in-2014/ [last viewed 06.01.2026]; ECtHR Judgment (Grand Chamber) of 30 November 2022 in the case Ukraine and the Netherlands v. Russia (applications No. 8019/16, 43800/14 and 28525/20); Now Ukraine has several pending cases against Russia at ECtHR, but these are not the topic of this research: in its decision in the case of Ukraine and the Netherlands v. Russia (2022) the Grand Chamber of the ECtHR has ruled that the applications are admissible in part. The decision is final, and will be followed by a Grand Chamber judgment on the merits at a later date. Aside from this, there are presently, and at time of writing, four other Ukraine v. Russia inter-state applications, and over 8 500 individual applications pending before the ECtHR concerning potential convention violations in the context of the events in Crimea, eastern Ukraine, the Sea of Azov and the armed attack which began in February 2022: see Tropin, 2023.

[7] ECtHR Judgment of 24 January 2006 in the case Penart v. Estonia (application No. 14685/04).

[8] ECtHR Judgment of 17 January 2006 in the case Kolk and Kislyiy v. Estonia (applications No. 23052/04; 24018/04).

[9] ECtHR Judgment (Grand Chamber) of 17 May 2010 in the case Kononov v. Latvia (application No. 36376/04); ECtHR Judgment of 24 July 2008 in the case Kononov v. Latvia (application No. 36376/04).

[10] ECtHR Judgment (Grand Chamber) of 20 October 2015 in the case Vasiliauskas v. Lithuania (application No. 35343/05).

[11] ECtHR Judgment of 12 March 2019 in the case Drelingas v. Lithuania (application No. 28859/16).

that their convictions by domestic courts were based on the unlawful retroactive application of national criminal law.

While the results on the interpretation of Article 7 ECHR in the Baltic historical cases varied, the ECtHR was confronted with additional legal and political dimensions that transcended those individual cases. These aspects included addressing the illegal Soviet occupation of the Baltic states: a prominent concern in the Estonian cases, and partially so in the Latvian case. Furthermore, the ECtHR grappled with the ongoing denial of Soviet crimes during WWII, as was particularly evident in the Latvian case. Notably, the Baltic historical cases also delved into the post-war concept of genocide as defined by the 1948 Convention on the Prevention and Punishment of Genocide,[12] a key point of contention in the Lithuanian cases. This multifaceted approach underscores the broader implications of these Baltic historical cases, extends beyond the interpretation of Article 7 ECHR, and highlights the core issue of the Baltic states' identity and right to exist.

The Russian war in Ukraine also contains legal and political preconditions to be challenged once again. This paper aims to address the bigger picture behind the Baltic historical cases at the ECtHR, asking how the individual Soviet crimes cases contributed to change in the post-WWII structure, what value this change further has for Ukraine in seeking accountability for current crimes committed by Russia, and, most importantly, to its right to exist – which has been violated by Russia still stuck in an imperialist mindset.

To achieve this aim, the article employs a comparative framework to analyse the relationship between the general legacy of the NT and the case law of the ECtHR on Soviet crimes in the Baltic states, having in mind their limits, including differences in mandate, legal nature, and temporal context. Despite these differences, both institutions engage with the legal legacy of World War II and the development of international criminal law. This approach enables the identification of broader jurisprudential patterns concerning legality, attribution of responsibility, and the role of international criminal law in human rights adjudication. The cases, including Penart v. Estonia, Kolk and Kislyiy v. Estonia, Kononov v. Latvia, Vasiliauskas v. Lithuania, and Drelingas v. Lithuania, were selected on the basis of three criteria: (1) relevance to criminal prosecutions for Soviet-era crimes; (2) centrality of Article 7 ECHR (principle of legality and foreseeability); and (3) comparative representativeness across all three Baltic states, Estonia, Latvia, and Lithuania.

The analysis of the selected cases combines three interpretative layers. First, doctrinal legal analysis is used to examine how the ECtHR interprets international criminal law concepts such as war crimes, crimes against humanity, and genocide within the framework of Article 7 ECHR. Second, comparative legal analysis is applied to identify similarities and differences in how national courts in the Baltic

[12] United Nations Convention on the Prevention and Punishment of the Crime of Genocide. Entered into force 12.01.1951.

states framed Soviet-era crimes and how these were subsequently assessed by the ECtHR. Third, contextual legal interpretation is used to situate these judgments within broader historical, political, and memory-law frameworks in post-Cold War Europe.

1. Post-colonial Baltic identity and the ECtHR

In legal terms, after 1990, the central question which connected all three Baltics states was the question of justice for Soviet victims – as all of them shared common historical experiences of Soviet occupation (1940–1990), interrupted by Nazi occupation between 1941–1944.[13] During the Nazi occupation between 1941 and 1944, the Baltic people became both the victims of the Nazi rule and accomplices in the "Final Solution", eventually failing to regain their sovereignty. The Baltic partisan movements unsuccessfully aimed to liberate the Baltic states from the USSR after 1944.[14] The Soviet occupations (1940–1941, 1944–1990) of Estonia, Latvia and Lithuania resulted in killing hundreds of thousands of innocent people.[15] Many were executed, imprisoned, or sent to GULAG camps, but the majority of those directly persecuted were deported from their homelands to inhospitable Siberia.[16] After 1990, common historical experiences of the Baltic states resulted in similar strategies in relation to various areas of transitional accountability processes. This especially includes focus upon Soviet culpability for the onset of the war (namely via the Molotov–Ribbentrop Pact of 1939), rather than the USSR's role in defeating Nazism.

However, behind the question of justice for Soviet victims, there was always the political context regarding the identity of the Baltic states and their right to exist as sovereign states. In the 1990s, Baltic nations claimed their countries were still independent republics established in 1918 and occupied by the USSR after the disclosure of the secret protocols of the Molotov–Ribbentrop Pact in

[13] Perchoc P. European Memory Beyond the State: Baltic, Russian and European Memory Interactions (1991–2009). Memory Studies, Vol. 12, No. 6, 2019, pp. 677–698. https://doi.org/10.1177/1750698017750011

[14] Bruskina N. The Crimes of Genocide Against the Lithuanian Partisans: A Dialogue Between the Council of Europe and the Lithuanian Courts. European Papers, Vol. 5, No. 1, 2022, pp.137–159.

[15] Cernousek S. Soviet Repression and Deportations in the Baltic States. June 2020. Available: https://gulag.online/articles/soviet-repression-and-deportations-in-the-baltic-states?locale=en [last viewed 06.01.2026].

[16] GULAG is an acronym for Glavnoe Upravlenie Lagerei or "Main Camp Administration", the name of the government institution which organised the Soviet camps. Over time, the word has also come to popularly refer to the entire system of Soviet slave and forced labour in all its various forms and varieties, including labour camps, punishment camps, criminal and political camps, women's camps, children's camps, and transit camps.

1989.[17] This legal continuity concept legitimised rebuilding democratic states in the Baltics and shaped new criminal regulations to prosecute still-living perpetrators for the Soviet crimes.[18] The Baltic elites sought to prevent a new deal between the leading western countries and Russia that could infringe on their security, and wanted to influence the EU's foreign policy toward Russia.[19] Thus, the Baltics' post-1990 politics of memory which focused on historical Soviet atrocities is a typical phenomenon of this stage of eastern Europe's post-colonial identity creation.[20] Even though the legal foundations were comparable in all three Baltic states, the results of national jurisdictions regarding Soviet crimes varied in numbers and legal (and political) repercussions at national and international levels.

1.1. The veiled dispute: Estonia opposing the illegality of Soviet occupations

There have been at least twelve criminal cases in Estonia prosecuting perpetrators of Soviet deportations under the crimes against humanity clause of the criminal code. In those cases, a total of eleven persons were convicted, including eight persons in connection with the "March deportation" of 1949, and three on account of murdering members of the Estonian national armed resistance (the so-called "forest brothers") in the period 1940–1950.[21]

Some of the convicted persons in the Estonian cases lodged their appeals to the ECtHR. In the cases concerning admissibility[22] to the ECtHR of Penart v. Estonia and Kolk and Kislyiy v. Estonia, all three applicants were convicted by Estonian courts for crimes against humanity through an Estonian regulation

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[17] Malksoo L. Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law. Leiden: Brill Nijhoff, 2022.

[18] Ibid., chapter 2.

[19] Malksoo M. From Existential Politics towards Normal Politics? The Baltic States in the Enlarged Europe. Security Dialogue, Vol. 37, No. 3, 2006, pp. 275–297.

[20] Malksoo M. The First Lady of the Baltic 'Memory Offensive'. 1 August 2007. Available: https://icds.ee/en/the-first-lady-of-the-baltic-memory-offensive-2/ [last viewed 06.01.2026].

[21] Sagatiene D. Memory Laws in the Baltic States. March 2024. Available: https://admin.memocracy.eu/wp-content/uploads/2023/03/MEMOCRACYrapport-10H.pdf [last viewed 06.01.2026].

[22] Under the ECHR, admissibility governs whether an individual or inter-State application will be accepted for consideration on the merits and progress to a full case. Normally, all domestic legal remedies must be exhausted before an application will be considered by the European Court of Human Rights (see: Vogiatzis N. The Admissibility Criterion Under Article 35(3)(b) ECHR: A 'Significant Disadvantage' To Human Rights Protection? International & Comparative Law Quarterly, Vol. 65, No. 1, 2016, pp. 185–211); Inter-State cases are also subject to more lenient admissibility rules than applications by individuals: Ulfstein G., Risini I. Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges. 24 January 2020. Available: https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/ [last viewed 06.01.2026].

only enacted in 1994.[23] The sole applicant in the first case (Penart) had been involved in the planning and directing of the killing of several civilians sheltering in the woods, whereas the applicants in the second case (Kolk and Kislyiy) had been involved in the deportation of civilians.[24] The criminal actions of the first applicant (Penart) occurred between 1953 and 1954, and those of the second and third applicants (Kolk and Kislyiy) in 1949 – in all three cases, well before the enactment of the regulation on which their conviction was based. Therefore, in appeal to the ECtHR, they submitted that their convictions had been unlawfully grounded on the retroactive application of criminal law, as crimes against humanity were not specific crimes under the law applicable on Estonian territory at the time of the acts in question (the USSR law), and that their conviction thus violated Article 7 ECHR. In rejecting these submissions, the Court asserted that both arbitrary deportations and extrajudicial executions committed after the Nuremberg tribunals had no doubt been considered criminal actions under international law, regardless of the domestic provisions, and which thus satisfied the requirement of Article 7(1).[25] The cases were therefore ruled inadmissible due to no apparent violation of Article 7 ECHR, thus meaning that the submissions were held manifestly ill-founded, and dismissed.[26]

More import for the purposes of the current article is that in these three cases concerning admissibility the ECtHR explicitly recognised that Estonia was illegally occupied by the USSR during the periods of 1940 to 1941, and from 1944 to 1991.[27] In political transformations like transitions from non-democratic to democratic regimes or from foreign suppression to self-governance, maintaining a sense of continuing state identity is crucial.[28] There are two main arguments that ground the assertion that the Baltic states were illegally occupied from 1940 by the USSR. Firstly, there is the analogous comparison between the occupation of the Baltics in 1940 to the German takeover of Czechoslovakia in 1939 – the latter was considered to be a direct crime against peace at the Nuremberg tribunals.

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[23] Estonian Parliament Act on Criminal Liability of Persons who have Committed Crimes against Humanity or War Crimes in Estonia [Eestis inimsusevastaseid kuritegusid voi sojakuritegusid toimepannud isikute kriminaalvastutuse seadus]. Available: https://www.riigiteataja.ee/akt/24781 [last viewed 06.01.2026].

[24] Susi M. Recent Judgments and Decisions of the European Court of Human Rights towards Estonia. Juridica International, No. 11, 2006, pp. 93–101.

[25] Liivoja R. 2013. Competing Histories: Soviet War Crimes in the Baltic States. In: Heller K. J., Simpson G. (eds.). The Hidden Histories of War Crimes Trials. Oxford: Oxford University Press, 2013, pp. 248–266.

[26] The Genocide Network. Digest of the European Court for Human Rights jurisprudence on core international crimes, September 2017. Available: https://www.eurojust.europa.eu/sites/default/files/assets/2017-09-digest-of-european-court-for-human-rights-jurisprudence-on-core-international-crimes-en.pdf [last viewed 06.01.2026].

[27] Malksoo L. Kononov v. Latvia. The American Journal of International Law, Vol. 105, No. 1, 2011, pp. 101–108.

[28] Malksoo M. Kononov v. Latvia as an Ontological Security Struggle over Remembering the Second World War. In: Belavusau U., Gliszczynska-Grabias A. (eds.). Law and Memory: Towards Legal Governance of History. Cambridge: Cambridge University Press, 2017, pp. 91–108.

The second is to note the regional/bilateral international treaties that the USSR violated in 1940 by invading. It thus followed, after the 1990s, that denying the illegality of the Soviet regime was seen as damaging Baltic states' legal continuity and legitimacy.[29]

Moreover, the ECtHR concluded that even though the acts committed by the Estonian defendants aforementioned (Penart, Kolk and Kisloi) were not regarded as "unlawful" pursuant to Soviet law, they *were* nonetheless considered crimes against humanity pursuant to international law.[30] This conclusion, affirming that the same international principles applied to both the Communist and Nazi regimes and their perpetrators, was essential to open the door to pursuing accountability not only for Nazi crimes but also for those committed by the USSR in the new European Union (EU) member states. Despite the frequent comparison between Stalinism and Nazism (or the GULAGs and Auschwitz), the former regime has never had its "Nuremberg moment", and been declared "criminal" in and of itself, in the same way as the latter has.[31]

Estonian cases in some sense reflected the numerous efforts since 2005 to bring the question of Soviet crimes to international level, as numerous European political declarations were introduced.[32] This eventually led to a German-led initiative in the EU to adopt Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law (hereinafter – the FD 2008).[33] While debating FD 2008, the Baltic countries lobbied to equally condemn Soviet crimes, but the CoE added only a declaration condemning all totalitarian atrocities to satisfy new member states.[34] Following FD 2008, Slovakia, Slovenia, Romania, Croatia, and Bulgaria enacted EU-style memory regulations, whereas Poland, the Czech Republic, Hungary, Lithuania, and Latvia criminalised the denial of both Nazi and Communist crimes.[35] "The movement for equal legal treatment" of the crimes of both dictatorial regimes eventually resulted in the so-called Prague declaration of 2008 "On European Conscience and Communism".[36] Its signatories, which included famous European

[29] Malksoo L. 2022.

[30] Sagatiene D. 2024.

[31] Toymentsev S. Legal but Criminal: The Failure of the "Russian Nuremberg" and the Paradoxes of Post-Soviet Memory. Comparative Literature Studies: Special Issue Trials of Trauma, Vol. 48, No. 3, 2011, pp. 296–319.

[32] Sagatiene D. The Transformation of Lithuanian Memories of Soviet Crimes to Genocide Recognition. International Journal of Transitional Justice, Vol. 16, Issue 3, 2022, pp. 396–405.

[33] Framework Decision 2008/913/JHA by the Council of the EU on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008, OJ L 328/55. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913 [last viewed 06.01.2026].

[34] Pech L. The Law of Holocaust Denial in Europe. In: Hennebel L., Hochmann T. (eds.). Genocide Denials and the Law. Oxford: Oxford University Press, 2011, pp. 185–234.

[35] Koposov N. Historians, Memory Laws, and the Politics of the Past. European Papers, Vol. 5, No. 1, 2020, pp. 107–117.

[36] Zilinskas J. Introduction of 'Crime of Denial' in the Lithuanian Criminal Law and First Instances of Its Application. Jurisprudencija, Vol. 19, No. 1, 2012, pp. 315–329.

politicians and activists, called for a fair and equitable recognition of the criminal communist legacy in eastern Europe.[37]

However, the acknowledgment of "the uniqueness of the Holocaust" in a 2009 EU resolution[38] made it unclear whether the European Parliament considered communist regimes "equally condemned" as the Nazi or as slightly different in terms of victims or crimes.[39] The case law of the ECtHR also demonstrates that the Court confers greater leniency to state interference with the freedom of expression when memories about Nazism and the Holocaust are the subject of protection, than when a previously occupied post-Communist state attempts to preserve a critical memory regarding their oppression.[40] For the Baltic states this question is crucial in the identity building process, as Baltic claims of state continuity and the right to exist "contrast with an official historical account that the Russian Federation supports, among others, through its memory laws: that it acted as a liberator rather than aggressor".[41]

1.2. Kononov v. Latvia – challenging the Russian denial of Soviet crimes during WWII

Under Latvian criminal regulations, ten persons were indicted for their participation in repression and other Soviet crimes.[42] Six people were convicted for genocide and crimes against humanity, and Vasily Kononov, then a Soviet

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[37] Parliament of the Czech Republic. Prague Declaration on European Conscience and Communism. 3 June 2008. Available: https://www.legal-tools.org/doc/e123be/pdf/ [last viewed 06.01.2026].

[38] European Parliament Resolution 0165 on European conscience and totalitarianism. 2 April 2009. Available: https://www.europarl.europa.eu/doceo/document/TA-6-2009-0213_EN.html [last viewed 06.01.2026].

[39] Demirel C., Englund M. Legislating Memory: From Memory Laws to Transitional Justice. 13 June 2021. Available: https://balticworlds.com/legislating-memory-from-memory-laws-to-transitional-justice/ [last viewed 06.01.2026]; According to Jelena Subotic's conclusion, the EU has also been complicit in this circle of memory contestation "by often uncritically accepting Eastern European claims of equalling the crimes of communism with the crimes of the Holocaust and providing cover for these claims with a series of high-profile EU resolutions, the most significant of which is the 2008 Prague Declaration".

[40] Gliszczynska-Grabias A., Baranowska G. The European Court of Human Rights on Nazi and Soviet Past in Central and Eastern Europe. Polish Political Science, Vol. 45, No. 1, 2016, pp. 117–129.

[41] Wojcik A. European Court of Human Rights, Freedom of Expression and Debating the Past and History. Problemy Wspolczesnego Prawa Miedzynarodowego, Europejskiego i Porownawczego, No. 17, 2019, pp. 33–46.

[42] Sprude V. Valstij jamaksa 3000 eiro ekscekistam [The State must pay 3000 euro to an ex-KGB agent]. 7 January 2017. Available: https://www.la.lv/latvija-izmaksas-ekscekistam-3000-eiro [last viewed 06.01.2026]; Cunka J. Liela dala vainigo 1941 gada deportacijas palikusi nesoditi [Many of the perpetrators of the 1941 deportations have gone unpunished]. 14 June 2021. Available: https://www.lsm.lv/raksts/zinas/latvija/liela-dala-vainigo-1941gada-deportacijas-palikusi-nesoditi.a408636/ [last viewed 06.01.2026]. Anonymised Latvian court decisions are available at: https://manas.tiesas.lv/eTiesasMvc/nolemumi; However, this database only contains rulings made after 2013, hence, no ruling on genocide, crimes against humanity and war crimes is available in the database. Other judgments and criminal cases should be available in the archives of the relevant court.

partisan, was charged with war crimes committed during World War II, including the murder of Latvian civilians in 1944. The latter appealed to the ECtHR, complaining that Article 7 ECHR was violated by national courts – he received a favourable decision by the ECtHR in 2008, which held that Latvian authorities had not properly investigated allegations of misconduct by the case's prosecutors and judges, and had not taken Kononov's status as a former partisan into account when assessing his actions during the war.[43] However, after referral was granted in 2010, the Court's Grand Chamber of ruled that Vasily Kononov's conviction by Latvia of war crimes during WWII did not violate Article 7 ECHR. The ECtHR determined that his execution of villagers was contrary to international law already established at the time, and accordingly, his conviction was not barred by any statute of limitations, as he had argued.

In contrast to the Estonian cases, the primary point of contention in Kononov v. Latvia was whether and how the laws and principles formulated in 1945 by the International Military Tribunal at Nuremberg should be applied today to a case concerning events that occurred not after, but during WWII. That had direct legal implications, as the Latvian and Estonian cases represented two different international crimes: war crimes may only be committed during an armed conflict (Kononov case), whereas crimes against humanity can be committed both in times of war and of peace (the Estonian cases). In 2008, the initial ECtHR regular chamber judgment asserted a discriminatorily high burden of proof for war crimes - in favour of the defendant. However, as the 2010 ruling of the Grand Chamber demonstrated, the viewpoint that the standard formulated at Nuremberg was not to be practically applicable with respect to the nationals of the victorious allies, including the USSR, failed – and the universalist approach that the Nuremberg standard is deemed universal prevailed.[44]

Similarly to the Estonian cases, beyond the specific war crimes committed by Kononov, this case represented a significant debate on illegal Soviet occupations.[45] However, this was to a lesser extent than in the Estonian cases, as this question was not addressed directly due to diplomatic reasons.[46] In addition, the case raised a controversial question, emphasised by the Dutch Judge Myjer, regarding the Soviet Army in Latvia in 1944 – specifically whether they should be categorised as occupiers or liberators.[47] This was the main trigger for Russian Federation to support Kononov in the very early stages of the case, by granting him Russian citizenship in 2000 – immediately before judgment was to be rendered in his appeal by the Supreme Court of Latvia. For Russia, the trial of a Soviet veteran

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[43] Pinzauti G. The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of Kononov v. Latvia. Journal of International Criminal Justice, Vol. 6, No. 5, 2008, pp. 1043–1060.

[44] Malksoo L. 2011, p. 105.

[45] Zilinskas J. The Kononov case and the Baltic states. Jurisprudencija, Vol. 18, No. 3, 2011, pp. 859–870.

[46] Malksoo L. 2011, p. 108.

[47] Zilinskas J. 2011, pp. 859–870.

for war crimes by a former Soviet vassal state was shattering, as Russia sought to sustain an image of the USSR as a key and heroic contributor to Nazi Germany's defeat.[48]

Yet, the final ruling by the Grand Chamber in 2010, despite the protest by the Russian Federation, made Kononov the only former Soviet partisan convicted for war crimes committed in WWII.[49] This case was also a crucial milestone in the Baltic states' campaign to expose the atrocities of the Soviet regime, and in challenging Russia's policy of denial internationally.[50] What was concerning, is that the debate between universal standards, and the unequal application of the concept of war crimes asserted in the Kononov case represented how Russia's legal thinking remained splintered from Europe's more liberal mainstream, even despite Russia's membership in the CoE.[51] In a very short time this contrast grew so significant, that after Russia's invasion and annexation of Crimea in 2014, Moscow was stripped of its voting rights at CoE until 2019,[52] and again after starting war in Ukraine in 2022.[53]

1.3. Lithuanian cases at the ECtHR confronting the post-war concept of genocide

While Estonia and Latvia were dealing with national cases regarding Soviet crimes against humanity and war crimes during their occupations,[54] Lithuania has claimed since 1990 that some Soviet crimes amounted to genocide.[55] Lithuania has adopted a comprehensive national definition of genocide, encompassing the social and political groups which were excluded in the 1948 Genocide Convention

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48 Malksoo M. 2017, pp. 91–108.

49 Bigg C. Amid V-Day Festivities, Soviet Partisan Braces for War Crimes Verdict. 7 May 2010. Available: https://www.rferl.org/a/Amid_VDay_Festivities_Soviet_Partisan_Braces_For_War_Crimes_Verdict_/2035785.html [last viewed 06.01.2026].

50 Zilinskas J. 2011, pp. 859–870.

51 Malksoo L. 2011, pp. 101–108.

52 Wang Y. C. Council of Europe backs Russia's return: Ukraine reacts with fury to the move. 25 June 2019. Available: https://www.politico.eu/article/council-of-europe-backs-russias-return/ [last viewed 06.01.2026].

53 Crawford J. 2022.

54 Mertelsmann O., Raih-Tamm A. Soviet Mass Violence in Estonia Revisited. Journal of Genocide Research, Vol. 11, No. 2–3, 2009, pp. 307–322.

55 Budryte D. We Call It Genocide: Soviet Deportations ˙ and Repression in the Memory of Lithuanians. In: Frey R. S. (ed.). The Genocidal Temptation: Auschwitz, Hiroshima, Rwanda, and Beyond. Dallas: University Press of America, 2004; Sagatiene D. Deconstruction of Soviet Deportations in Lithuania in the Context of the Genocide Convention. International Criminal Law Review, Vol. 21, No. 3, 2021, pp. 588–608; Sagatiene D. The Debate about Soviet Genocide in Lithuania in the Case Law of The European Court of Human Rights. Nationalities Papers (Special Issue on 1918 and the Ambiguities of 'Old-New Europe'), Vol. 49, No. 6, 2020, pp. 776–791.

text, mainly for political reasons, and have been debated since then.[56] Between 1987 and 2017, 155 instances of potential genocide against Lithuanian partisans were investigated. A total of only ten persons were convicted, and four were left on probation due to poor health. Furthermore, five suspects died during their investigation, and a further twenty-five died during their trials.[57]

Two persons eventually reached the ECtHR to complain about their convictions by Lithuanian national courts for the crime genocide against Lithuanian partisans. These cases, of Vasiliauskas v. Lithuania (2015) and Drelingas v. Lithuania (2019), both allowed the ECtHR to address the legal definition of genocide. In the former case, the question for the Court was whether the applicant's conviction for genocide in 2005 by Lithuanian courts was reasonably foreseeable in light of international law as formulated in 1953, when the crime was committed during his former role as a Soviet official.[58] The ECtHR's Grand Chamber rendered a heavily divided verdict, ruling by nine votes to eight that said conviction for genocide of certain groups on the basis of post-Soviet Lithuanian legislation was not sufficiently foreseeable, and thus that the conviction violated Article 7 ECHR. In the Drelingas case, the question before the Court was practically identical: whether the applicant could have sufficiently foreseen that his conduct would have amounted to genocide in 1956 under international law. In March 2019, the ECtHR upheld the Lithuanian domestic judgment, whereby partisans were recognized

[56] Zilinskas J. Broadening the Concept of Genocide in Lithuania's Criminal Law and the Principle of nullum crimen sine lege. Jurisprudencija, No. 4(118), 2009, pp. 333–348; Law of the Seimas of the Republic of Lithuania Regarding Responsibility for the Genocide of the Lithuanian Population [Del atsakomybes u Lietuvos gyventoju genocida], 15 April 1992. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.2006?jfwid=xrbliefas [last viewed 06.01.2026]; In 1992, Lithuania acceded both to the Genocide Convention, and to the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Simultaneously Lithuania's 'Law on responsibility for genocide of inhabitants of Lithuania' specifically recognised Soviet actions as genocidal; In 1998, these provisions were revoked, and the crime of genocide was thereafter incorporated into Articles 49 and 71 of the Criminal Code; In 2003, Article 99 of the new Criminal Code stipulated: "a person, who, seeking to physically destroy some or all of the members of any national, ethnic, racial, religious, social or political group, organizes, is in charge of, or participates in killing, torturing, or causing bodily harm to them, hindering their mental development, deporting them or otherwise inflicting on them situations which bring about the death of some or all of them, restricting births to members of those groups or forcibly transferring their children to other groups, shall be punished by imprisonment for a term of from five to twenty years or by life imprisonment."; Law of the Seimas of the Republic of Lithuania Supplementing the Criminal Code of The Republic of Lithuania with Articles 62(1), 71 and amending of Articles 8(1), 24, 25, 26, 35, 49, 54(1), 89, 21 April 1998. Available: https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpvg&documentId=a84fa232877611e5bca4ce385a9b7048&category=TAD [last viewed 06.01.2026].

[57] Sagatiene D. 2020, pp. 776–791.

[58] ECtHR Registrar of the Court. Conviction of an officer in the State security services for genocide was not justified. 20 October 2015. Available: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5204869-6446796&filename=Grand%20Chamber%20Judgment%20Vasiliauskas%20v.%20Lithuania%20-%20conviction%20of%20an%20officer%20in%20the%20State%20security%20services%20for%20genocide%20was%20not%20justified.pdf [last viewed 06.01.2026].

as comprising significant part of the Lithuanian nation. The ECtHR specifically agreed that their systematic killing was genocide of the Lithuanian nation in part.

The broader concept of genocide in Lithuanian law and Lithuanian historical cases before the ECtHR remains controversial among legal scholars.[59] One major point of criticism was the expansion of the definition of genocide to include "ethno-political" genocide as it potentially stretched the legal boundaries and retroactively broadened the scope of the Genocide Convention.[60] Some other scholars indicate that the numeric threshold for a substantial part of the group under the genocide definition was not met, and there was a lack of the required genocidal motive for cultural destruction.[61] Yet, for the first time, an international judicial institution had recognised that some crimes committed by USSR could be regarded as genocide. It is especially important given the context, that the ECtHR has repeatedly classified Soviet deportations of tens of thousands of Baltic peoples as crimes against humanity, not genocide.[62] Regardless, cases adjudicated before the ECtHR regarding (Soviet) genocide against Lithuanian partisans have together created more options, and provided confidence, for further victims of crimes committed under the USSR's occupation to fight for recognition of what they endured as genocide at both national and international levels.[63]

Moreover, as in the Estonian and Latvian cases, Lithuanian cases at the ECtHR engaged with another important dimension of Baltic state identity and continuity – the importance of politically active citizens supporting independence and defending it through armed resistance, specifically highlighting the significance of the partisan movement. Soviet repressions in Lithuania targeted eliminating the politically influential Lithuanian nationals who sought an independent state, considering the political community as a vital element of the nation. Partisans, representing a form of self-defence against occupation, played a crucial role in obstructing Soviet repression and maintaining Lithuanian statehood. In the Drelingas case, Lithuanian domestic courts highlighted the importance of

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[59] Bruskina N. 2022, pp. 137–159; Sagatiene D. 2020, pp. 776–791; Berster L. The Soviet Crackdown on Lithuanian Partisan Movements (1946–1956) – a Genocide? Background Deliberations on the ECHR Judgment in Drelingas v. Lithuania. International Comparative Jurisprudence, Vol. 7, No. 2, 2021, pp. 135–145. https://doi.org/10.13165/j.icj.2021.12.002; Kuris E. Vasiliauskas, Drelingas and beyond – an insider's view. In: International Scientific Conference Two Years After Drelingas Case: Changes and Perspectives for the Future. 10 September 2021, Vilnius. Available: https://cris.mruni.eu/server/api/core/bitstreams/fe08b331-8a95-46ef-9a53-57fcb73860b5/content [last viewed 06.01.2026].

[60] Minervini G. The Principle of Legality and the Crime of Genocide: Drelingas v. Lithuania. Human Rights Law Review, Vol. 20, No. 4, 2020, pp. 810–828.

[61] Berster L. 2021, pp. 135–145; Kuris E. 2021.

[62] Pettai E.-C. Prosecuting Soviet Genocide: Comparing the Politics of Criminal Justice in the Baltic states. European Politics and Society, Vol. 18, No. 1, 2017, pp. 52–65; Muiznieks N. Latvian-Russian Memory Battles at the European Court of Human Rights. In: Muiznieks N. (ed.). The Geopolitics of History in Latvian-Russian Relations. Riga: Academic Press of the University of Latvia, 2011, pp. 219–238.

[63] Sagatiene D. 2022, pp. 396–405.

Lithuanian partisans as an integral and indivisible part of the nation, reflecting international legal standards set by the Genocide Convention.[64]

This indicates the direct link between the concept of genocide and the nation's right to exist, which helps to explain why Lithuania, despite many obstacles, is and has spent a great deal of political and legal capital into legally proving that genocide was committed against them. While some believe it is too late to investigate post-war crimes, others contend that justice is essential for post-conflict societal recovery: providing insight into historical events, upholding the right to truth, and allowing victims to confront the culprits.[65] The Lithuanian historical cases at the ECtHR indicate once more the social and psychological power of the concept of genocide, which protects specific human groups, instead of individuals like in other international crimes. As noted by Philippe Sands, "categorising such atrocities as genocide is a vital first step for the future of the wellbeing of the victims. Calling it a genocide recognizes the group's identity, recognizes what was being done to it, and most significantly recognizes the right of the group to exist. Crimes against humanity does not do that".[66]

2. Baltic states advocating for Ukraine's right to exist in the context of the Nuremberg legacy

Russia's unlawful aggression against Ukraine, beginning in 2014 and escalating to total invasion 2022, represents the final stage of the decolonisation process of the Soviet empire.[67] As Russia itself has never got shed that colonial identity,[68] in the 2000s the idea of *Ruskij mir* was reinforced to influence relevant

[64] Sagatiene D. 2020, pp. 776–791.

[65] Kuczynska H. Nazi Crimes in Poland: A Never-Ending Search for Justice. Contemporary Central & East European Law, No. 1(133), 2019, p. 153; Drumbl M. A. Atrocity, Punishment and International Law. Cambridge: Cambridge University Press, 2007, pp. 173–180; Simpson G. J. Law, War and Crime: War Crimes, Trials and the Reinvention of International Law. Cambridge: John Wiley & Sons, 2007, pp. 79–105.

[66] Sands P. Genocide and Crimes against Humanity under International Law: A Personal Story, 26 February 2018. Available: https://www.youtube.com/watch?v=Thb00-2OuN0 [last viewed 06.01.2026].

[67] Kang B.-K. Understanding the Ukrainian Conflict from the Perspective of Post-Soviet Decolonization. Regional Studies of Russia, Eastern Europe, and Central Asia, Vol. 9, No. 2, 2020, pp. 1–27.

[68] Gerdziunas B., Vegyte S. Is Russia colonising Ukraine? Interview. 25 June 2022. Available: https://www.lrt.lt/en/news-in-english/19/1726069/is-russia-colonising-ukraine-interview [last viewed 06.01.2026].

audiences.[69] Russia has taken for granted its hegemonic role in the vacuum left by the USSR's collapse, and the legitimacy of its interests within the region.[70]

One of the main features of colonial wars is the denial that nations are real.[71] The current invasion is not the inevitable outcome of historical, cultural or political trends, but rather a result of Putin's outright rejection of Ukrainian sovereignty.[72] In 2022 Ukraine was attacked by Russia to crush its identity and rightful claim to exist after its experiences with the 20th-century totalitarian regimes. Russia's exploitation of Ukraine's totalitarian traumas of the twentieth century has made it a national security priority, as the in-parts blurred identity of Ukraine is the main reason for Russia to claim that Ukraine is not a real state, which has no right to exist, and needs to be destroyed via genocidal war. Genocidal intent can be traced in the official or officially endorsed Russian statements denying the existence of an actual Ukrainian nation, portraying a significant portion of its population and government as Nazis or existential threats to Russia. This portrayal renders the country a legitimate target for destruction through continuation of a "denazification" process. There are many public cases by high Russian officials denying Ukraine's right to exist, calling for its destruction.[73] Probably the most notable high-level public declarations, which could be considered as genocidal, are the following: a) Putin's essay of July 2021;[74] b) Putin's speech before the invasion on 21 February 2022;[75] c) RIA Novosti editorial entitled 'What Russia should do with Ukraine 'on 3 April 2022;[76] and d) a Telegram post by Dmitry Medvedev on 5 April 2022.[77] Each of these pieces contribute to establishing the state ideology towards Ukraine and can be considered as elements of the Russian genocidal plan to exterminate Ukraine, denying the nation's right to exist in general.

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[69] Kudors A., Orttung R. Russian Public Relations Activities and Soft Power. Russian Analytical Digest, No. 81(10), 2010, pp. 1–13.

[70] De Waal T. The End of the Near Abroad. 16 May 2024. Available: https://carnegieendowment.org/research/2024/05/the-end-of-the-near-abroad?lang=en&center=middle-east [last viewed 06.01.2026].

[71] Gerdziunas B., Vegyte S. 2022.

[72] Wang J. How Putin's invasion of Ukraine connects to 19th-century Russian imperialism. 7 March 2022. Available: https://news.uchicago.edu/story/putin-invasion-ukraine-russian-empire-19th-century-imperialism-history [last viewed 06.01.2026].

[73] Wang Diamond Y., et al. An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent. May 2022. Available: https://newlinesinstitute.org/wp-content/uploads/An-Independent-Legal-Analysis-of-the-Russian-Federations-Breaches-of-the-Genocide-Convention-in-Ukraine-and-the-Duty-to-Prevent-1-2.pdf [last viewed 06.01.2026].

[74] Putin V. 2021. On the Historical Unity of Russians and Ukrainians. 12 July 2021. Available: http://en.kremlin.ru/events/president/news/66181 [last viewed 06.01.2026].

[75] The Kremlin. Address by the President of the Russian Federation. 21 February 2022. Available: http://en.kremlin.ru/events/president/news/67828 [last viewed 06.01.2026].

[76] Sergeytsev T. Chto Rossija dolzhna sdelat' s Ukrainoj [What Russia should do with Ukraine], 4 March 2022. Available: https://archive.ph/FoMBp [last viewed 06.01.2026].

[77] Medvedev D. O fejkah i nastojashhej istorii [About fakes and real history]. 5 April 2022. Available: https://t.me/medvedev_telegram/34 [last viewed 06.01.2026].

The Baltic states thus view legal accountability for historical Soviet crimes as fundamental: not only to attain albeit delayed justice for their victims, but furthermore to reinforce recognition of Ukraine's right to exist. The Baltic states have become perhaps the leading voice in Europe in support of Ukraine – continuously arguing in favour of EU and NATO membership, and for harsher sanctions against Russia.[78] The Baltics have further played a key role in advocating for justice and accountability across several legal arenas, too.[79] After Russia invaded Ukraine, Lithuania was the first to referred the situation to the ICC,[80] and with its fellow Baltic states furthermore championed the establishment of the Joint Investigative Team at Eurojust (JIT)[81] which is gathering evidence for potential war crimes trials, and has sent investigative teams to assist their Ukrainian colleagues.[82] It has additionally advocated for a special international tribunal to arraign Russia for this aggression, and supported Ukraine's genocide case against Russia at the International Court of Justice (ICJ[83]).[84] The actions of Lithuania, Latvia, and Estonia represent a fundamental challenge to this long-standing order of unaccountability of international crimes in eastern Europe, signalling a shift towards a more just and accountable international legal framework based on Nuremberg principles.

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[78] Budryte D. Memory, War, and Mnemonical In/Security: A Comparison of Lithuania and Ukraine. In: Resende E., Budryte D., Buhari-Gulmez D. (eds.). Crisis and Change in Post-Cold War Global Politics: Ukraine in a Comparative Perspective. Palgrave Macmillan, 2018, pp. 155–177; Budryte D. Memory Politics and the Study of Crises in International Relations: Insights from Ukraine and Lithuania. Journal of International Relations and Development, Vol. 24, No. 4, 2021, pp. 980–1000. https://doi.org/10.1057/s41268-021-00231-1

[79] Anderson J. H. Why Lithuania is at The Forefront of The Ukrainian Lawfare. 9 September 2022. Available: https://www.justiceinfo.net/en/106188-why-lithuania-forefront-ukrainian-lawfare.html [last viewed 06.01.2026].

[80] AFP. ICC: Historic State Referrals Accelerate Opening of An Investigation on Ukraine. 2 March 2022. Available: https://www.justiceinfo.net/en/88144-icc-historic-state-referrals-accelerates-opening-investigation-ukraine.html [last viewed 06.01.2026].

[81] Crawford J. 2022, Eurojust. Press conference – Joint investigation team on alleged core intl. crimes in Ukraine. 21 May 2022. Available: https://www.youtube.com/watch?v=_HW9AcF-AxI&t=351s [last viewed 06.01.2026].

[82] Anderson J. H. A Nuremberg for Russia's Crime of Aggression? 11 April 2022. Available: https://www.justiceinfo.net/en/91135-nuremberg-russia-crime-of-aggression.html [last viewed 06.01.2026]; Brzozowski A. Baltics call for special tribunal to try Russian leadership for 'crime of aggression'. 17 October 2022. Available: https://www.euractiv.com/section/europe-s-east/news/baltics-call-for-special-tribunal-to-try-russian-leadership-for-crime-of-aggression/ [last viewed 06.01.2026].

[83] The International Court of Justice, seated in The Hague, is the principal judicial organ of the United Nations. More information can be found at: www.icj-cij.org/home.

[84] Quell M., Cruvellier T. The International Court of Justice Orders Russia to Stop Its Invasion of Ukraine. 17 March 2022. Available: https://www.justiceinfo.net/en/88936-international-court-of-justice-orders-russia-stop-invasion-ukraine.html [last viewed 06.01.2026]; US Office of Public Affairs. Readout of Assistant Attorney General Kenneth A. Polite, Jr.'s Trip to Lithuania, 17 April 2023. Available: https://www.justice.gov/opa/pr/readout-assistant-attorney-general-kenneth-polite-jr-s-trip-lithuania [last viewed 06.01.2026].

The Baltic states and Ukraine share postcolonial trauma of past crimes by two totalitarian regimes during the twentieth century,[85] not to mention their common history within the Lithuanian Grand Duchy until the 18th century. The Baltics and Ukraine possess similar collective memories regarding their Soviet past, especially under Stalin, which were triggered in 2022. To this end, their countries have created similar memory regimes,[86] both of which came into force in 2014, thereby consolidating and somewhat codifying their collective traumatic experiences.[87] The consolidation and stimulation of traumatic memories can have a powerful impact on subject's sense of identity, and creates the desire, as well as resolve to act.[88]

In spite of these similarities, the Baltic states and Ukraine rode down quite different paths after (re)gaining independence from the USSR in 1991. The Baltic states relatively quickly attained membership in both the EU and NATO, whereas Ukraine, struggling with transitional and identity challenges, was more isolated from transatlantic communities and institutions. The newly-independent Baltic countries quickly revised their official narratives to both emphasise their historical and cultural ties to western Europe, and to criticise authoritarian regimes. The transition from a socialist economy, political domination of the communist party, and an eastern-oriented international strategy, to a liberal market economy, political pluralism, and integration into the Euro-Atlantic structures shaped the reframing of these narratives, memories, and related politics.[89] Although many communist leaders came from Ukraine, and though the country served as a major centre of Soviet agriculture and industry, the region was also resistant to Soviet rule. When Ukraine started moving westwards in development, particularly after the Euromaidan protests and the subsequent annexation of Crimea by Russia, discourse about Russian civilisation and the unity of Russia and Ukraine was dramatically enhanced.[90] Ukraine's recent reorientation and attempted

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[85] Gerdziunas B., Vegyte S. 2022; Milisic A. Bosnians relive past war trauma as Russia invades Ukraine. 3 March 2022. Available: https://www.aljazeera.com/features/2022/3/3/bosnians-relive-past-war-trauma-as-russia-invades-ukraine [last viewed 06.01.2026]; International Centre on Nazi Persecution. War in Ukraine: Trauma and re-traumatization. 30 March 2022. Available: https://arolsen-archives.org/en/news/war-in-ukraine-trauma-and-re-traumatization/ [last viewed 06.01.2026]; Zhurzhenko T. War and Memory in the Post-Soviet Space: Arming without Borders? Hamburg: Koeber Stiftung, 2022.

[86] Assmann A. Cultural Memory and Western Civilization: Functions, Media, Archives. Cambridge: Cambridge University Press, 2012; "Memory regimes" refer to the systems or frameworks established by societies or governments to manage, interpret, and memorialize historical events, especially those that are contentious, traumatic, or significant.

[87] Budryte D. Living through the other: Lithuania's emotional identification with Ukraine. 18 September 2022. Available: https://www.lrt.lt/en/news-in-english/19/1780392/living-through-the-other-lithuania-s-emotional-identification-with-ukraine [last viewed 06.01.2026].

[88] Budryte D. 2022; Budryte D. 2021.

[89] Mink G., Neumayer L. History, Memory and Politics in Central and Eastern Europe Memory Games. London: Palgrave Macmillan UK, 2013, p. 3.

[90] Gerdziunas B., Vegyte S. 2022.

strengthening of its western ties further threatened Putin's view of the country as "a buffer between himself and the West".[91]

This historical perspective influences Baltic support for Ukraine, as they see emotional parallels between Ukraine's struggle for sovereignty and their own historical fight for independence, reinforcing their commitment to Ukraine's right to exist as a sovereign nation, and not to become the part of the *Ruskij mir*. It is essential for Ukraine to approach its own twentieth century oppressive and totalitarian experience as a single narrative in order to claim the right to exist after the war, and to further align with the outside world.[92] This process was already underway since at least 2014, and was accelerated greatly after 2022. The question is, how will the war in Ukraine affect European identity and the EU's commitment to justice for international crimes?[93]

Conclusions

This article has examined ECtHR jurisprudence concerning Soviet-era crimes prosecutions in the Baltic states, while comparing the case law of the European Court of Human Rights with the legacy of Nuremberg Tribunal. The analysis demonstrates that while these institutions differ fundamentally in mandate, structure, and legal function, their jurisprudential relationship reveals important continuities in the current development of international accountability.

The Baltic historical cases at ECtHR primarily aimed to give a voice to the history of Soviet victims and achieve a semblance of justice for them by empowering the principles established at Nuremberg after WWII. These cases, brought before the ECtHR in the 2000s by the three Baltic states, each emphasised distinct yet vital aspects of Baltic state identity and continuity. Estonia centred on the issue of illegal Soviet occupation, Latvia confronted Russian denial of Soviet crimes and the misleading narrative of liberation, while Lithuania secured recognition of certain Soviet crimes as the gravest offenses against a nation's right to exist, constituting the crime of genocide.

The analysis of these cases suggests that ECtHR jurisprudence contributes to the consolidation of a post-Nuremberg accountability framework in Europe, while simultaneously exposing the limits of contemporary international legal institutions in addressing historical and politically contested atrocities. The Baltic cases illustrate how domestic prosecutions of Soviet-era crimes are filtered through human rights standards that both enable and constrain accountability.

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[91] Wang J. 2022.

[92] Dickinson P. Ukraine's Unique Totalitarian Trauma Offers Key to Historic Healing. 9 May 2016. Available: https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-s-unique-totalitarian-trauma-offers-key-to-historic-healing/ [last viewed 06.01.2026].

[93] Zhurzhenko T. 2022.

Finally, these patterns offer broader analytical insights relevant to current debates on international responses to Russia's aggression against Ukraine.

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Naste Grubliauskiene, *LL.M.*
Mykolas Romeris University, Lithuania

ACCESS TO REPRODUCTIVE HEALTH CARE SERVICES FOR WOMEN WITH DISABILITIES IN LITHUANIA: HUMAN RIGHTS AND PRACTICAL CHALLENGES

Key words: disability, women, reproductive health, discrimination, accessibility, human rights

Summary

There are approximately 46 million women and girls with disabilities living in the European Union, based on a functional understanding of disability. Despite this significant number, discrimination against this group remains pervasive. Access to both general and reproductive health care services continues to be limited and, for many, unattainable. Barriers stem from practical obstacles – such as inadequate infrastructure, insufficient accessibility, and lack of effective communication – as well as legal and systemic issues, including entrenched discriminatory attitudes. Women with disabilities are still too often perceived as asexual or unfit for motherhood, which reinforces their exclusion from reproductive health services.

International and European human rights law prohibits discrimination on the grounds of disability and requires states to ensure equal and effective access to health care. The aim of this article is to assess whether the Lithuanian legal framework and its implementation ensure effective and non-discriminatory access to reproductive health care services for women with disabilities, considering international and European human rights obligations. The article examines structural, legal and attitudinal barriers that persist in practice and evaluates their compatibility with the principles of equality, non-discrimination and reproductive autonomy.

Introduction

Art. 1 of the Convention on the Rights of Persons with Disabilities (hereinafter – the Convention) indicates that persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective

participation in society on an equal basis with others.[1] Art. 6 of the Convention is a binding equality and non-discrimination provision that clearly prohibits discrimination against women with disabilities and seeks to ensure both equal opportunities and equal outcomes.

According to WHO Global Disability Action Plan 2014–2021,[2]

> *Disability is universal. Everybody is likely to experience disability directly or to have a family member who experiences difficulties in functioning at some point in his or her life, particularly when they grow older. […] this action plan uses "disability" as an umbrella term for impairments, activity limitations and participation restrictions, denoting the negative aspects of the interaction between an individual (with a health condition) and that individual's contextual (environmental and personal) factors. Disability is neither simply a biological nor a social phenomenon.*

People with disabilities encounter extensive obstacles when trying to access services such as health care (including medical treatment, therapy, and assistive technologies), education, employment, and social support, including housing and transport. These barriers stem from factors such as insufficient legislation, policies, and strategies; limited service availability; shortcomings in service delivery; low levels of disability awareness and understanding; negative attitudes and discrimination; poor accessibility; inadequate funding; and minimal involvement of persons with disabilities in decisions that affect their lives. Additional barriers also hinder their ability to express their views and to seek, receive, and share information and ideas on an equal basis with others, using the communication methods of their choice.[3]

There are approximately 46 million women and girls with disabilities living in the European Union, based on a functional understanding of disability, while in Lithuania around 120 000 women and girls are officially recognized as persons with disabilities under national law. It should be noted that statistical data on disability may vary depending on whether it is based on a legal status of disability or on a functional definition, as reflected in the UN Convention on the Rights of Persons with Disabilities.[4] However, despite significant number, women with disabilities often face double discrimination at the intersection of gender and disability, limiting their access to reproductive health services and undermining their reproductive autonomy. This issue is particularly topical due to its

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1 Convention on the Rights of Persons with disabilities and Optional Protocol. Adopted 13.12.2006.

2 WHO Global Disability Action Plan 2014–2021. Better health for all people with disability. World Health Organization 2015. Available: https://iris.who.int/server/api/core/bitstreams/66d03dfb-99ae-4e8e-bb62-48a62311f305/content [last viewed 14.08.2026].

3 WHO Global Disability Action Plan 2014–2021. Better health for all people with disability. World Health Organization, 2015.

4 Negalios statistika ir dinamika [Disability statistics and dynamics]. Available: https://socmin.lrv.lt/lt/veiklos-sritys/socialine-integracija/negalios-reforma-ir-asmenu-su-negalia-itrauktis/statistika-2/ [last viewed 25.11.2025].

intersectional character, as discrimination arises on multiple, interacting grounds, such as gender and disability, which operate simultaneously and are inseparable in their effects[5]. History, attitudes, and prejudices of our societies, including those embedded within families, have shaped and continue to reinforce negative stereotypes about women and girls with disabilities, contributing to their further isolation and marginalization.[6] Reproductive health is an inherent component of the right to health and bodily autonomy. Persistent stereotypes portraying women with disabilities as asexual, infantilized, or unfit for motherhood further entrench this exclusion.[7]

1. Women with disability as a specific right holders' group

Women with disabilities form a highly diverse group. They include indigenous women; refugees, migrants, asylum seekers, and internally displaced women; women in various forms of detention (such as hospitals, residential institutions, juvenile facilities, or prisons); women living in poverty; women from different ethnic, religious, and racial communities; women with multiple disabilities or high support needs; women with albinism; as well as lesbian, bisexual, and transgender women and intersex persons.[8] This diversity also encompasses all types of impairments – physical, psychosocial, intellectual, or sensory – which may or may not involve functional limitations.[9]

Despite significant numbers of women with disabilities and extensive legal base, this demographic group continues to be discriminated. Barriers in reproductive healthcare, ranging from inadequate infrastructure and inaccessibility to discriminatory attitudes and systemic legal gaps, continue to raise serious concerns about compliance with international and European human rights standards.

Protecting the human rights of women requires a deep understanding of the social structures and power dynamics that shape laws and policies, as well

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[5] Discrimination that takes place on the basis of several personal grounds or characteristics/identities, which operate and interact with each other at the same time in such a way as to be inseparable. European Union Agency for Fundamental Rights – FRA (2009). Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation. Available: https://eige.europa.eu/publications-resources/thesaurus/terms/1395?language_content_entity=en [last viewed 31.03.2026].

[6] Siri A., Leone C., Bencivenga R., Zavirsek D., Bezjak S. Women, disability, and culture. New York: Nova Science Publishers, Inc., 2020, p. 10.

[7] Moterys su negalia ir reprodukcine sveikata – tyrimo ataskaita [Women with disability and reproductive health – research report]. Vilnius, 2023. Available: https://share.google/XkyBZ45HNgoTvlulo [last viewed 14.08.2026].

[8] United Nations general comments and recommendations. General comment No. 3 on Article 6 – women and girls with disabilities. 25 November 2016, p. 2 Available: https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no3-article-6-women-and-girls [last viewed 14.08.2026].

[9] General comment No. 3 on Article 6 – women and girls with disabilities. 25 November 2016, p. 2.

as the economic, social, familial, and cultural contexts in which they live. Gender stereotypes can restrict women's opportunities to develop their talents, advance in their careers, and make independent decisions about their lives and future.[10]

It should also be clearly stated that disability and gender are not the only grounds of discrimination affecting women with disabilities. Discrimination against women and girls with disabilities takes multiple forms, including direct and indirect discrimination, discrimination by association,[11] denial of reasonable accommodation, and systemic or structural discrimination. These practices undermine their ability to enjoy their human rights on an equal basis with others.[12]

In case G. M. and others against the Republic of Moldova the European Court of Human Rights held that there had been a violation of Art. 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights[13] in both its substantive and its procedural aspects. It noted that the domestic authorities had failed to carry out an effective investigation into the applicants' allegations of ill-treatment despite it having been reopened on four occasions following their appeals. Moreover, the inquiry had not factored in their vulnerability as intellectually disabled women exposed to sexual abuse in an institutional context. The Court also found that the domestic criminal law had not provided effective protection against such invasive medical interventions carried out without the patient's valid consent.[14]

Across many cultures, deeply entrenched stereotypes persist regarding the sexuality of persons with disabilities. These perceptions are predominantly negative and tend either to deny their sexuality altogether or to frame it as inherently problematic.[15] The persistent inaccessibility of reproductive health care services for women with disabilities should not be understood as a collection of isolated, incidental, or purely logistical shortcomings. Rather, it constitutes a form of structural discrimination, embedded in the organization, regulation, and delivery of health-care systems. Structural discrimination arises when apparently neutral policies, institutional practices, and systemic omissions disproportionately disadvantage a particular group and perpetuate inequality, even in the absence of explicit discriminatory intent.

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[10] General comment No. 3 on Article 6 – women and girls with disabilities. 25 November 2016, p. 6.

[11] A decision by the Court of Justice of the European Union on 11 September reaffirms that protection against discrimination at work on the grounds of disability must extend to discrimination "by association". This means that employers are obliged to provide adaptations to working arrangements for employees with a responsibility for caring for and supporting children with disabilities.

[EU] Court of Justice's decision enhances protection at work for carers of children with disabilities. European Disability Forum. Available: https://www.edf-feph.org/eu-court-of-justices-decision-enhances-protection-at-work-for-carers-of-children-with-disabilities/ [last viewed 14.08.2026.].

[12] General comment No. 3 on Article 6 – women and girls with disabilities. 25 November 2016, p. 5.

[13] European Convention on Human Rights. Signed in Rome on 4 November 1950.

[14] Persons with Disabilities and the European Convention of Human Rights. Available: https://www.echr.coe.int/documents/d/echr/fs_disabled_eng [last viewed 14.08.2026].

[15] Sexual and reproductive rights. Geneva Foundation for Medical Education and Research. Available: https://www.gfmer.ch/srr/peoplewithdisability.htm [last viewed 14.08.2026].

2. Access to (reproductive) health care services for women with disability

Research consistently shows that women and girls with disabilities face significant barriers in accessing health care, including sexual and reproductive health services. These obstacles contribute to multiple, overlapping forms of discrimination and limit their ability to make informed decisions and exercise control over their own lives.[16]

In 2023 Lithuania Disability Forum[17] conducted a survey of women with disabilities and healthcare professionals regarding access to reproductive health care.[18] In discussions on service accessibility, healthcare professionals mainly highlighted two areas: the physical accessibility of facilities and equipment, and situations requiring alternative means of communication, such as sign language interpretation or simplified language. It became clear that doctors are often left to improvise and "figure things out creatively", as they put it, because they lack knowledge about accessibility standards and the individual needs of persons with disabilities. Although their accounts reflect genuine empathy and efforts to preserve the dignity of patients with disabilities, many questioned whether fully accessible services are realistically achievable given limited resources, and whether this responsibility lies solely with healthcare institutions.[19]

It was acknowledged that in the facilities not all rooms or equipment are accessible. Renovating older buildings was described as particularly challenging, and some healthcare professionals questioned whether it is rational to invest in expensive equipment that, in their view, would be rarely used. Even in newly built hospitals, elements that reduce patient autonomy remain, for example, heavy doors that are difficult to open. While doctors recognize the importance of accessibility, they emphasized that at present the quality of care depends more on goodwill than on accessible infrastructure.[20]

In March 2021, an article "The Experiences of Lithuanian Obstetricians and Gynaecologists in Providing Health Care Services to Patients with Disabilities",[21] written by three doctors, was published in medical scientific journal "Lithuanian Obstetrics and Gynaecology". In this article, authors stated:

> *Disabled women require not only rehabilitation services and treatment for the conditions that caused their disability, but also regular, high-quality*

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[16] General comment No. 3 on Article 6 – women and girls with disabilities. 25 November 2016, p. 6.

[17] Lietuvos negalios organizaciju forumas [Lithuanian disability forum]. Available: https://www.lnf.lt/

[18] Moterys su negalia ir reprodukcine sveikata – tyrimo ataskaita [Women with disability and reproductive health – research report]. Vilnius, 2023. Available: https://share.google/XkyBZ45HNgoTvlulo [last viewed 14.08.2026].

[19] Ibid.

[20] Ibid.

[21] Kancaite R., Jariene K., Jaras K. Obstetricians and gynaecologists' experience in healthcare provision for disabled patients in Lithuania. Lithuanian Obstetrics and Gynaecology, Vol. XXIV, No. 1, March 2021.

services from an obstetrician – gynaecologist. As with non-disabled women, disabled women must be provided with conditions that enable them to receive comprehensive, unbiased counselling on family planning issues, to participate in preventive cervical and breast cancer screening programmes, and to obtain other necessary reproductive health care. According to research data, women with physical disabilities are screened less frequently for breast and cervical cancer, and they undergo regular gynaecological examinations less often. Both women with physical and intellectual disabilities receive insufficient information on contraception, preparation for pregnancy, and pregnancy planning. Disabled women are more likely to receive inadequate prenatal care, face a higher risk of preterm birth and low birth weight of the newborn, are more frequently hospitalized during pregnancy, and are more often delivered by caesarean section.[22]

The findings show that women and girls with disabilities in Lithuania continue to face substantial and multifaceted barriers in accessing health care, particularly reproductive health services. While healthcare professionals in Lithuania demonstrate goodwill and empathy, the system itself remains ill-equipped to meet accessibility needs, relying too heavily on individual improvisation rather than structural support. Physical inaccessibility, insufficient adaptive equipment, limited communication and a lack of knowledge about disability-inclusive practices all contribute to unequal and often inconsistent care. These challenges are further compounded by the complex health needs many women with disabilities experience, which require regular and reliable access to medical services.

Understanding reproductive health care inaccessibility as structural discrimination shifts the analytical focus from individual failures to systemic responsibility. It highlights that the problem lies not in the exceptional needs of women with disabilities, but in the failure of health-care systems to accommodate human diversity. This perspective aligns with international human rights law, particularly the Convention on the Rights of Persons with Disabilities, which requires States to move beyond formal equality and adopt structural measures aimed at achieving substantive and effective equality in access to health care.

3. Legal framework of disability in Lithuania

Lithuania is a part of United Nations Convention on the Rights of Persons with Disabilities[23] and the Convention on the Elimination of All Forms of Discrimination against Women[24] (hereinafter – CEDAW) and, as a member state

[22] Obstetricians and gynaecologists' experience in healthcare provision for disabled patients in Lithuania. Lithuanian Obstetrics and Gynaecology, Vol. XXIV, No. 1, March 2021.

[23] Convention on the Rights of Persons with Disabilities and Optional Protocol. Adopted on 13 December 2006.

[24] Convention on the Elimination of All Forms of Discrimination against Women. Adopted on 18 December 1979.

of European Union (hereinafter – EU), a part of EU Charter of Fundamental Rights[25] and EU strategy on the Rights of Persons with Disabilities 2021–2030[26]. On national level, Lithuania has a Law on the Fundamentals of the Protection of the Rights of Persons with Disabilities,[27] Law on Equal Opportunities,[28] Law on Patients' Rights and Compensation for Damage to Health[29] and Law on Assisted Reproduction.[30] The latter is the only law concerning reproductive rights as there in no Reproductive Rights Act in Lithuania. The scope of the Assisted Reproduction Law is inherently exclusionary: it addresses access to specific technologies under strictly defined conditions, leaving outside its regulatory reach a wide range of reproductive health services, including education, contraception, prenatal and postnatal care, fertility counselling, and disability-inclusive reproductive support. Moreover, the law primarily reflects a biomedical and family policy-oriented approach, rather than a rights-based framework grounded in non-discrimination and autonomy. As such, its existence does not compensate for the absence of a systemic legal recognition of reproductive health rights, nor does it address the structural barriers faced by women with disabilities in accessing reproductive care.

The Law on Equal Opportunities explicitly prohibits discrimination on the grounds of disability and is applicable horizontally across various fields, including access to health care services. However, its provisions remain general in nature and do not establish concrete, sector-specific obligations to ensure accessibility and reasonable accommodation in practice.

While the law provides a general prohibition of discrimination, it does not sufficiently operationalize the duty to adapt health-care services to the specific needs of persons with disabilities. As a result, the realization of equality in access to health care, including reproductive health services, remains largely dependent on the interpretation and goodwill of individual institutions rather than on clear and enforceable legal standards.

Disability-related issues are often treated in a declarative manner, with legislation enshrining abstract norms that are not applied in practice. This suggests

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[25] Charter of Fundamental Rights of the European Union. Signed in Nice on 7 December 2000.

[26] Union of Equality: Strategy for the Rights of Persons with Disabilities. Directorate-General for Employment, Social Affairs and Inclusion (European Commission), 2021. Available: https://op.europa.eu/en/publication-detail/-/publication/3e1e2228-7c97-11eb-9ac9-01aa75ed71a1/language-en [last viewed 14.08.2026].

[27] Lietuvos Respublikos asmens su negalia teisiu apsaugos pagrindu istatymas [Law on Protection of Fundamental Rights of People with Disabilities] (Lietuvos Aidas, No. 249; 1991, No. 36-969; Zin., 1998, No. 98-2706; 2004, No. 83-2983; TAR, 4 January 2023, No. 2023-00135).

[28] Lietuvos Respublikos lygiu galimybiu istatymas [Law on Equal Opportunities of the Republic of Lithuania] (Zin., 2003, No. 114-5115; 2008, No. 76-2998; TAR, 17 November 2016, No. 2016-26967).

[29] Pacientu teisiu ir zalos sveikatai atlyginimo istatymas [Law on Patients' Rights and Compensation for Damage to Health].

[30] Lietuvos Respublikos pagalbinio apvaisinimo istatymas [Law on Assisted Reproduction of the Republic of Lithuania] (TAR, 19 September 2016, No. 2016-23713).

that women and girls with disabilities in Lithuania are discriminated against on two grounds: gender and disability.

The Constitutional Court of the Republic of Lithuania has established that the provisions of Art. 29 of the Constitution enshrine the principle of equality of all persons. In interpreting the provisions of Art. 29 of the Constitution, the Constitutional Court has noted that the constitutional principle of equality of all persons—which must be observed in the enactment of laws, their application, and the administration of justice—requires that identical facts be assessed equally in legal terms and prohibits the arbitrary assessment of essentially similar facts in a different manner; that the constitutional principle of equality of all persons establishes formal equality of all persons; and that individuals may not be discriminated against nor granted privileges. The constitutional principle of equality before the law would be violated if certain persons or groups of persons were treated differently despite the absence of differences of such a nature and extent that unequal treatment could be objectively justified.[31] However, in the context of disability, the concept of equality cannot be limited to formal equality alone. It must also encompass substantive equality, which recognizes that treating persons in significantly different situations in the same manner may itself result in discrimination. This reflects the Aristotelian paradigm of equality, according to which justice requires treating like cases alike and different cases differently. In this sense, discrimination may arise not only from differential treatment, but also from a failure to differentiate where it is necessary. In the case of persons with disabilities, the denial of reasonable accommodation or the failure to take into account their specific needs may lead to indirect or structural discrimination, even where legal norms appear neutral. Therefore, ensuring equality requires not only the prohibition of unequal treatment, but also the adoption of positive measures aimed at securing equal opportunities and effective access to rights.

Despite Lithuania's extensive international and European human rights commitments, reproductive health rights are not systematically articulated or protected within the national legal framework. Lithuanian legislation lacks a comprehensive and coherent conception of reproductive health as a set of autonomous, enforceable rights grounded in bodily integrity, personal autonomy, and equality. Instead, reproductive matters are regulated in a fragmented and sectoral manner, resulting in normative gaps that disproportionately affect women, particularly women with disabilities.

This gap is particularly evident in the field of reproductive health, where the absence of a comprehensive Reproductive Rights Act results in a lack of explicit legal obligations to ensure accessibility and reasonable accommodation for women with disabilities.

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[31] On Holding a Mandatory Referendum Over Two Days with a Two-Week Interval. Constitutional Court of the Republic of Lithuania, ruling of 15 February 2019, No. KT8-N2/2019. Infolex Collection – Key Jurisprudence Excerpts. Available: Infolex (http://www.infolex.lt/rp/) [last viewed 12.12.2025].

Conclusions

This article has examined whether the Lithuanian legal framework and its implementation ensure effective and non-discriminatory access to reproductive health care services for women with disabilities in accordance with international and European human rights standards. The analysis demonstrates that, despite extensive formal commitments to equality and non-discrimination, women with disabilities in Lithuania continue to face persistent and systemic barriers that significantly undermine their reproductive autonomy.

The findings indicate that barriers to reproductive health care for women with disabilities cannot be understood as isolated practical shortcomings or the result of individual failures within the health-care system. Rather, they constitute a pattern of structural discrimination, arising from the interaction of physical inaccessibility, insufficient adaptive equipment, inadequate communication support and entrenched social and medical stereotypes. These barriers are predictable and recurring, revealing that reproductive health services remain implicitly designed around the norm of the able-bodied patient, thereby excluding women with disabilities from services that are formally available to others.

The legal analysis further reveals a fundamental normative gap within Lithuanian law. Reproductive health rights are not systematically articulated or protected as autonomous, enforceable rights grounded in bodily integrity, personal autonomy, and equality. The regulation of assisted reproduction, while often presented as evidence of reproductive rights protection, addresses only a narrowly defined set of medical technologies and does not amount to a comprehensive recognition of reproductive health rights. This fragmented and sectoral approach leaves significant aspects of reproductive health – particularly those relevant to women with disabilities – outside the scope of effective legal protection.

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17. General comment No. 3 on Article 6 – women and girls with disabilities, 25 November 2016, p. 2 Available: https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no3-article-6-women-and-girls [last viewed 14.08.2026].
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Agne Juskeviciute-Viliene, *Dr. iur., Associate Professor*
Vilnius University, Lithuania

HOW DOES THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA RECONCILE ENVIRONMENTAL PROTECTION STANDARDS WITH THE PRINCIPLE OF ECONOMIC FREEDOM?

Key words: environmental constitutionalism, climate change litigation, economic freedom, proportionality, Constitutional Court of the Republic of Lithuania

Summary

The aim of this article is to examine the balance struck by the Constitutional Court of the Republic of Lithuania between environmental protection and the freedom of economic activity. Relying on national constitutional jurisprudence, this analysis examines the Court's application of proportionality and public interest reasoning in resolving tensions between economic development and environmental objectives. The Waste-to-Energy case illustrates an evidence-based and sustainability-oriented approach to constitutional balancing.

Introduction

The growing impact of climate change has significantly altered the role of constitutional law, prompting states to reconsider the extent of their constitutional obligations regarding environmental protection. Constitutional courts are therefore increasingly tasked with reconciling environmental imperatives with other constitutionally protected values. This tension is particularly evident in legal systems that primarily frame environmental protection through state obligations rather than explicit individual rights.

The aim of this article is to analyse how the Constitutional Court of the Republic of Lithuania (LCC, CC) interprets and applies constitutional principles when balancing environmental protection requirements with the freedom of individual economic activity.

The research employs doctrinal legal methods, including document analysis, comparative analysis and teleological interpretation. Based exclusively on the jurisprudence of LCC, the study examines how constitutional values are coordinated in cases involving environmental regulation, economic freedom and public interest considerations.

The literature used in this article consists of a limited body of works by Lithuanian legal researchers addressing this topic (in particular J. Zilys, R. Ragulskyte-Markoviene and A. Juskeviciute-Viliene), supplemented by selected contributions of internationally recognised authors in this field, including L. Weis and J. Kimblin. By focusing on constitutional jurisprudence at the national level, this article aims to enhance the understanding of how Lithuania's constitution responds to environmental challenges within the broader context of European constitutionalism[1].

1. Why environmental protection matters for constitutional law today

Over the past decade, environmental protection and climate change have moved from the periphery to the very centre of constitutional discourse. Climate change no longer constitutes merely an environmental or scientific concern. Instead, it poses a profound challenge to the foundations of democratic governance, the effective protection of fundamental rights, and the pursuit of social justice. As an existential and long-term phenomenon, climate change compels states to reconsider the scope and content of their constitutional responsibilities and invites courts to reassess the boundaries of state accountability for environmental harm and the protection of future generations.

Climate change represents one of the most fundamental challenges to contemporary constitutionalism. It raises questions about whether traditional constitutional frameworks that are built around the separation of powers, the protection of individual rights, and the rule of law are capable of addressing systemic, cumulative, and intergenerational risks.[2] In particular, it brings into focus the issue of whether constitutional guarantees can effectively require states to adopt proactive, sustained, and forward-looking measures to safeguard the ecological foundations upon which human life and societal stability depend.

The growing constitutionalisation of environmental protection reflects a broader normative shift in constitutional thought: the recognition that the right to a clean, safe, and sustainable environment is intrinsically linked to the protection of life, health, human dignity, and personal autonomy. Environmental degradation

[1] AI-based tools (ChatGPT, DeepL) were used exclusively for language editing and translation. No AI system was used for legal research, interpretation of sources, or development of legal arguments.

[2] Maloy J. Climate Change, Energy Transition, and Constitutional Identity. International Studies Review, Vol. 25, Issue 1, 2023, p. 8.

and climate change increasingly threaten the effective enjoyment of these rights, thereby transforming environmental protection from a policy choice into a constitutional concern.[3]

This evolution is clearly observable in European constitutional and human rights jurisprudence. In its landmark 2021 judgment, the German Federal Constitutional Court held that insufficient climate action violated the fundamental freedoms of future generations by disproportionately shifting the burden of emissions reduction into the future. In the Netherlands, the Urgenda judgment of 2019 established a legally enforceable duty for the state to reduce greenhouse gas emissions, grounded in human rights and the state's duty of care. More recently, in KlimaSeniorinnen v. Switzerland (2024), the European Court of Human Rights recognised that Article 8 of the Convention entails a positive obligation on states to adopt timely, adequate, and science-based climate policies. Collectively, these judgments mark a decisive shift: climate protection is no longer treated as a purely political aspiration, but as a matter of constitutional and fundamental rights responsibility.

Against this backdrop, constitutional law acquires a new and expanded role. It increasingly functions as a framework for articulating and enforcing positive state obligations in the field of climate protection, while simultaneously preserving institutional balance, democratic legitimacy, and the rule of law. Constitutional and supreme courts are thus called upon not only to interpret existing constitutional provisions, but also to recalibrate core constitutional principles, such as proportionality, justice, and intergenerational solidarity, in light of unprecedented environmental realities.

2. Constitutional foundations of environmental protection

This chapter examines whether environmental protection in Lithuania is constitutionally anchored and how this anchoring has evolved through constitutional jurisprudence. While the Constitution of the Republic of Lithuania does not explicitly recognise an individual right to a clean and healthy environment, it nevertheless establishes a robust constitutional framework for environmental protection through state duties and judicial interpretation.

The constitutional foundations of environmental protection in Lithuania are laid down in Chapter IV of the Constitution, "The National Economy and Labour", which also governs the economic life of the State and simultaneously guarantees freedom of individual economic activity. The core environmental provisions are contained in Articles 53 and 54. Article 53 imposes a duty on both the State and every person to protect the environment from harmful influences, while Article 54 obliges the State to safeguard the natural environment, wildlife and flora, individual

[3] Kimblin J. Climate Change, the Courts, and the Constitution. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4703120 [last viewed 02.01.2026].

natural objects, and areas of particular value. It further mandates the rational use, restoration, and enhancement of natural resources, and prohibits environmental degradation, including land destruction, pollution of water and air, radioactive impact, and biodiversity depletion.[4] These provisions constitute the constitutional basis for Lithuania's national environmental protection policy.[5]

Lithuania thus belongs to a group of EU Member States whose constitutions emphasise environmental protection guarantees and state obligations, rather than expressly formulating a subjective right to a healthy environment.[6] Nevertheless, Lithuanian constitutional doctrine increasingly recognises that environmental protection cannot be reduced to a merely programmatic objective. Through more than three decades of jurisprudence, the LCC has systematically developed the constitutional content of Art. 53 and 54, affirming that environmental protection is a public interest of universal importance and a constitutionally protected value binding upon public authorities.[7]

According to the Court's jurisprudence, the natural environment, biodiversity, individual natural objects, and areas of particular value are treated as national values of universal significance, the protection of which constitutes a public interest that the State is constitutionally obliged to guarantee.[8] In fulfilling this obligation, the State may, by law, restrict the use of natural resources, impose specific duties on economic actors, or require them to refrain from certain activities. However, such regulation must ensure a proper balance between constitutional values, respect the constitutional imperative of social harmony, and comply with the principles of justice, reasonableness, and proportionality, particularly where restrictions interfere with fundamental rights and freedoms.

In environmental protection cases, the CC most frequently applies such constitutional principles as respect for human dignity, the principle of proportionality, and the principle of intergenerational justice. Although the precautionary principle, long recognised in European Union law, has not yet been directly applied in environmental cases in Lithuania, it has become familiar to the CC following constitutional adjudication in the context of the Covid-19 pandemic and has been addressed in its constitutional doctrine.[9] Accordingly, in

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4 Constitution of the Republic of Lithuania (adopted 25 October 1992).

5 Ragulskyte Markoviene R. Aplinkos teise. Lietuvos derinimas su Europos Sajungos raikalavimais. [Environmental Law. Harmonisation of Lithuania with the Requirements of the European Union.] Vilnius: Eugrimas, 2005, p. 98.

6 Kuzniar K. Environmental Protection in Constitutional Law. Warsaw: Wolters Kluwer, 2021, p. 204.

7 Juskeviciute-Viliene A. Lietuvos Respublikos Konstitucinio Teismo jurisprudencijos itaka zaliosios ekonomikos igyvendinimui Lietuvoje [The Influence of the Jurisprudence of the Constitutional Court of the Republic of Lithuania on the Implementation of the Green Economy in Lithuania]. In: Juskeviciute-Viliene A., Puraite-Andrikiene D. (eds.). Konstitucine justicija Lietuvoje. Trys veiklos desimtmeciai [Constitutional Justice in Lithuania: Three Decades of Activity]. Vilnius: Vilnius University, 2023, p. 154.

8 Ruling of the Constitutional Court of the Republic of Lithuania of 31 March 2005. Available in English: https://www.lrkt.lt [last viewed 05.01.2026].

9 Constitutional Court of the Republic of Lithuania, rulings of 24 of January 2023, No. KT8-N1/2023.

light of the precautionary principle's fundamental importance for environmental protection – particularly in situations of scientific uncertainty – it may be regarded as a readily available and doctrinally well-grounded instrument for future constitutional adjudication in environmental matters.

An analysis of the Court's case law further reveals that most constitutional disputes concerning environmental protection were initiated not by individuals or environmental organisations, but by business entities seeking to defend the freedom of economic activity. These cases typically concerned licensing regimes, operational obligations, taxation, or other regulatory constraints imposed in the name of environmental protection.[10] Despite this procedural posture, the CC has consistently held that restrictions on economic activity aimed at protecting human health, safeguarding the environment, ensuring the rational use of natural resources, and remedying environmental damage are, in principle, compatible with the Constitution and pursue the general welfare of the people.[11]

Taken together, the Constitution of Lithuania and the jurisprudence of the CC establish a coherent constitutional framework for environmental protection. Although the constitutional text itself remains cautious and duty-oriented, the Court has progressively expanded its normative content through interpretation. In this sense, Lithuania's model of environmental constitutionalism may be described as lying between aspirational and transformative: according to legal theory, aspirational constitutionalism refers to constitutional provisions that frame environmental protection primarily as programmatic goals or state duties with limited direct enforceability, whereas transformative constitutionalism entails the judicial translation of constitutional norms into concrete, justiciable obligations capable of fundamentally reshaping public policy and power relations[12].

While the Lithuanian Constitution remains predominantly duty-oriented and cautious in its textual formulation, the CC has increasingly moved beyond a purely aspirational model by giving these duties operative legal effect through proportionality-based review, public interest reasoning, and context-sensitive balancing between environmental protection and other constitutional rights and freedoms.

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[10] Constitutional Court of the Republic of Lithuania, rulings of 31 May 2005; 31 January 2011; 16 December 2015; 11 July 2019, 19 March 2025, No. KT14-N3/2025. Available in English: https://www.lrkt.lt [last viewed 15.01.2026].

[11] Juskeviciute-Viliene A. Bridging Between an Effective Economy and Environmental Protection Under the Lithuanian Constitution. Review of Central and East European Law, Vol. 48, Issue 2, 2023, p. 217.

[12] For further discussion of aspirational and transformative constitutionalism, see: Weis L. Environmental Constitutionalism: Aspiration or Transformation? International Journal of Constitutional Law, Vol. 16, Issue 3, 2018, pp. 836–870.

3. Constitutional foundations of economic freedom

Economic freedom constitutes one of the core elements of Lithuania's post-1990 constitutional identity. After the collapse of the Soviet economic system, the Constitution of the Republic of Lithuania established the legal foundations of a market-based democratic order. The constitutional basis of economic freedom is expressly laid down in Article 46, which guarantees the *freedom of individual economic activity and initiative* and simultaneously authorises the State to regulate economic activity so that it serves the general welfare of the people. It is interesting to note that this article falls within the same chapter of the constitution as the foundation of environmental protection (Chapter IV "The National Economy and Labour").

In its jurisprudence, the LCC has interpreted freedom of economic activity broadly. This freedom encompasses, *inter alia*, freedom of contract, freedom of fair competition, equality of economic actors, the freedom to enter and exit the market, and the right to engage in any economic activity not prohibited by law, etc.[13] Economic freedom is thus recognised both as a constitutional value and as a subjective right forming the basis of a functioning market economy.[14]

At the same time, Lithuanian constitutional law clearly rejects an absolutist understanding of economic freedom. The Constitution reflects the socially oriented nature of the State, requiring a balance between private initiative and collective interests[15]. Article 46 obliges the State to support economic efforts useful to society, and, moreover, to regulate economic activity in a manner that ensures the general welfare of the people. According to the CC, this welfare cannot be reduced to individual material gain; it must be assessed in light of broader economic, social, health-related, security-related, and environmental considerations.[16]

This constitutional framework is particularly relevant in cases where economic freedom comes into tension with environmental protection. The Constitution expressly obliges the State to protect human health and the natural environment (Arts 53–54), thereby establishing environmental protection as a constitutionally significant public interest. The CC has consistently held that economic freedom may be restricted where such restrictions pursue legitimate constitutional objectives, including the protection of the environment, provided that the principle of proportionality is respected.[17]

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[13] Constitutional Court of the Republic of Lithuania, rulings of 13 May 2005; 29 April 2009; 15 January 2015; 24 January 2023.

[14] Juskeviciute-Viliene A. Asmens ukines veiklos laisves konstituciniai pagrindai Lietuvoje: ekonomines, istorines ir lyginamosios izvalgos [Constitutional Foundations of the Freedom of Individual Economic Activity in Lithuania: Economic, Historical and Comparative Perspectives]. Vilnius: Vilnius University, p. 16.

[15] Zilys J. Socialine valstybe konstitucineje teiseje [Social State in Constitutional Law]. Jurisprudencija, No. 12(90), 2006, p. 19.

[16] Constitutional Court of the Republic of Lithuania, ruling of 6 February 2012.

[17] Constitutional Court of the Republic of Lithuania, ruling of 16 March 2005.

Proportionality functions as the central constitutional standard for assessing limitations on economic freedom. Restrictions must be established by law, suitable and necessary to achieve the pursued objective, and must not impose an excessive burden on economic actors. Through this balancing exercise, the Court seeks to reconcile economic freedom with other constitutional values, ensuring that environmental protection measures do not arbitrarily undermine economic initiative, while at the same time preventing economic activity from overriding constitutionally protected public interests.[18]

Taken together, the constitutional regulation of economic freedom in Lithuania reveals a mixed constitutional economic model**.** While the Constitution consolidates the foundations of a market economy based on private ownership and economic initiative, it embeds these freedoms within a broader framework of social justice and environmental responsibility. Economic freedom is therefore protected, but not absolute; it operates as a constitutionally conditioned freedom that must be exercised in harmony with the requirements of environmental protection and the general welfare of the people.

4. Searching for balance: The Waste-to-Energy case

The 18 February 2020 ruling of the LCC on waste incineration plants constitutes one of the clearest illustrations of how Lithuanian constitutional law seeks to balance environmental protection and freedom of economic activity in practice.[19] The case directly operationalised the constitutional frameworks discussed in the previous chapters, namely, the State's environmental obligations under Articles 53 and 54 of the Constitution and the constitutionally protected freedom of individual economic activity under Article 46.

The contested legal regulation prohibited the construction of waste-to-energy facilities within a 20-kilometre radius of residential areas. Formally, the restriction pursued constitutionally legitimate objectives: the protection of public health and the prevention of harmful environmental effects. As the CC reaffirmed, waste management constitutes a public interest, since improperly managed waste poses a threat to both the environment and human health. In this sense, the case clearly fell within the constitutional paradigm according to which environmental protection may justify restrictions on economic freedom.[20]

However, the CC emphasised that the constitutional legitimacy of the aim alone is insufficient. Consistently with its doctrine on economic freedom, the CC subjected the restriction to a strict proportionality review. It found that the absolute and uniform 20-kilometre distance requirement lacked a sufficient scientific basis and, due to Lithuania's settlement structure, was practically impossible to

[18] Constitutional Court of the Republic of Lithuania, rulings of 31 January 2011; 16 December 2015.

[19] Constitutional Court of the Republic of Lithuania, ruling of 18 February 2020.

[20] Constitutional Court of the Republic of Lithuania, rulings of 31 May 2005; 16 December 2015.

implement. As a result, the regulation did not merely restrict economic activity but effectively eliminated the possibility of developing waste-to-energy projects altogether.

Importantly, the CC rejected a simplified opposition between environmental protection and economic development. Drawing on the constitutional concept of the general welfare of the people, it underlined that sustainable waste management – including waste-to-energy solutions – serves environmental objectives by supporting the circular economy and reducing reliance on landfilling. Consequently, the contested restriction paradoxically undermined environmental protection rather than strengthening it. This reasoning reflects the mixed constitutional economic model discussed earlier, in which economic activity is not inherently antagonistic to environmental values but may, under certain conditions, contribute to their realisation.[21]

From the perspective of environmental constitutionalism, the case is particularly significant because it demonstrates the Court's insistence on evidence-based environmental regulation. While acknowledging the State's duty to act preventively in environmental matters, the CC made clear that preventive measures must be rational, targeted, and proportionate.

Taken together, the Waste-to-Energy case exemplifies how the LCC mediates between environmental protection and economic freedom within a coherent constitutional framework. By integrating proportionality, public interest, and rule-of-law considerations, the CC ensured that environmental regulation remains constitutionally grounded, economically viable, and oriented towards sustainable development. In doing so, the judgment serves as a concrete illustration of the broader constitutional balance analysed in the preceding chapters. It confirms the gradual evolution of Lithuanian constitutional doctrine towards a more nuanced and sustainability-oriented model.

Conclusions

Although freedom of economic activity is explicitly enshrined in the Constitution of the Republic of Lithuania as an individual right, the right to a healthy and clean environment is not formulated as such. However, the jurisprudence of the LCC has significantly expanded the constitutional content of environmental protection. The Court consistently emphasises that the constitutional foundations of environmental protection derive from Art. 53 and 54 of the Constitution, constituting a constitutional value of particular importance aimed at safeguarding the interests of society as a whole while providing a constitutional basis for individuals' rights to live in a clean and healthy environment. Against this background, the CC clearly holds that restrictions on the freedom of economic activity imposed for the purpose of environmental

[21] Constitutional Court of the Republic of Lithuania rulings of 16 March 2005; 30 May 2017.

protection are constitutionally justified and compatible with the Constitution. Nevertheless, such restrictions are lawful only if they comply with the principle of proportionality and if the necessity to limit economic freedom is substantiated by sufficient, objective and rational evidence.

An analysis of the LCC's case law reveals that, to date, no individuals or groups have applied to the Court alleging that economic activity has infringed their right to a healthy or clean environment. In fact, the majority of cases have been initiated by economic operators who are challenging what they perceive to be disproportionate restrictions on economic activity introduced for environmental protection purposes.

However, international practice and the rapidly developing field of environmental constitutionalism suggest that, in the future, Lithuania may also experience an increase in cases in which environmental protection issues are raised as a basis for the protection of individual or collective rights. In this context, it may be argued that the jurisprudence of the CC developed over more than three decades is sufficiently mature and well prepared to address such challenges. Moreover, the LCC's consistent engagement with the case law of supranational and foreign courts allows for the reasoned prediction that, in the future, the LCC will shape a constitutional doctrine that is more favourable to environmental protection rather than exclusively oriented towards economic freedom.

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Marieta Safta, *Professor Habil.*
Titu Maiorescu University Bucharest, Faculty of Law, Romania

Andrei Iacuba, *PhD student*
Bucharest University of Economic Studies, Doctoral School Law, Romania

THE RIGHT TO A HEALTHY ENVIRONMENT: FUNDAMENTAL RIGHT, COLLECTIVE INTEREST OR CORRELATIVE OBLIGATION? WITH A FOCUS ON THE JURISPRUDENCE OF THE ROMANIAN CONSTITUTIONAL COURT

Key words: right to a healthy environment, Romanian Constitutional Court, fundamental rights, climate change, proportionality, environmental protection, collective rights

Summary

The evolution of constitutional law has led to a gradual expansion of fundamental rights beyond their traditional individualistic framework, particularly in response to global challenges such as climate change and environmental degradation. Among these developments, the right to a healthy environment occupies a distinctive position, raising complex questions regarding its legal nature, scope and enforceability.

This article examines whether the right to a healthy environment should be understood solely as an individual fundamental right or rather as a collective right of humanity, inherently linked to the protection of future generations. It further explores the hypothesis that this right entails a correlative obligation incumbent not only upon States and public authorities, but also upon private individuals, thus challenging classical distinctions between rights and duties in constitutional law.

The analysis is conducted from a constitutional perspective, combining doctrinal considerations with an examination of the evolving case law of the Romanian Constitutional Court. Special attention is paid to the role of constitutional adjudication in balancing environmental protection with other fundamental rights.

The authors argue that the right to a healthy environment increasingly emerges as a hybrid legal construct, based on cooperation and shared responsibility, requiring a systemic interpretation of constitutional principles. This transformation reflects a broader shift in constitutional

thinking, in which the protection of the environment becomes both a right and a duty essential to the survival of present and future generations.

Introduction

In recent decades, climate change, environmental degradation and resource shortages have led to a significant transformation in constitutional law, prompting a reconsideration of the traditional understanding of fundamental rights. While classical rights were primarily conceived as individual entitlements enforceable against the State, contemporary developments reveal the emergence of rights extending beyond the individual sphere, encompassing collective interests and even the survival of humanity as a whole.

In this context, the right to a healthy environment occupies a complex position, being recognized not only as a fundamental right, but also as closely linked to intergenerational justice and global environmental protection. The idea that such a right may entail corresponding obligations is not entirely new in legal doctrine. However, its concrete configuration and implications remain subject to ongoing clarification, particularly at the level of constitutional adjudication.

This study examines whether the right to a healthy environment can be conceptualized as a "right-obligation", reflecting a shift from a purely subjective right to a framework based on shared responsibility. The contribution of this paper lies in analyzing this perspective through the lens of the recent case law of the Romanian Constitutional Court (RCC), highlighting how constitutional jurisprudence shapes and operationalizes the balance between environmental protection and other fundamental rights.

The analysis is based on a doctrinal and jurisprudential methodology, focusing on constitutional provisions and recent case law of the RCC, in light of relevant European and international legal standards.

1. Constitutional framework and preliminary observations

1.1. Constitutional framework in Romania

The right to a healthy environment was expressly enshrined in Article 35 of the Romanian Constitution, after its amendment in 2003, similarly to the fundamental laws of many other European Union (EU) Member States, as well as in the case law of the Court of Justice of the European Union (CJUE) and the European Court of Human Rights (ECHR). This evolution must be understood in the broader context of the constitutionalization of environmental protection in Romania. As noted in legal doctrine, the recognition of the right to a healthy environment as a fundamental right was closely linked to the process of

harmonization with EU law and international environmental standards, reflecting both internal legal developments and external obligations.[1]

According to the first paragraphs of the Art. 35 of the Romanian Constitution, the State shall acknowledge the right of every person to a healthy, well preserved and balanced environment. For that purpose, according to para. 2, the State shall provide the legislative framework for the exercise of such right. Para. 3 further extend the obligation to protect the environment to private individuals and entities too, stating that "natural and legal entities shall be bound to protect and improve the environment".

Therefore, constitutional provisions make it clear that, in Romania, the right to a healthy environment has a dual nature, including a right per se, but also an obligation of every authority, public body, private party or natural person to contribute to the protection and improvement of the environment. It should be mentioned that this obligation is not further defined and/or extended through subsequent legislation, except for the usual obligations related to environment protection which are applicable in most Member States of the EU, as are the obligation to evaluate the environmental impact of any economic activity, the enforcement of the principle according to which the polluter is fully responsible for any damage created to the environment ("the polluter pays" rule), waste management rules or recycling rules. However, the mere existence of this Constitutional basis for establishing and enforcing more strict rules and obligations to protect the environment, applicable both to state actors or private parties, is of extraordinary importance, assuring a constitutional platform for a swift response to future climate or environmental crisis.

The provisions of Art. 35 of the Constitution should be correlated with those of the 2nd paragraph of Art. 135 of the Constitution, according to which "the State must secure: [...] d) exploitation of natural resources, in conformity with national interests; [...] e) environmental protection and recovery, as well as preservation of the ecological balance; [...] f) creation of all necessary conditions so as to increase the quality of life; [...]." These priority areas, expressly designated by the Constitution, should be interpreted as an illustrative list based on their intrinsic importance.

This constitutional framework must also be interpreted in conjunction with the provisions of Art. 20 and 148 of the Romanian Constitution, which ensure the openness of the national legal order to international and EU law. Art. 20 establishes the principle of conformity with international human rights instruments, giving priority to higher standards of protection, while Art. 148 governs the relationship with EU law, ensuring the primacy of binding regulations of the EU in case of conflict with domestic law. Together, these provisions

[1] Mocanu L., Mastacan O. Constitutionalizarea dreptului la un mediu sanatos in Romania [The constitutionalization of the right to a healthy environment in Romania]. Studii de Drept Romanesc, Vol. 21(55), No. 3, 2009, p. 219. Available: https://www.rsdr.ro/Art-2-3-2009.pdf [last viewed 23.04.2026].

create a normative bridge between the domestic and international legal orders, contributing to the coherence and uniformity of the interpretation of fundamental rights. In the field of environmental protection, this interaction is particularly significant, as it allows national authorities and courts to integrate evolving international and European standards, including those developed in the case law of the ECHR and the CJUE, into the constitutional framework governing the right to a healthy environment.

2. Preliminary observations and theoretical considerations

Before examining how RCC has addressed these areas, three observations must be made, which the authors of the current article consider essential.

Firstly, although the human rights protection mechanism is integrated and operates at a pan-European level, the constitutional identities[2] of each member state of the EU and/or the Council of Europe remain relevant, given the minimal rather than maximal nature of European standards in regard to fundamental rights and, furthermore, the specific national experience of each country. Mutual knowledge of these identities on each issue of interest forms the basis for the harmonization, integration, and strengthening of the European protection system, serving as a guarantee rather than a threat to its cohesion.

Secondly, the experience of the evolving interpretation of constitutional provisions allows for an assessment of how the rights enshrined in constitutions are transformed under the influence of social change, acquiring new meanings and sometimes becoming entirely new rights compared to when they were first legislated. Thus, constitutional courts are constantly expanding both their own powers and the content of constitutions themselves, sometimes becoming a veritable constitutional co-legislator.

Thirdly, and most importantly for the purpose of this article, the authors of the current article asked themselves what may happen when a fundamental right proves to be vital not only for the individual, but also for the community to which he or she belongs, for the country of which he or she is a citizen of, and for humanity as a whole? What is the nature of such a right and how can its content be harmonized at regional or global level?

The proposed answer is that if one were to accept that, in the context of climate change, pollution, and global population growth, the right to a healthy environment belongs not only to the individual but also to humanity itself and, moreover, not only to ourselves, the people of today, but also to future generations, should this not be equivalent to always recognizing a correlative, implicit, but fully enforceable, obligation to protect it?

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[2] Zs Varga A., Berkes L. (eds.). Common Values and Constitutional Identities: Can Separate Gears Be Synchronised? Central European Academic Publishing, 2023.

This perspective is also supported by Romanian legal doctrine. In this regard, it was emphasized[3] that environmental law expresses the very requirement of the existence of humanity as a species, thus placing environmental protection beyond the sphere of purely individual interests. Such an approach highlights the collective and global dimension of environmental protection and supports the idea that the right to a healthy environment necessarily entails shared responsibilities. From this standpoint, the protection of the environment cannot be reduced to a simple entitlement enforceable against the State, but must be understood as a legal framework involving the active participation of all members of society, including individuals, public authorities and international actors.

The approach is consistent with the theory of fundamental rights developed in contemporary constitutional doctrine on human rights. According to some authors,[4] fundamental rights are not absolute rules, but principles that require optimization through a process of balancing, depending on the specific legal and factual context. This understanding is particularly relevant in the field of environmental protection, where the right to a healthy environment must be constantly weighed against other fundamental rights, such as property rights or economic freedoms. In this sense, the emergence of correlative obligations can be understood as a natural consequence of the need to ensure the effective realization of such rights. Similarly, other authors[5] emphasizes that environmental rights often transcend the traditional framework of individual entitlements, being closely linked to collective interests and the protection of common goods.

The nature and extent of such obligations and responsibilities are still evolving, and their scope can only be intuited at this point, but it is safe to estimate that in order to prevent the irreversible effects of climate change and even the possibility of extinction, it will have to fall in the future not only to states but also to individuals, that is, to each and every one of us. In the context of extraordinary social polarization on the issue of climate change, balancing the equation between this "right-obligation" to protect the environment and other fundamental rights can only be ensured through the jurisprudence of constitutional courts, so as to prevent the creation of a, formal or informal, hierarchy of fundamental rights and, on the contrary, to ensure their coexistence in a complementary relationship.

At the international level, this evolution is also reflected in the increasing recognition of environmental protection as a legal obligation under international law. In its recent advisory opinion on climate change, the ICJ emphasized the responsibilities of States in preventing environmental harm and protecting the climate system. This development further supports the argument that

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[3] Dutu M. Dreptul mediului exprima cerinta existentei umanitatii ca specie intre specii [Environmental law expresses the requirement of the existence of humanity as a species among species]. Universul Juridic, 20 May 2016. Available: https://www.universuljuridic.ro/mircea-dutu-dreptul-mediului-exprima-cerinta-existentei-umanitatii-ca-specie-intre-specii/ [last viewed 23.04.2026].

[4] Alexy R. A Theory of Constitutional Rights, Oxford University Press, 2002, p. 66.

[5] Shelton D. Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized? Denver Journal of International Law and Policy, Vol. 35, No. 1, 2006, p. 129.

environmental protection is not merely a policy objective, but a legal obligation with implications for both States and the international community as a whole.[6]

3. Case law of the constitutional court of Romania – trends and balancing rights

3.1. General trends

A brief overview of the case law of the RCC in the field of environmental protection enables identification of several general trends.

Thus, through a series of decisions, the RCC has built and consolidated a "pro-environment" doctrine, allowing the legislator, namely the Parliament, but also the Government, which in Romania has the role of delegated legislator, a certain margin of discretionary power in adopting legislative solutions that favor development and ensure the speed of major public projects in areas such as the transition to green energy, the protection of forest areas, the conservation and development of urban green spaces, the valorization of state-owned public property in ecological projects etc.

In all these decisions, the Court has shown moderate activism, exercising caution to avoid upsetting the balance that exists between different fundamental rights in favor of the right to the environment.

3.2. Proportionality and limits of legislative discretion

The margin of appreciation thus granted to Parliament and the Government was not, in any of these cases, a "blank check", but rather a conditional "green light", yielded by both external (procedural) or internal limits (which mainly concern either the quality of regulation or the correlation with other fundamental rights, through the application of a proportionality test, which creates a genuine "balancing standard").

The pursuit of a legitimate aim, such as the protection of the environment, does not justify de plano and a priori the circumvention of the general legislative framework governing a particular area, as any derogation must be strictly necessary and duly justified; such an objective pursued by the legislator does not justify a form of "positive discrimination" based on circumventing administrative procedures or the competence of various public authorities.

The quality of regulation (in terms of predictability and accessibility), ensuring free access to justice, and the existence of a system of consultation and, subsequently, compensation for third parties affected by the implementation

[6] Obligations of States in respect of Climate Change. Advisory Opinion, 2025, ICJ Rep 187. Available: https://www.icj-cij.org/case/187 [last viewed 23.04.2026].

of various public projects related to environmental protection are regarded as mandatory standards for public authorities.

This approach is not specific to the Romanian constitutional framework but can also be observed at the level of the ECHR. In particular, in Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, the Court recognized the existence of positive obligations incumbent upon States to adopt effective measures against climate change, thus confirming that environmental protection may generate concrete legal obligations requiring active implementation. At the same time, this doctrine of balance appears to be consistent with the more recent judgment in Greenpeace Nordic and Others v. Norway (28 October 2025), concerning exploration licenses for future oil extraction. In this case, the Court took into account the broader context in which State action may have immediate or future environmental impacts, engaging in a comprehensive balancing of the competing interests involved, rather than automatically prioritizing environmental considerations. If this line of jurisprudence is confirmed, it may indicate that the ECHR is moving towards a point of equilibrium in its environmental case law, reaffirming that the protection of fundamental rights requires a systemic and balanced approach, rather than the absolute prioritization of a single right.

Conversely, the jurisprudence of the RCC continues to evolve regarding the prioritization of the right to a healthy environment, notwithstanding the arguably gradual pace of such developments. Nevertheless, the trajectory of the Court's case law is unequivocal: environmental considerations are being awarded increasingly greater weight in its adjudicative balancing process.

This observation is warranted, since recent jurisprudential shifts in other jurisdictions demonstrate that this positive trend is neither universal nor irreversible, as shown by the recent ruling of the US Supreme Court in Chevron USA Inc. v. Plaquemines Parish, Louisiana (17 April 2026).[7]

Although this ruling is a procedural decision and it can be argued that the Supreme Court did not rule whether the oil company in question caused the environmental damage to the coast of Louisiana or if it is immune for paying for it, but rather ruled solely on the matter of where the trial should take place (in federal courts, instead of Louisiana state courts), the practical effect of the ruling is likely to confer procedural advantages to the supposed polluter (venue advantage, delayed restoration, increased legal costs, which favors the more financially potent of the parties etc.), to upend a previous jury verdict on damages and to significantly influence nationwide disputes, despite the "polluter pays" general principle of environmental law.

In brief, the doctrine of a fair balance between environmental rights and other fundamental rights, constantly promoted by the RCC may have its down points regarding boldness and speed of evolution, but it establishes a solid and sure base for future

[7] Full text available: https://www.supremecourt.gov/opinions/25pdf/24-813_3e04.pdf [last viewed 23.04.2026].

developments, drawing upon, rather than mechanically transposing, the developments and fluctuations of the international framework.

3.3. Brief analysis of key decisions

This evolving approach of the RCC on environmental issues is based on balancing urgent national interests, environmental protection, and fundamental constitutional rights, thus emerging a clear pattern wherein the Court rigorously scrutinizes legislative acts to ensure adherence to constitutional parameters, even when the declared legislative intent is grounded in major public interests such as green energy transition or heritage preservation.

The tension between the necessity for rapid environmental adaptation and the imperative of procedural legal safeguards was addressed by the Court, for example, in Decision No. 497/2023[8], which concerned the law approving a Government emergency ordinance on the development of hydroelectric projects necessary for the transition to "green energy", allowing for their accelerated development, the Court agreed to allow the Government a more lenient interpretation of the constitutional concept of "exceptional situation", relevant from the perspective of its ability to adopt the respective normative act, by virtue of the legal force of the law, but did not allow it to establish any form of procedural autonomy in this area.

The major public interest related to the energy transition did not constitute an argument that prevented the RCC from sanctioning the attempt to avoid impact assessments or other administrative procedures or informing the European Commission, as provided for by the general legislative framework in this area. In other words, the quality of the law (in terms of predictability and accessibility) was considered an essential element, particularly in view of the adoption procedure and the effects of the legislative act. By enforcing these boundaries, RCC reaffirmed that environmental urgency cannot be used as a pretext to circumvent established legal and ecological safeguards. The Court also ensured that, in the case of any specific measures related to the application of that legislative act, free access to justice is guaranteed, including the possibility of invoking the exception of unconstitutionality (in regard of primary legislation) or illegality (for secondary legislation), precisely in order to ensure a balance between the rights protected.

The constitutional scrutiny applied to environmental measures also heavily relies on the proportionality principle and the strict observance of the separation of powers. This was central in Decision No. 726/2023[9] on the adoption of measures to preserve UNESCO heritage sites, which included changing the legal regime of a large area of forest, the Court applied a proportionality test, examining the parameters of the adequacy and necessity of the measures concerned, ensuring minimal interference with the rights of third parties and the legitimacy

[8] Monitorul Oficial al Romaniei (M.Of.) [Official Journal of Romania (OJR)], No. 982/30.10.2023.

[9] M.Of. [OJR] No. 510/31.05.2024.

and proportionality of the measures, concluding that, despite the undoubted legitimacy of the objective pursued, the measures adopted were not necessary and appeared disproportionate, and the normative act itself lost the generality that is the essence of the law, moving into the realm of individual legislation by substituting administrative decisions and measures, thus violating the principle of separation of powers in the state.

On another key aspect, RCC extended its rigorous oversight to the management of state assets intended for ecological purposes and on the limits to the rights of private property. For example, it validated the interpretation that certain specific aspects, such as the protection of urban green spaces (Decision No. 274/2024,[10] which consolidates the findings of Decision No. 301/2022[11]) are means of directly achieving the right to a healthy environment regulated by Art. 35 of the Romanian Constitution, thus allowing the establishment of reasonable limitations on the right to private property, or recognized the major public interest in the implementation of forestry infrastructure works and works with an ecological role (Decision No. 149/2024[12]). However, it did so while insisting on the standards and rigors of the public property regime and the need to ensure legality with regard to inter-domain transfers. Furthermore, the Court was also constantly careful in enforcing the constitutional rules which establish the foundation for the competence of public authorities, and, in general, the general legislative framework governing a particular area, any derogation being absolutely necessary and justified, to ensure compliance with the principle of rule of law and supremacy of Constitution and the law.

Conclusions

The brief analysis offered in the current article is an invitation to a more extensive examination of the constitutional protection of the right to a healthy environment, a right whose complexity and evolving nature allow for multiple and highly diverse avenues of doctrinal and jurisprudential inquiry. The attention here has been deliberately circumscribed to the research directions outlined in the introductory section, focusing on selected aspects of the recent case law of the Constitutional Court of Romania that are relevant to the ongoing debate concerning the nature of this right and its necessary correlation with other fundamental rights and constitutional principles.

Within these limits, in the opinion of authors, there is an essential feature of the recent case law of RCC in the field of environmental protection rights. Although the Court has shown some reluctance to adopt innovative solutions similar to those handed down by other constitutional courts or by the ECHR,

[10] M.Of. [OJR] No. 943/19.09.2024.
[11] M.Of. [OJR] No. 783/05.08.2022.
[12] M.Of. [OJR] No. 497/29.05.2024.

it has carefully constructed a doctrine of balance between the right to a healthy environment and other fundamental rights enshrined in the Constitution or constitutional principles, such as the right to property, the quality of the law, the principle of legality or that of equal treatment or free access to justice, avoiding each time to pit them against each other. Rather than indicating which of the rights in such a "competition" takes precedence, the Court has preferred to consider them together, in correlation, in a complementary manner.

The authors of the current article believe that the aforementioned specificity of our constitutional jurisdiction's case law does not invalidate, but rather synergizes with the premise with which this article commenced, because, in the current context of climate change and pollution, the realization of the right to a healthy environment can no longer be achieved simply by "asking" the state (and that should mean "any state") to take the necessary positive measures, but rather only through the cooperation of all those involved in ensuring the future of mankind – states, institutions, and individuals themselves. Therefore, the authors believe that the right to a healthy environment appears as a true *right essentially based on cooperation*,[13] necessarily implying the correlative obligation of everyone to contribute to its realization.

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[13] See also UN General Assembly. The human right to a clean, healthy and sustainable environment. Resolution 76/300, 28 July 2022.

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SECTION 6

CORPORATE GOVERNANCE AND COMMERCIAL LAW BETWEEN EU LAW AND NATIONAL LAW

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Piia Kalamees, *PhD, Associate Professor*
University of Tartu, Estonia

Kalev Saare, *Dr. iur., Visiting Professor*
Tallinn University, Estonia

THE IMPACT OF THE CJEU'S CASE LAW ON UNFAIR CONTRACT TERMS AND RESPONSIBLE LENDING ON THE *RES JUDICATA* PRINCIPLE IN ESTONIAN LAW[1]

Key words: unfair contract terms, principle of responsible lending, *res judicata* principle, consumer law

Summary

The CJEU has consistently held that, while *res judicata* serves legal certainty and the proper administration of justice, national procedural rules must nevertheless comply with the principles of equivalence and effectiveness. Accordingly, the CJEU requires national courts to examine *ex officio* both the unfairness of standard contract terms under Directive 93/13/EEC and compliance with the creditor's creditworthiness assessment obligations under Directive 2008/48/EC. Where such a review has not been conducted prior to the finality of a judgment, EU law requires that it be possible to carry it out in subsequent proceedings, a requirement that Estonian law does not always satisfy.

The authors of this paper analyse the effect of the CJEU practice on Estonian civil, bankruptcy and enforcement procedures. It demonstrates that the review of final judgments – the only mechanism in Estonian law capable of retroactively removing the effects of *res judicata* – is unavailable where the relevant circumstances existed at the time of the original decision. As EU law does not oblige national courts to interpret domestic law *contra legem*, effective consumer-protection review must instead be ensured in enforcement proceedings or other subsequent and separate procedures.

Although Estonian enforcement law does not expressly permit deviation from *res judicata*, such deviation is possible through interpretation, particularly under § 221 of the Code of Enforcement Procedure. By contrast, bankruptcy proceedings reveal a direct conflict: Estonian law mandates the unconditional recognition of claims based on final judgments, thereby excluding any review for consumer protection. This approach is incompatible with CJEU case law and calls for legislative amendment.

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Introduction

The CJEU has frequently emphasised the importance of the principle of *res judicata* in maintaining the stability of the law and legal relations, as well as ensuring the proper administration of justice.[2] Member States' procedural rules must, however, respect the principles of equivalence and effectiveness, including not making the exercise of subjective rights granted under the European Union legal order impossible or excessively difficult in practice.[3] Therefore, the CJEU has stated that a national court is required to assess, of its own motion (*ex officio*), whether a contractual term falling within the scope of Directive 93/13/EEC[4] (hereinafter the UCTD) is unfair[5] and also whether there has been a failure to comply with the creditor's pre-contractual obligation to assess the consumer's creditworthiness[6] under Directive 2008/48/EC[7] (hereinafter – CCD). An effective review of the possible unfairness of contractual terms cannot be guaranteed if the force of *res judicata* extends to judicial decisions that do not indicate such a review.[8] The rights of the consumers are, however, protected if, in the course of the first set of judicial proceedings, the competent court has evaluated the possible unfair nature of the contractual terms.[9] The CJEU has expressed its views on the principle of *res judicata* in relation to the validity of standard terms and conditions and has not explicitly stated that the same principles apply to the assessment of the adequacy of creditworthiness checks. Given the similar objectives of the UCTD and the CCD – to ensure a high level of consumer protection,[10] in order to contribute to the development of a well-functioning internal market, the authors of this article are of the opinion that the relevant principles are also transferable to the assessment of the adequacy of consumer creditworthiness

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2 CJEU judgment of 18 December 2025 in case No. C-320/24 Soledil Srl, p. 32; 9 April 2024 in case No. C-582/21 Profi Credit Polska S.A., pp. 35–37; 17 May 2022 in case No. C-600/19 Ibercaja Banco, p. 41; 7 November 2024 in case No. C-178/23 ERB New Europe Funding II, p. 32.

3 CJEU C-320/24 Soledil Srl, p. 26; 24 October 2018 in case No. C-234/17 XC, p. 22; 5 March 2020 in case No. C-679/18 OPR-Finance, p. 32; C-582/21 Profi Credit Polska S.A., p. 40.

4 Council Directive 93/13/EEC, 5 April 1993 on unfair terms in consumer contracts. OJ L 95, 21.4.1993, pp. 29–34.

5 CJEU C-320/24 Soledil Srl, p. 24; 4 June 2009 in case No. C-243/08 Pannon, p. 35; 30 May 2013 in case No. C-488/11 Asbeek Brusse, pp. 45, 46,

6 CJEU C-679/18 OPR-Finance, p. 23.

7 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC. OJ L 133, 22.05.2008, pp. 66–92.

8 CJEU C-600/19 Ibercaja Banco, p. 50; C-178/23, ERB New Europe Funding II, p. 38.

9 CJEU C-320/24, Soledil Srl, p. 34; C-178/23, ERB New Europe Funding II, p. 38.

10 With regard to the UCTD see Schulte-Nolke H. The Objectives of Directive 93/13/EEC on Unfair Contract Terms: An Overview after 30 Years of Case Law. European Review of Private Law, No. 3, 2023, pp. 317, 319. With regard to the CCD – Morello F. From Consumer Credit to Consumer Credits? Merits and Flaws of the 2008/48/EC Directive's Reform Proposal. European Review of Private Law, No. 4, 2023, p. 847 and CJEU judgment of 11 January 2024 in case No. C-755/22 Narokuj s.r.o., p. 33 and the case law referred to therein.

checks.[11] It is up to Member States to introduce national procedural principles that allow effective judicial protection of consumers in these matters.

In Estonian law, the principle of *res judicata* is an integral part of the principle of legal certainty,[12] which requires that court decisions be reliable and remain in force. This means that once a court decision has resolved a legal dispute, it is generally not permitted to reopen the same dispute.[13] The CJEU has also interpreted the principle of *res judicata* in a similar manner.[14] However, in certain limited cases, reopening a case is permitted under the Estonian Code of Civil Procedure[15] (hereinafter CCP), primarily through review.[16]

The mandatory consumer protection provisions of the UCTD and CCD have been transposed into Estonian law through the relevant provisions of the Law of Obligations Act[17] (hereinafter – LOA). Pursuant to § 403^4(1) LOA, a creditor must adhere to the principle of responsible lending during the pre-contractual negotiation phase, in particular by properly assessing the consumer's creditworthiness. In the event of a breach of this obligation, the creditor may not charge the consumer a higher interest rate for the use of credit than the statutory interest rate provided for in § 94 of the LOA[18] (i.e., the interest agreement and agreements for other fees contained in the contract are void). Art. 6(1) of the UCTD has been implemented into Estonian law by § 42(1)–(3) of LOA, which states that unfair standard terms (e.g., excessive late payment interest, grounds for termination of the contract) are void. It is the duty of the Member States' courts to apply EU law in court proceedings. The Estonian Supreme Court has stressed that in doing so, the court must review the transaction's validity *ex officio*.[19]

This article examines the impact of the CJEU's case law on the operation of the *res judicata* principle in Estonian civil, enforcement, and bankruptcy proceedings. It assesses whether the existing procedural framework ensures

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[11] The similarity of the objectives of the UCTD and the CCD is also referred by the CJEU in its judgment of 21 April 2016 in case No. C-377/14 Radlinger and Radlingerova, pp. 62–63.

[12] Eesti Vabariigi pohiseadus. Kommenteeritud valjaanne [Constitution of the Republic of Estonia. Annotated edition]. Iuridicum 2020, § 10 comm. 46.

[13] Eesti Vabariigi pohiseadus. Kommenteeritud valjaanne, § 10 comm. 54.

[14] CJEU C-320/24 Soledil Srl, p. 32; C-582/21 Profi Credit Polska S.A., pp. 35–37; C-600/19 Ibercaja Banco, p. 41; C-178/23 ERB New Europe Funding II, p. 32.

[15] Code of Civil Procedure. Available: https://www.riigiteataja.ee/en/eli/510042025001/consolide [last viewed 12.01.2026].

[16] See, e.g. CJEU judgment of 17 May 2022 in case No. C-869/19 Unicaja Banco and 17 May 2022 in case No. C-725/19 Impuls Leasing Romania.

[17] Law of Obligations Act. Available: https://www.riigiteataja.ee/en/eli/525112025001/consolide [last viewed 12.01.2026].

[18] Since 01.07.2025 the statutory interest rate is 2.15%, see https://www.eestipank.ee/volasuhete-intressimaar [last viewed 12.01.2026].

[19] Order of the Civil Chamber of the Supreme Court 24 November 2023 in case No. 2-21-13098, p. 13. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=2-21-13098/50 [last viewed 12.01.2026]; Judgment of the Civil Chamber of the Supreme Court 28 January 2015 in case No. 3-2-1-141-14, p. 18. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-2-1-141-14 [last viewed 12.01.2026].

the level of consumer protection required by EU law against unfair standard terms and irresponsible lending.[20] The analysis is confined to the interaction between EU law and Estonian statutory provisions and does not address issues of constitutional review or the compatibility of EU law with the fundamental principles of the Estonian Constitution.

1. Review of judgments that have entered into effect

Under Estonian law, the principal mechanism allowing a final court judgment to be challenged is review of judgments that have entered into effect (§§ 702-710 CCP). Review permits the retroactive removal of the binding force of a final judgment,[21] but is available only on the exceptional grounds exhaustively listed in § 702(2) CCP. These grounds do not include the court's failure, in the original proceedings, to assess *ex officio* either the unfairness of standard contract terms or compliance with the creditor's obligation to assess the consumer's creditworthiness.

In its judgment in Profi Credit Polska, the CJEU held that where a national court has failed to carry out an *ex officio* review of unfair contract terms in the initial proceedings, it must be examined whether national provisions governing review can be interpreted broadly so as to permit such assessment at a later stage.[22] Where necessary, national courts are required to depart from established case law if it is based on an interpretation incompatible with the objectives of EU directives.[23] Therefore, it must be assessed whether the provisions of Estonian law governing the grounds for review can be interpreted in such a way that a review would also be permitted in cases where the unfair nature of the standard terms or the adequacy of the creditworthiness assessment has not been assessed in the previous court proceedings.

Pursuant to § 702(2)(9) CCP, review is permitted only where a material circumstance existed at the time of the judgment but was unknown and could not have been known to the party. Neither the existence of potentially unfair standard terms nor deficiencies in the creditor's creditworthiness assessment can, as a rule, satisfy this condition, as these circumstances predate the judgment and are not unknown to the consumer. Nor does Estonian review procedure allow reopening a case on the basis of an alleged misapplication of the law.[24] Therefore, it must be

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[20] The limitations applicable to the principle of res judicata in disputes concerning consumer contracts have also been analysed in more detail in Kalamees P., Saare K. Kohtulahendi oigusjou piirangud tarbija(krediidi) lepingute naitel: Euroopa Liidu oiguse moju Eesti menetlusoiguse normidele [Res judicata principle in the case of consumer (credit) agreements: the impact of European Union law on Estonian procedural law norms]. Juridica, No. 8–9, 2025, pp. 533–552.

[21] Kove V. et al. (eds.). Tsiviilkohtumenetluse seadustik III. Kommenteeritud valjaanne [Code of Civil Procedure III. Annotated edition]. Juura, 2018, Chapter 68, introduction, p. 1308.

[22] CJEU C-582/21 Profi Credit Polska S.A., p. 84.

[23] CJEU C-582/21 Profi Credit Polska S.A., pp. 65 and 84.

[24] Kove V., et al. (eds.). 2018, § 702 comm. 3.2.10.e.

concluded that the rules of the CCP generally do not permit a case to be reviewed if the court has not, *ex officio,* assessed the potentially unfair nature of the standard terms in the previous proceedings and has not verified whether the creditor has properly assessed the consumer's creditworthiness.

Although the CJEU has referred to the need to interpret the grounds for review in national law broadly as a primary solution, it is not possible to interpret the aforementioned provisions of the CCP in accordance with the directive, because their purpose is clearly to prevent a situation where proceedings would be opened on grounds that already existed at the time of the initial proceedings and which the party could have relied on earlier. The CJEU does not oblige national courts to interpret the possibilities for review *contra legem* if an expansive interpretation is not possible due to the limits set by general principles of law. In this case, the principle of effectiveness requires that the protection of consumers' rights be ensured in the enforcement proceedings or in subsequent separate proceedings.[25] The decision on whether it is possible to interpret the rules of a Member State without giving a *contra legem* interpretation must be made by a national court.[26] Since, under Estonian law, it is problematic to consider the court's failure to check the validity of the standard term and the consumer's creditworthiness assessment as grounds for reviewing the court decision, the possibilities for protecting consumer rights in the enforcement proceedings of the relevant court decision must be assessed below.

2. Claim for declaring compulsory enforcement impermissible

According to the case law of the CJEU, the principle of effective judicial protection requires that the court involved in enforcement proceedings be able to assess, including for the first time, whether contractual terms underlying an enforceable claim are unfair.[27] In assessing compliance with the principle of effectiveness, national procedural rules must be considered as a whole, while EU law does not require courts to compensate entirely for a consumer's complete inaction in earlier proceedings.[28]

It can be concluded that if the court that made the decision in a consumer contract claim has not provided a summary of the reasons for the decision or warned of the negative consequences of failing to submit an objection within the time limit, the court handling the enforcement of the enforcement document must be able to exercise *ex officio* control.

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[25] CJEU C-582/21, Profi Credit Polska S.A., p. 78.

[26] CJEU C-582/21, Profi Credit Polska S.A., p. 64.

[27] CJEU judgment of 17 May 2022 in joined cases No. C-693/19 and C-831/19 SVP Projekt 1503 Srl, p. 66; 29 February 2024 in case No. C-724/22 Investcapital, p. 52; C-582/21, Profi Credit Polska S.A., p. 84; C-600/19 Ibercaja Banco, pp. 49 and 52.

[28] CJEU C-600/19 Ibercaja Banco, p. 44.

It needs to be clarified in which cases an Estonian court may exercise such control. One option for the consumer is to lodge a complaint with the bailiff under § 217(1) of the Estonian Code of Enforcement Procedure[29] (hereinafter – CEP). If the bailiff does not satisfy the complaint, the consumer may appeal to the district court. If the debtor does not submit a complaint to the bailiff within the prescribed period (10 days), they lose the right to subsequently rely on circumstances that they could have presented in the complaint (§ 217(6) CEP).

An alternative option for the consumer is to file a claim for declaring compulsory enforcement to be impermissible (§ 221 CEP). This is because enforcement proceedings are formal proceedings, and there is no competence to assess the substance of the claim arising from the enforcement document. In accordance with the principle of formalisation, the enforcement officer must mainly verify the authenticity of the enforcement document submitted for enforcement.[30] If the enforcement document is a court decision, then, as a rule, an action for declaring enforcement inadmissible can only be based on objections that have arisen after the court decision has entered into force (§ 221(2) CEP).[31]

The Estonian Supreme Court has repeatedly emphasised that it is not possible to challenge the facts established in an earlier decision with an action for declaring enforcement inadmissible.[32] The purpose of § 221(2) CEP is to prevent situations where a dispute that has been resolved by a final court decision is reopened in enforcement proceedings, and therefore, only factual events that have occurred after the entry into force of the decision that is the basis for enforcement can be taken into account.[33] Since the standard terms were included in the contract before the commencement of court proceedings, and if they are unfair, this circumstance also existed before the initial court decision entered into force. The creditor must also verify the consumer's creditworthiness before concluding the credit agreement with them. Therefore, this circumstance also occurred before the payment order or default judgment, which is the enforcement document, was issued.

However, the Estonian Supreme Court has taken the position that it is possible to file an action for declaring compulsory enforcement inadmissible based on

[29] Code of Enforcement Procedure. Available: https://www.riigiteataja.ee/en/eli/517122025006/consolide [last viewed 12.01.2026].

[30] Judgment of the Civil Chamber of the Supreme Court of Estonia 20 September 2018 in case No. 2-17-14364, p. 10.2. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=2-17-14364/20 [last viewed 12.01.2026].

[31] For more details on the compliance of this regulation with the UCTD, see Kalamees P., Sein K. Case Law of the Court of Justice of European Union on Unfair Contract Terms Directive: Implications on Estonian Domestic Law. International Comparative Jurisprudence, Vol. 3, No. 1, 2017, pp. 122-124.

[32] Order of the Civil Chamber of the Supreme Court 17 June 2009 in case No. 3-2-1-64-09, p. 9. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-2-1-64-09 [last viewed 12.01.2026]; Judgment of the Civil Chamber of the Supreme Court of Estonia 21 June 2017 in case No. 3-2-1-64-17, p. 10. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-2-1-64-17 [last viewed 12.01.2026].

[33] Order of the Civil Chamber of the Supreme Court of Estonia 4 May 2021 in case No. 2-19-13236, p. 10.1. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=2-19-13236/44 [last viewed 12.01.2026].

§ 221(1) CEP even if the basis for such an action arose during the court proceedings, but it was not possible for reasons independent of the party to the proceedings to enforce it in such a way that the court could have taken a position based on the claim in its judgment.[34] In some instances, applying the restriction on raising objections to the inadmissibility of enforcement may also be contrary to the principle of good faith. This is the case, for example, when a claim arising from an enforceable court decision is enforced, which was fulfilled before the enforcement document became enforceable, but the debtor does not rely on its fulfilment in court proceedings, even though this would have been possible. Additionally, the creditor had acted inconsistently before the court decision took effect.[35] Thus, in certain exceptional cases, the claimant may also raise objections to a court judgment that were already present before the court judgment entered into force.

Based on the aforementioned rulings of the CJEU, such an exceptional case should also include a situation where the enforceable claim is based on a consumer contract, the validity of which cannot be verified from the enforceable ruling.[36] This interpretation is also supported by the fact that, in situations where *ex officio* control is not apparent from the decision itself, it is difficult for the consumer to assess whether they need to challenge the decision consciously. If the court has exercised proper control in making the initial decision (and this is also reflected in the court decision), the consumer is not permitted to file an action for declaring the enforcement inadmissible. If the court has performed an effective review of whether contractual terms are unfair (and it is also reflected in the judgment), the consumer is not permitted to file an action for declaring the enforcement impermissible. This interpretation aligns with the principle that a result unfavourable to the consumer cannot constitute a circumstance that could call into question the principle of *res judicata*.[37]

Accordingly, where a consumer brings an action for declaring enforcement inadmissible, or challenges the bailiff's actions, and the enforceable decision does not demonstrate that the required consumer-protection review was conducted, the Estonian court must verify these circumstances *ex officio*. Interpreted in this manner, Estonian enforcement law can ensure the effectiveness of the rights conferred on consumers by the UCTD and the CCD. Nevertheless, the consumer's ability to invoke these safeguards does not follow clearly from the current wording

[34] Judgment of the Civil Chamber of the Supreme Court of Estonia 15 November 2023 in case No. 2-22-9401, p. 14.2. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=2-22-9401/29 [last viewed 12.01.2026]; Order of the Civil Chamber of the Supreme Court of Estonia 4 May 2021 in case No. 2-19-13236, p. 11.2. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=2-19-13236/44 [last viewed 12.01.2026].

[35] Order of the Civil Chamber of the Supreme Court of Estonia 4 May 2021 in case No. 2-19-13236, p. 11.2. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=2-19-13236/44 [last viewed 12.01.2026].

[36] CJEU C-600/19 Ibercaja Banco, p. 52; C-582/21 Profi Credit Polska S.A., pp. 80-81.

[37] CJEU C-178/23 ERB New Europe Funding II, p. 40.

of the law. For reasons of legal certainty, an amendment of § 221 CEP would therefore be desirable.

It should be noted that if the consumer does not file an action to declare the enforcement inadmissible or lodge a complaint against the bailiff's actions or decision, Estonian law does not grant the level of protection to the consumers as deemed by the aforementioned directives. Based on the principle of formalisation of enforcement proceedings, the bailiff must first and foremost verify the authenticity of the document submitted for enforcement,[38] and Estonian law does not provide for a separate enforcement judge who would supervise the compulsory enforcement of enforcement documents as part of their official duties.

3. Bankruptcy proceedings

The most acute tension between the principle of *res judicata* and EU consumer-protection law arises in Estonian bankruptcy proceedings. Pursuant to the Estonian Bankruptcy Act[39] (hereinafter BA) § 100^3(4)(1), claims arising from final court judgments must be recognised unconditionally, thereby precluding the bankruptcy court from examining *ex officio* either the validity of standard contract terms or compliance with the creditor's obligation to assess the consumer's creditworthiness.

The CJEU has taken the position that national legislation which provides that, in insolvency proceedings related to natural persons, once the list of claims has been approved by a judicial authority, which has not examined the possible unfair nature of the standard terms, and proceedings have been commenced before the bankruptcy court, the latter is bound by that list, are contrary to the UCTD. The CJEU has also noted that in such cases, the bankruptcy court must, *ex officio,* assess whether the standard terms are unfair.[40]

Although § 100^3(4)(1) BA provides for the unconditional recognition of a claim arising from a final court judgment, and the Estonian Supreme Court has taken the same approach in its earlier case law,[41] it is questionable whether this applies where a final judgment rendered in respect of a claim arising from a consumer credit agreement does not reveal that the court, in issuing the judgment, examined the validity of standard contract terms or compliance with the principle

[38] Judgment of the Civil Chamber of the Supreme Court of Estonia 20 September 2018 in case No. 2-17-14364, p. 10.2.

[39] Bankruptcy Act. Available: https://www.riigiteataja.ee/en/eli/501122025004/consolide [last viewed 12.01.2026].

[40] CJEU judgment of 3 July 2025 in case No. C-582/23 Wiszkier, pp. 56-58.

[41] Order of the Civil Chamber of the Supreme Court of Estonia 23 March 2023 in case No. 2-21-5718, p. 16. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=2-21-5718/35 [last viewed 12.01.2026]; Order of the Civil Chamber of the Supreme Court of Estonia 24 May 2023 in case No. 2-20-7904, p. 16. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=2-20-7904/99 [last viewed 12.01.2026].

of responsible lending.[42] If the creditor's claim were not based on an enforceable court judgment, the substantiation of the claim – including the validity of standard terms and compliance with the principle of responsible lending – would first have to be reviewed by the bankruptcy trustee when compiling the list of creditors.

In more recent case law of Estonian lower courts, the position has been adopted that an interpretation of § 100^3(4)(1) BA according to which a court may, without any additional review, deem a claim to be recognised without defence based on that provision – where the claim has been satisfied by a prior final court decision and is based on a legal relationship bearing the characteristics of a consumer credit agreement – is not compatible with the case law of the CJEU, the CCD, or the UCTD, if the earlier court decision does not demonstrate that the court examined the absence of grounds for invalidity of the underlying transaction. Read in conjunction with § 100^3(1) BA, this means that the court must verify, both *ex officio* and based on submissions by other parties to the proceedings, whether the court decision submitted in respect of a consumer-credit-type claim contains sufficient reasoning, at least in summary form, demonstrating that the required review was carried out. Where such reasoning is not apparent from the court's decision, the court must conduct the requisite review itself.[43]

One may agree with the view that the above interpretation is, in principle, consistent with the spirit of EU law as well as with the relevant case law;[44] however, it is questionable whether interpretation can be used to overcome a conflict with the applicable national law (i.e. § 100^3(4)(1) BA). The situation constitutes a rather clear case of *contra legem* interpretation. While it is indeed the task of the courts to interpret the relevant provisions of national law in conformity with applicable EU law, such an obligation cannot serve as a basis for interpreting national law *contra legem*.[45]

It must therefore be concluded that the Estonian bankruptcy regime requires legislative amendment. Claims arising from final court judgments rendered in proceedings in which the validity of a consumer contract was not reviewed must be excluded from the category of claims deemed to be recognised without defence. Pending such amendment, Estonian courts face the unresolved question whether § 100^3(4)(1) BA should be disapplied due to its incompatibility with EU law – a question that ultimately depends on the limits imposed by the Estonian Constitution and its fundamental principles.

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[42] See Order of the Civil Chamber of the Supreme Court of Estonia 18 November 2025 in case No. 2-24-12833. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=2-24-12833/27 [last viewed 12.01.2026].

[43] Order of Tallinn Circuit Court 28 March 2025 in case No. 2-24-1214, p. 7.5. Available in Estonian: https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=400325247 [last viewed 12.01.2026].

[44] CJEU C-582/23 Wiszkier, pp. 57-58.

[45] CJEU C-582/21 Profi Credit Polska S.A., p. 63; C-679/18 OPR-Finance, p. 45.

Conclusions

The case law of the Court of Justice of the European Union has significantly reshaped the relationship between the principle of *res judicata* and the requirements of effective consumer protection under EU law. While national procedural autonomy permits Member States to structure their judicial systems, that autonomy is constrained by the principles of equivalence and effectiveness, which require courts to examine *ex officio* both the unfairness of standard contract terms and compliance with creditworthiness assessment obligations. Where such review has not been carried out before a judgment becomes final, EU law requires that it be possible to conduct it in subsequent proceedings.

In Estonian law, review of judgments that have entered into effect does not generally provide an avenue for remedying the failure to conduct the required consumer-protection review, as it is limited to circumstances unknown at the time of the original decision and does not permit *contra legem* interpretation. The effectiveness of EU consumer law is therefore safeguarded primarily through enforcement proceedings, where existing procedural rules can be interpreted so as to allow *ex officio* judicial review in cases involving consumer contracts.

Although the rules governing enforcement proceedings in Estonia do not expressly provide the court with the possibility of departing from the principle of *res judicata*, such a departure is nevertheless possible through interpretation of the relevant provisions. In particular, § 221 of CEP should be interpreted as allowing an action seeking a declaration of inadmissibility of enforcement also in cases where the enforceable claim is based on a consumer contract and the enforceable decision does not disclose that the validity of that contract was reviewed. Such an interpretation is also supported by the Estonian Supreme Court's case law. Accordingly, the rights afforded to consumers under the UCTD and the CCD are ensured in Estonian law in enforcement proceedings, provided that the consumer actively seeks judicial protection of those rights, either by challenging the actions of the enforcement agent or by bringing an action for a declaration of inadmissibility of enforcement. It must nevertheless be acknowledged that the consumer's right, in the situation described above, to bring such an action does not follow clearly or unambiguously from the current wording of the law. Greater legal clarity would therefore require an amendment to § 221 CEP.

By contrast, Estonian bankruptcy proceedings reveal a structural incompatibility with EU law. The unconditional recognition of claims arising from final court judgments under § $100^3(4)(1)$ of the BA precludes any consumer-protection review and cannot be reconciled with CJEU case law through interpretation alone. As EU law does not require national courts to engage in *contra legem* interpretation, legislative intervention is necessary. Claims based on final judgments rendered without an assessment of the validity of consumer contracts must be excluded from the category of claims deemed to be recognised without defence. Pending such reform, Estonian courts must confront the unresolved question whether the conflicting provision should be disapplied, a determination

that ultimately turns on the constraints imposed by the Estonian Constitution and its fundamental principles.

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Enrico Locascio Aliberti, *Associate Professor*
University of Naples Federico II, Italy

THE PROBLEMS OF TERM LIMITS FOR DIRECTORS OF PUBLIC LIMITED COMPANIES IN EUROPEAN LEGAL SYSTEMS

Key words: governance of public companies, directors, term limits, sustainability, ESG objectives

Summary

The paper examines the time limits on the term of office of directors in public limited companies in the main European legal systems. The existence of a threshold is not limited to domestic regulations, but it is a transnational feature that generally responds to a need for corporate democracy. The actual determination of the maximum number of years in office is the result of a political decision. It is explored whether, especially in light of new ESG approaches, the provision of fairly restrictive thresholds is still an appropriate choice or whether *de iure condendo* a reshaping of it can be envisaged.

Introduction

The temporary nature of administrative offices, and corporate offices in general, is a feature of the governance of public limited companies.[1]

This characteristic is not limited to domestic regulations, but is actually transnational. In fact, in almost all European countries, administrative positions in public limited companies cannot be permanent, but are subject to a time limit, that depends on the choice made by the different legal systems.

Firstly, the focus will be on the reasoning behind the term limits in question, and then we will attempt to verify whether these are compatible with the medium

[1] Sanfilippo P. Funzione amministrativa e autonomia statutaria nelle societa per azioni [Administrative function and statutory autonomy in public limited companies]. Torino: Giappichelli, 2000, p. 289; Minervini G. Gli amministratori di societa per azioni [The directors of public limited companies]. Milano: Giuffre, 1956, p. 71.

to long-term management prospects, which are imposed by recent sustainability regulations.

1. The purpose of the term limits for directors of public limited companies

The existence of a time limit on the duration of directorships in public limited companies, serves the purpose of corporate democracy. In fact, the limit aims to ensure a balance between stable corporate governance and the possibility of replacing directors, if the company is not satisfied with their performance. Indeed, many legal systems allow for the removal of directors before the natural expiry of their term of office, but, in the absence of just cause, this involves a cost for the company in the form of compensation for damages to the removed director.[2]

The aforementioned threshold represents an inviolable limit on private autonomy; if there is a cap on the term of office, not even a shareholders' agreement could establish the appointment of a director for a longer period.[3]

This principle applies not only to the administrative body, but generally to all corporate offices in these companies, in particular to the supervisory bodies. The aim is the same, namely to avoid situations where governance becomes overly consolidated.

The temporary nature of the appointment is a mechanism for restoring the relationship of trust, between the administrative body and the entity that appointed it[4]: the shareholders' meeting or the supervisory body, respectively, in companies that use the traditional or one-tier model or in companies that use the two-tier model.

The limit on the duration of directorships in public limited companies is essentially aimed at preventing the concentration of decision-making power in the hands of the same people for excessively long periods of time, and thus at preventing the consolidation of positions of dominance within companies.

In many legal systems, the time limit is mitigated by the possibility of re-election in the following term of office, although company statutes may contain clauses that preclude re-election.

In any case, it should be noted that the re-election of a director obviously requires a new appointment and therefore a desire to confirm the director.

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[2] Rossi S., Di Cataldo V. Osservazioni in tema di revoca per giusta causa degli amministratori di societa di capitali [Observations on the removal of directors of limited companies for just cause]. Giurisprudenza commerciale, 2022, I, p. 535.

[3] Cagnasso O. Patti parasociali e contratto a favore di terzo [Shareholders' agreements and contracts in favour of third parties]. Societa, 2022, p. 137.

[4] See Jensen M. C., Meckling W. H. Theory of the firm: Managerial behaviour, agency costs and ownership structure. Journal of Financial Economics, No. 3, 1976, p. 305; Friedman M. Capitalism and Freedom. Chicago: University of Chicago, 1962, p. 133.

This shows that the legislator does not reject the idea that a director may manage the company for a very long period of time, but rather the idea that he may do so without having received a renewal of confidence from the person who appointed him.

2. The transnational nature of the term limits for directors. A comparison between different countries

In many legal systems, such as the Italian one, there is a maximum limit. This means that the administrator may be appointed for shorter periods, but no longer ones. For example, a director may be appointed for only one year, or, in the case of a board of directors, it may be possible to opt for so-called staggered board.

This mechanism is quite widespread in the United States. It provides that the board of directors is not renewed entirely every three years, but that, for example, one director or a portion of the directors is appointed each year. The staggered board has numerous benefits.[5] Above all, it ensures "managerial continuity and stability"[6], since the partial renewal of the board each time allows for the continuation of strategies that have already been initiated. Furthermore, it facilitates the integration of different professional skills within the body and promotes integration between previous members, who are already experts, and new members.

As mentioned above, the provision of a term limit for directors in public limited companies is a transnational feature.

The temporary nature of the position of director is evident in the *Societas Europea*.[7] Doctrine has stated that "members of the organs of an SE – as well as members of the organs of public companies established according to many domestic legislations – may not be appointed for a lifelong period".[8]

Moving on to individual legal systems, to mention just a few, Spanish law[9] is quite unique in that it provides for a difference in the maximum term depending on whether the company is listed or unlisted. Specifically, the term of office of

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[5] Sacco Ginevri A. Why Staggering Italian Banks' Boards in a World of Destaggering? Rivista trimestrale di diritto dell'economia, No. 1, 2016, p. 52; Massa Felsani F. Scadenza "contemporanea" e scadenza "scaglionata" del consiglio di amministrazione ["Simultaneous" expiry and "staggered" expiry of the board of directors]. Rivista del diritto commerciale, 1995, I, p. 545; Cremers K. J. M., Litov L. P., Sepe S. M. Staggered Boards and Firm Value. Journal of Financial Economics, No. 2, 2017, p. 422.

[6] Bebchuk L. A., Coates J. C., Subramanian G. The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy. Stanford Law Review, 2002, p. 887; Koppes R. H., Ganske L. G., Haag C. T. Corporate Governance Out of Focus: The Debate over Classified Boards. Business Lawyers, No. 3, 1999, p. 1051.

[7] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

[8] De Luca N. European Company Law. Cambridge: Cambridge University Press, 2017; Rivaro R. La Societa Europea [The European Company]. Nuovo diritto delle societa, 2017, p. 47.

[9] Ley de Sociedades de Capital, Section 221.

directors may not exceed four years if the public limited company is listed, and six years if the public limited company is unlisted.[10]

The maximum term of six years also applies in French law.[11] A relatively shorter term is provided for in German law: members of the management board of an *Aktiengesellschaft* are appointed for a maximum term of five years.[12] The same term is also provided for in Latvian law in relation to the *Akciju Sabiedriba*, the Latvian public company: the *Komerclikums* states that "Members of the executive board shall be elected to position for five years if the articles of association do not specify a shorter term".[13]

In the Italian legal system, the maximum duration is three financial years;[14] this limit applies to all public limited companies, whether listed or unlisted, private or public, regardless of their size.

The actual determination of the maximum number of years in office is the result of a political decision. The provision of a maximum term of office represents a trade-off between corporate balance and management efficiency. On the one hand, an excessively short term is useful for corporate democracy but disadvantageous from a management perspective; on the other hand, an excessively long term is risky for maintaining balance within governance, although advantageous from the point of view of management continuity.

3. The consideration of the term limit as an obstacle to the managerial continuity of companies

However, the precise number of the limit can be justified in economic doctrine, which usually takes the period of 3–5 years as the dividing line between the short and long term. It is not a coincidence that companies typically draw up three-year or, in some cases, five-year business plans. Nor is it a coincidence that, in all legal systems that provide for a time limit, this is between 3 and 6 years.

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[10] Rojo A. Consideraciones sobre el derecho espanol de las sociedades mercantiles [Considerations on Spanish commercial company law]. Rivista di Diritto Societario, I, 2008, p. 2; Cortes Domìnguez L. La temporalidad del cargo de administrador en la sociedad anonima [The temporary nature of the position of director in a public limited company]. Revista de Derecho Mercantil, 1979, p. 411; Sanchez Calero F. Los administradores en las sociedades de capital [Directors in limited companies]. Madrid: Editorial Civitas, 2007, p. 121.

[11] Code de commerce, Section L. 225-18. See Menjucq M. Corporate Governance Issues in France. European Business Law Review, 2005, p. 1007; Cozian M., Viandier A., Deboissy F. Droit des Societes [Company Law]. Paris: Litec, 1999, p. 240.

[12] Aktiengesetz (AktG), Section 84, paragraph 1. See Bernhard W. Aufsichtsrat – die schoenste Nebensache der Welt? Defizite fuer eine effiziente Aufsichtsratstaetigkeit [Supervisory board – the most enjoyable secondary matter in the world? Deficits for efficient supervisory board activity]. Zeitschrift fuer das gesamte Handels und Wirtschaftsrecht, 1995, p. 312; Raiser T., Veil R. Recht der Kapitalgesellschaften [Company Law]. Muenchen: Verlag Franz Vahlen, 2006, p. 149.

[13] Komerclikums, Section 305, paragraph 3.

[14] Italian Codice civile, Section 2383, paragraph 2.

The critical issue with these thresholds arises primarily, from a management perspective. In fact, the equality between the term of office of directors and that of business plans is often only nominal and not effective.

Especially in cases where new top management is appointed for the first time, the first year in office is essentially spent getting to know the company. In any case, as a practice, business plans are defined and approved six or twelve months after the new top management takes office; therefore, the actual implementation of the business plan only begins during the second year of the term of office.

Furthermore, in the last year of the term of office, in light of the presumed instability regarding the re-election of board members, it is likely that the implementation of the plan will suffer some setbacks.

In this context, a three-year period definitely does not allow for the execution and completion of a three-year (let alone five-year) business plan. It should also be remembered that the possibility of re-election of directors, where not precluded by the articles of association, is only potential; the confirmation of directors requires in any case a decision by the shareholders' meeting, or a decision by the different body responsible for the appointment.

4. The impact of ESG factors and sustainable development on the term limits for directors

Further problems arise in terms of sustainability. So-called sustainable development is the driving force behind recent European ESG regulations.

Sustainable development requires a mitigation of the concept of social interest as maximization of shareholder profit; it requires that the corporate purpose also consider ESG factors and, in general, the interests of stakeholders involved in the business. Therefore, sustainable development certainly has an impact on the definition of business strategies[15].

Despite some recent setbacks (such as the so called "Stop the clock Directive"[16]), the inclusion of social, environmental and governance sustainability objectives in the management policies of large companies seems to be a given, from which it will be difficult to turn back. The new legislation in question – especially the Corporate Sustainability Reporting Directive[17] and the Corporate

[15] Denozza F. Due concetti di stakeholderism [Two concepts of stakeholderism]. Orizzonti del diritto commerciale, No. 1, 2022, p. 34.

[16] Directive (EU) 2025/794 of the European Parliament and of the Council of 14 April 2025 amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements.

[17] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

Sustainability Due Diligence Directive[18] – highlights the need for a long-term perspective in the management of social enterprises.

The consideration of ESG factors in business management has breathed new life into the contrast between short-term and long-term concepts[19]. For some time now, US doctrine has been proposing an extension of the reference horizon for management strategies, especially in listed companies. In this context, the short-term horizon is mainly affected by the markets, which are characterized by an excessive focus on current share prices rather than on the company's growth prospects. This is reflected in pressure from shareholders on boards, which are often incentivized to focus on short-term goals. Thus, a longer term of office for directors could give them greater autonomy from shareholders.

The necessary consideration of ESG factors and the ideal association of shareholder primacy with the short term has led to an exaltation of the long term and, conversely, a resolute criticism of the short term.[20] As if the short term were necessarily good and beneficial for ESG factors and the long term were implicitly harmful to them. In reality, this criticism is certainly valid. However, beyond the criticism expressed in doctrine, regarding the exaltation of the so-called long term[21], there is no doubt that most of the negative externalities caused to the environment and human rights are the result of short-term management decisions. Therefore, a focus on long-term development necessarily impacts the time horizons taken as a reference for the strategic decisions of directors.

Conclusions

In this framework, the need for management stability, on the one hand, and consideration of ESG objectives, on the other, are not always compatible with excessively short terms of office for directors.

Thus, the hope is that the thresholds will be reconsidered in those jurisdictions that still have term limits of only three or four years.

In particular, a real term of office for directors that is significantly shorter than the nominal term certainly does not encourage the adoption of decisions

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[18] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

[19] Ferrarini G., Siri M., Zhu S. The EU Sustainable Governance Consultation and the Missing Link to Soft Law. European Corporate Governance Institute. Law Working Papers, 2021, p. 10.

[20] Haldane A. G. The cost of short-termism. The Political Quarterly, 2016, p. 66, according to which the term "short term" "is generally taken to refer to the tendency of agents in the financial intermediation chain to weight too heavily near-term outcomes at the expense of longer-term opportunities".

[21] Stella Richter M. Long-Termism. Rivista delle societa, 2021, p. 41. See also Amatucci C. Responsabilita sociale dell'impresa e nuovi obblighi degli amministratori. La giusta via di alcuni legislatori [Corporate social responsibility and new obligations for directors. The right path for some legislators]. Giurisprudenza commerciale, 2022, I, p. 620.

based on sustainability principles. The problem of limited tenure is obvious: it is difficult to imagine that a director who, after only three or four years, risks leaving the company he or she manages, would be willing to invest in long-term objectives, let alone prioritize the interests of third parties over those of the shareholders.

Above all, sustainable choices need time to be implemented and put into practice. Short time horizons do not allow for this. Rather than considering possible regulatory changes to the corporate purpose, the legislator could begin to reflect on extending the time limits for directorships. Alternatively, consideration could be given to introducing partially differentiated rules for listed companies, which are more exposed to ESG issues. In these companies, more than in closed companies with a limited number of shareholders, there is a problem of limited terms of office for directors. The proposed change would benefit not only ESG issues, but more broadly the management dynamics of companies, which often need more time to perform at their best.

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Cristiana Fiengo, *Associate Professor*
University of Naples Federico II, Italy

THE CONVERGENCE PROCESS OF CORPORATE GOVERNANCE MODELS IN EUROPEAN LEGAL SYSTEMS TOWARDS BEST PRACTICES

Key words: corporate governance models, one-tier board model, two-tier board model, listed companies, corporate self-regulation

Summary

The article addresses the process of convergence that has taken place within the legal systems of European countries in the field of corporate governance models. This process has been marked, on the one hand, by the alignment of European frameworks with Anglo-American benchmarks and, on the other, by the increasing receptiveness of US and UK practices to principles rooted in the European tradition. In light of the foregoing, the paper identifies a euro-unitary trend in favour of the one-tier model, conceived as the corporate governance system best suited to support the implementation of the principles set out in the self-regulatory codes for listed companies.

Introduction

Referring to the generally accepted definition, a corporate governance structure consists of a company's system of boards, committees and officers, entrusted with specific powers and responsibilities regarding decision-making, management and supervision in the interest of shareholders and other stakeholders. As an eminent scholar has noted, "a corporate governance structure derives from the implementation of a one-tier or a dual-board model of corporate governance".[1]

The corporate governance models established in the internal legal frameworks of European Union member countries are mainly structured around three models:

[1] Bosetti L. Anglo-American Board Model (One-Tier) Versus European Model (Two-Tier). In: Idowu S. O. et al. (eds.). Encyclopedia of Sustainable Management. Springer Nature Switzerland AG, 2023, p. 2.

one-tier board model, two-tier board model and dual-board model with a side-by-side board.[2]

First of all, European Regulation No. 2157 of 2001 allows the choice between the one-tier and the two-tier model also for the European Company. The same choice is also extended to European Cooperative Societies (SCE) under Regulation (EC) No. 1435 of 2003.[3]

Turning to the national legal systems of the European Union Member States, only some jurisdictions operate under a single corporate governance model. More specifically, certain countries exclusively adopt the one-tier model, whereas others rely solely on the two-tier model. Meanwhile, the majority of legal systems of the European Union Member States allow a choice between the two models.[4]

The legal systems of Italy and Portugal – as well as Japan,[5] when non-European Union jurisdictions are also taken into consideration – display a distinctive feature. In addition to allowing a choice between the one-tier and the two-tier corporate governance models, these jurisdictions also permit the adoption of a third model specific to their respective legal systems.[6] This model is characterised by establishment of two separate, distinct bodies, operating alongside one another, both appointed by the shareholders' meeting. One body is entrusted with the management of the company, while the other is responsible for supervising the administration of the company.

Expanding the analysis to the forty-nine jurisdictions examined by the Organization for Economic Cooperation and Development in its Governance Factbook 2023 reveals a diversified regulatory landscape. Of these jurisdictions, 23 recognise exclusively the one-tier model, while 9 permit only the two-tier model. The remaining jurisdictions allow companies to choose between the two models,

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[2] Davies P. L., Hopt K. J. Corporate Boards in Europe – Accountability and Convergence. The American Journal of Comparative Law, Vol. 61, Issue 2Hopt, 2013, p. 301; Hopt K. J. Comparative Corporate Governance: The State of the Art and the International Regulation, The American Journal of Comparative Law, Vol. 59, Issue 1, 2011, p. 22.

[3] Caterino D. La Societa europea [The European Company]. In: Donativi V. (ed.). Trattato delle societa, IV, Societa quotate – Statuti normativi speciali – Societa cooperative. Vicenza: Wolters Kluwer, 2022, p. 1256; Miola M. Lo statuto di Societa europea nel diritto societario comunitario: dall'armonizzazione alla concorrenza tra ordinamenti [The Statute of the European Company in EU Company Law: from Harmonisation to Regulatory Competition]. Rivista delle societa, 2003, p. 322.

[4] Alvaro S., D'Erasmo D., Gasparri G. Modelli di amministrazione e controllo nelle societa quotate. Aspetti comparatistici e linee evolutive [Models of corporate governance in listed companies. Comparative aspects and evolutionary trends]. Quaderni giuridici Consob, No. 7, 2015, p. 40.

[5] Passador M. L. Modelli di amministrazione e controllo: il caso del Giappone [Corporate Governance Models: The Case of Japan]. Rivista delle societa, 2016, p. 194.

[6] By allowing three alternative corporate governance models, the Italian and Portugal legal systems offer their economic actors a wide range of organizational options, even surpassing, in numerical terms, the flexibility of the European legislator, which, as mentioned, contemplates only the choice between the one-tier model and the two-tier model. See: Enriques L. Concorrenza tra ordinamenti e migrazioni opportunistiche: che fare? [Competition between legal systems and opportunistic migration: what should be done?]. Rivista delle societa, 2024, p. 596; Rivaro R. La societa europea [The European Company]. Il Nuovo Diritto delle Societa, No. 2, 2017, p. 47.

whereas only three countries provide for a choice among all three governance models.[7]

From the data reported above, it is clear that the one-tier system is the most widespread corporate governance model at the international level.[8] It is therefore not surprising that in Germany it has been established the largest number of European Companies in order to gain access to the one-tier board model; in fact, in the German law, the legal system allows (more precisely, requires) only the two-tier board model (§§ 76 ff. AktG), which is characterized by the institutional separation between the management board and the supervisory board.

Moreover, in France, where the law offers all public limited companies the choice between the monistic model and the dualistic structure the preference – both in practice, in academic debate and in the Corporate Governance Code – is clearly in favour of the former.[9]

A phenomenon of convergence among the different corporate governance systems

Even if each corporate governance model has its own distinct features, they share important similarities with one another.[10] Indeed, starting from the mid-nineties, a phenomenon of convergence among the different corporate governance systems has occurred, both at the regulatory and practical levels.[11] The phenomenon occurred following corporate scandals involving publicly listed companies in several countries and the financial crisis that has spread worldwide over the past years.

Particularly interesting is the play of interactions and mutual influences that has emerged among the different corporate governance systems. Convergence has been driven by supranational legal reforms (like those initiated in the EU), corporate self-regulation, and mutual imitation among firms. However, from a regulatory perspective, the most significant progress in convergence still remains

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[7] OECD (Organisation for Economic Co-operation and Development). Corporate Governance Factbook 2023, Paris: 2023, p. 134.

[8] Gelter M., Siems M. Letting Companies Choose between Board Models: An Empirical Analysis of Country Variations. University of Pennsylvania Journal of International Law, Vol. 43, Issue 1, 2021, p. 137, state that "today many countries [...] provide two separate legal templates by giving firms a choice between a one-tier and a two-tier board model".

[9] Cozian M., Viandier A., Deboissy F. Droit des societes. 37th ed. Paris: Lefebvre Dalloz, 2024, p. 300.

[10] Fiengo C. Sistema monistico. Tra sfide competitive e successo sostenibile [One-tier model: between competitive challenges and sustainable success]. Napoli: Edizioni Scientifiche Italiane, 2025, p. 257.

[11] Ventoruzzo M., Conac P. H., Goto G., Mock S., Notari M., Reisberg A. Comparative Corporate Law, St. Paul (Minnesota): West Academic Publishing, XXXIII, (American Casebook Series), 2015, p. 257; Montalenti P., Balzola S. La societa per azioni quotata [The listed joint-stock company]. Bologna-Roma: Zanichelli, 2013, p. 4.

largely confined to the self-regulatory codes of listed companies.[12] In fact, self-regulatory codes, built on the "comply-or-explain" approach, have often focused on crucial aspects of management administration and oversight. Moreover, it should be noted that guidelines from business organizations and regulations set by stock exchanges have, in some cases, preceded the enactment of compulsory rules by policymakers. This has played a significant role in promoting the exchange of corporate governance best practices globally and in narrowing the gaps between national frameworks.

Although the process is still ongoing, it has already led to a notable reduction of the key differences between corporate governance models, making companies more comparable in international markets and enhancing the overall quality of their management and oversight globally.

This process of convergence shows, on the one hand, a tendency of European models to move closer to Anglo-American standards and, on the other hand, a gradual openness of US and UK practices to the core principles of the European tradition.

Taking Germany as an example, German scholars have pointed out that, in practice, there is an increasing interchange of roles between the management board (*Vorstand*) and the supervisory board (*Aufsichtsrat*). Therefore, despite the traditional two-tier governance structure is formally adopted, the actual corporate governance increasingly takes on a one-tier structure. Moreover, the German Corporate Governance Code (updated on 28 April 2022) shows clear signs of functional convergence from the two-tier model towards the one-tier model. In the German Corporate Governance Code we can observe a close and mutual cooperation between the management board and the supervisory board of listed companies, regarding in particular strategy, planning, business development, risk situation, risk management and compliance. The Principle No. 13 is very interesting because it highlights the importance of cooperation between the *Vorstand* and the *Aufsichtsrat*, based on mutual trust and aimed at the benefit of the enterprise. Principle No. 13 precisely states that "good corporate governance requires an open dialogue between the Management Board and the Supervisory Board, as well as between the members of these individual Boards". The subsequent Principle No. 16 places great importance on the mutual exchange of information that must be established between the two bodies.

A similar phenomenon, but in reverse, can be observed in the British legal system.

The legal framework of corporate governance in the United Kingdom, unlike the German and Italian ones, does not contain rules that impose a strict separation of functions between management and supervisory bodies; at the same time, however, it does not include provisions that would prevent such a separation from occurring in practice.

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[12] Montalenti P. I problemi di governance [Governance issues]. Giurisprudenza Commerciale, No. 2, 2024, p. 376.

Progressively, in the United Kingdom, where only the one-tier system has always been applied, a process has developed both at the regulatory and practical levels, which has manifested itself through the separation between management and supervisory functions within the boards of directors. This updating process of rules concerning the internal structure of the board of directors has led to a strengthening of the duties and powers of the internal committee who is responsible of control. Furthermore, the committee members must demonstrate possession of stricter subjective independence requirements. As noted by many scholars, these elements represent progressive steps aimed at defining a control function distinct from management function, where such a distinction was previously lacking.[13]

The UK Corporate Governance Code, updated in January 2024, (in Section 2, Principle G) considers it essential for listed companies to have a combination of executive and non-executive directors (particularly non-executive and independent directors) within the board of directors, so that no individual or small group of individuals dominates the board's decision-making process. It is also required a clear division of responsibilities between the leadership of the board and the executive leadership of the company business.

According to flexible criteria, the function of setting strategy and social goals is entrusted to the full board of directors, day-to-day conduct is entrusted to the executive directors and supervision is entrusted to the internal audit committee. Therefore, as it has been well summarized by leading scholarship: "the board has a dual function, both to "lead" and to "control" the company. And it is also thanks to self-regulation that the board's monitoring function is raised to the same level as the function of defining corporate strategies".[14] At least one third of the board as a whole should be made of non-executive directors, most of whom should be independent. Independent means being free from management and from any business or other relationship with the company that could materially interfere with the exercise of objective judgment.[15]

The circumstances which are likely to impair, or could appear to impair, a non-executive director's independence are listed in the UK Corporate Governance Code, Section 2, Provision 10 – it is a list that should not be considered exhaustive.[16]

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[13] Fortunato S. I "controlli" nella riforma del diritto societario [The "controls" in the reform of company law]. Rivista delle societa, 2003, p. 891.

[14] Davies P. L. Board Structure in the UK and Germany: Convergence or Continuing Divergence? International and Comparative Corporate Law Journal, No. 2, 2000, p. 6.

[15] Davies P. The System of Corporate Governance in the United Kingdom. In: Tombari U. (ed.). Corporate governance e "sistema dei controlli" nella s.p.a. [Corporate governance and the "system of controls" in the joint-stock company]. Torino: Giappichelli, 2013, p. 211, argues that "the single most important achievement of the Cadbury Committee was its successful advocacy of the introduction (or, perhaps better, re-introduction) of the monitoring function to the boards of large British companies, and its elevation to equal status with the strategy-setting function".

[16] It is a responsibility of the board, in the annual report, to identify each non-executive director who is considered independent.

In listed companies, as reflected in the UK Corporate Governance Code, Section 4, Provision 25, in addition to other functions "The main roles and responsibilities of the audit committee should also include [...] – reviewing the company's risk management and internal control framework, unless expressly addressed by a separate board risk committee composed of independent non-executive directors, or by the board itself".

Thus, the process of regulatory convergence outlined above, characterized by enhanced oversight requirements and the assignment of supervisory functions to suitably qualified individuals, has resulted in the recognition of a more distinct separation between management and the supervision, even where both functions are performed within a single board.

Finally, it is worth noting that a process of convergence has also taken place in Italy among the different corporate governance systems.

Specifically, in most Italian companies characterized by a certain organizational complexity, the traditional "dual-board model with a side-by-side board" is formally adopted, while in practice the corporate governance tends to take on a one-tier structure, properly considering the cooperation that exists between the management body and the supervisory body.

As a result of the rules set out in the Corporate Governance Code, updated in January 2020, the traditional Italian model – characterised by the cooperative *ab externo* oversight exercised by the supervisory body – has experienced an increased degree of contamination from international best practices, which assigns to the management body the additional role of a monitoring board, consisting of continuously overseeing the efficiency and proper conduct of the company's executive directors.

In this context, the increasingly frequent participation of the members – either all or only some – of the supervisory body in board committees has emerged. The largest Italian listed companies have effectively shifted the summit of the control function from the supervisory body to the board of directors, specifically – to its non-executive members, adjusting themselves to international best practices.

Over time, the traditional model of management and control has undergone a form of institutional evolution, progressively incorporating features characteristic of the one-tier system. This phenomenon has been most pronounced among listed companies, driven by their adherence to the Corporate Governance Code, and has gradually steered the overall corporate governance framework towards coser alignment with the Anglo-Saxon model and international best practices.

Conclusions

Scholars largely agree that, under equal conditions, there is no universally superior corporate governance model in abstract terms. However, within the euro-unitary framework, there is a strong tendency to give the board a progressively

more central role, with a careful internal allocation of both management and supervisory functions. Therefore, according to the prevailing view among scholars, instead of uselessly opposing this euro-unitary trend towards the one-tier model, it is better to adjust it to the national legal systems of the Member States.[17] Moreover, at the heart of the current international legal debate on corporate governance models lies the question of whether the one-tier model is intrinsically suitable for listed companies.

This conclusion, in my opinion, is fully acceptable even in the Italian context, as the emphasis on the operational flexibility and solid structure that the one-tier model can offer appears constructive; moreover, the one-tier model is no longer perceived as entirely alien to the Italian traditional model.

This has been confirmed by the reform of the Italian financial system enacted by the Italian legislator in 2026 to strengthen the competitiveness of Italian companies.[18] This reform appears suitable to overcome the resistance towards the one-tier model that has existed in Italy until now. Thus, the one-tier model becomes a competitive factor and a pull for investments, especially for foreign institutional investors. Indeed, in larger listed companies, the composition of the shareholding structure is increasingly represented by institutional investors (both domestic and foreign), rather than by retail or other kinds of investors.

This significant change in the composition of share ownership is the factor that, more than any other, prompts a reconsideration of the goals of company law and the tools through which achieve them. In fact, institutional investors consider the quality of corporate governance systems a key element of their investment policies. In this regard, it is worth to highlight that the one-tier model is often seen, particularly abroad, as a simple and flexible solution able of ensuring transparency and high-quality corporate information, thanks to the flow of data between the board of directors and its committees.

Taking everything into consideration, once the criticisms raised in Italy against the one-tier model have been overcome, it could represent a preferable alternative to other systems, especially in the context of listed companies.

The significance of the guiding principle underlying the recent Italian reform of the financial system should not be underestimated. Accordingly, in alignment with international best practices, it is necessary to simplify corporate governance rules, while taking into account the provisions set out in the Codes of Corporate Governance. This indication represents a clear acknowledgment of the value of self-regulatory rules, to which the legislator intends to refer in defining primary legislation. In this context, a marked shift in favour of the one-tier model emerges, which is configured as the system of management and control best suited to support the implementation of the principles contained in the Italian Corporate Governance Code. To date, it is indeed undisputed that the preferred

[17] Stella Richter jr. M. Le opportunita del sistema monistico per il diritto societario [Opportunities offered by the one-tier model in corporate law]. Rivista delle societa, 2019, p. 519.

[18] D. Lgs. No. 47/2026 of 27 March 2026.

environment for the one-tier model is that of listed issuers, which, being required to preferably establish a governance system in line with the principles expressed in the CCG, can derive clear advantages from the allocation and balancing of roles and responsibilities among their corporate bodies, achieving a balance between strategic supervision, management, and supervisory functions in accordance with the Code itself.

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SECTION 7

ADMINISTRATIVE OFFENCE LAW IN COMPARATIVE PERSPECTIVE: INTERACTION OF EU LAW, ADMINISTRATIVE LAW AND PENAL LAW

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Thibault Lahalle, *Senior Lecturer (HDR),*
Director of the Master's programme in Social Law
University of Paris-Est Creteil, France

APPLICATION OF THE ADMINISTRATIVE FINES SYSTEM TO FRENCH LABOUR LAW

Key words: administrative fine, appeal, breaches, debtor, labour law, liability, prosecution

Summary

The growing use of administrative fines in labour law warrants an explanatory analysis that considers both legislative and regulatory texts, as well as case law. Following the general legal framework, this recourse to administrative sanctions allows public authorities to save considerable time in enforcing established standards, with a limited risk of litigation.

Introduction

Origin

The administration has the power to punish the perpetrator of an offense by imposing an administrative fine. This is indeed a matter of sanctioning after the fact those who have not complied with the legislation, and not of preventing a potential breach of public order beforehand. This fine does not have a compensatory purpose, as is the case in tax law when a taxpayer is ordered to pay the State an amount corresponding to back taxes. This recourse to administrative fines is unusual. Traditionally, the public authorities sanction violations of the rules they prescribe through criminal penalties handled by the criminal courts. Overriding the objection of a violation of the principle of the separation of powers, the Constitutional Council ruled that the administration could both judge and punish.[1] The legislature has created numerous cases of application.

[1] Cons. const. 17 January 1989, Liberte de communication, No. 88-248 DC.

Cases of application

There are many situations in which administrative fines can be applied. Examples include public service law, which allows for disciplinary action against public officials; tax law, which can impose fines for late tax payments; administrative law, which authorizes independent administrative authorities – such as the High Council for Audiovisual Media or the Competition Authority – to issue fines; and labour law, the subject of this study. The success of administrative fines is well-established. They allow the administration to quickly sanction misconduct while avoiding the inherent difficulties of judicial review. Only challenges to these fines before the administrative courts can cause delays. After examining the general framework of administrative fines in French law (I), we will focus more specifically on their implementation in labour law (II).

1. General Law of Administrative Fines in France

1.1. Origin

The use of administrative fines is not a natural phenomenon. It developed over time, becoming established in the various branches of public law, and subsequently in private law. The result of this development allows for a better understanding of its implementation mechanisms.

1.2. Development, foundation, constitutional case law

It was through its significant 1989 rulings that the Constitutional Council validated the possibility for the administration to sanction an offense by imposing a fine. The Council, however, required respect for the rights of the defence. He thus decided that "neither the principle of the separation of powers, nor any principle or rule of constitutional value, prevents an administrative authority, acting within the framework of prerogatives of public power, from exercising a power of sanction provided that, on the one hand, the sanction that may be imposed excludes any deprivation of liberty and, on the other hand, the exercise of the power of sanction is accompanied by law by measures intended to safeguard constitutionally guaranteed rights and freedoms." The judges of the Constitutional Council added that "a sentence can only be imposed if the principle of legality of offenses and penalties, the principle of necessity of penalties, the principle of non-retroactivity of criminal laws establishing more severe offenses, and the principle of the rights of the defines are respected," and that "these requirements apply not only to sentences handed down by criminal courts but also to any sanction that constitutes a punishment, even if the legislature has entrusted its pronouncement to a non-judicial authority." The administration is therefore not free to act arbitrarily. It must respect fundamental rights relating to the definition of an offense, as well as

the rights of the defence. The introduction of the priority preliminary ruling on constitutionality in 2008 allowed the Council to confirm its approach.[2]

2. European case law

In European law, the term "accusation" in criminal matters, as defined in Article 6 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, is broadly interpreted. It can encompass not only judicial proceedings but also administrative ones.[3] Based on this analysis, the Council of State ruled that tax penalties fall under the scope of criminal law,[4] as do financial sanctions imposed, in particular, by the Financial Markets Authority.[5]

2.1. Procedure

2.1.1. Rights of the defence. A fundamental principle of any democratic state, the rights of the defines were enshrined in administrative law as early as the end of the Second World War.[6] As a general principle of law, it applies independently of any specific legislation, including administrative sanctions. This principle requires respect for the adversarial process, allowing individuals to contest the fine imposed upon them. In practice, the accused must be able to consult the case file and be aware of the charges against them[7] in order to submit oral or written[8] observations, possibly with the assistance of a lawyer. The legislature has since enshrined these rules.[9]

2.1.2. Publicity of proceedings. Applying European case law, the administrative judge requires public hearings for disciplinary proceedings before professional bodies.[10] However, in the absence of specific legislation, this publicity is not required for sanctions imposed by an administrative authority. The possibility of an appeal to the administrative judge, who rules publicly, is sufficient to respect the fundamental principles of procedure.[11]

2.1.3. Reasoning. A fundamental principle of all contentious or administrative proceedings, reasoning limits the arbitrariness of the judge or the administration. It obliges them to explain their decision and allows for verification of the principle of proportionality between the sanction imposed and the alleged facts. Beyond

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2 Cons. const. QPC 25 November 2011, No. 2011-199.

3 ECtHR judgment, 8 June 1976, Engel et autres c. Pays-Bas, No. 5100/71.

4 CE, 31 March 1995, Ministre du budget c/ Auto-Industrie, No. 164008.

5 CE, 24 February 2005, Societe GSD gestions et M.G. No. 269001.

6 CE, 5 May 1944, Dame Veuve Trompier-Gravier : Rec. p. 133.

7 CE, 22 November 1995, No. 171045.

8 CE, 26 March 1982, No. 20569.

9 C. des relations entre le public et l'administration, art. L. 122-1 et L. 122-2.

10 CE, 14 February 1996, Maubleu, No. 132369.

11 CE, 10 May 2004, Credit du Nord, No. 241587.

the right to information that it embodies, reasoning also allows for understanding the sanction and even challenging it. The judge must be attentive to its respect.[12]

2.1.4. Impartiality. A general principle of law, impartiality is a constant in all proceedings. It applies both to the individual making the contested decision and to their environment and any other positions they may hold that could cast doubt on their independence and objectivity.[13] Thus, a member of the sanctions committee of the Financial Markets Authority cannot objectively sit on the executive committee of a banking group whose subsidiary is involved in the proceedings.[14] In doing so, the national judge follows the line of European case law, which deems it "necessary to more precisely define the power to initiate proceedings *ex officio* so as to eliminate the impression that the applicant's guilt has been established from the outset of the proceedings".[15] Accordingly, the same person cannot simultaneously participate in the investigation of a case and in its judgment.[16] The Constitutional Council adopts this analysis.[17]

2.2. Framework

2.2.1. Legality of offenses and penalties. The alleged offenses and the applicable penalties must be defined precisely and exhaustively in advance.[18] This rule applies to both criminal and administrative sanctions. It is therefore the responsibility of the legislature to determine the system of administrative sanctions, including the severity of the penalty and the constituent elements of the offense.[19]

2.2.2. Retroactivity of more lenient criminal law. This principle of the retroactivity of more lenient criminal law has constitutional value. It is binding on judges, particularly administrative judges, who require its respect in matters of administrative sanctions such as tax surcharges[20] or traffic fines[21]. Determining whether a criminal law is more lenient or not is not always straightforward. This is the case, for example, with the repeal of regulations that previously penalized an offense.

2.2.3. Personal liability. Vicarious criminal liability is prohibited. Only the person found guilty must pay the fine in question. The administrative judge affirms that "the constitutional principle of personal responsibility in criminal

[12] CE, 3 May 1961, No. 52312 : Rec. p. 367.
[13] CE, Ass. 4 July 2003, No. 234353.
[14] CE, 30 May 2007, No. 288538.
[15] Cour EDH, 11 June 2009, Dubus c/ France (affaire No. 5242/04).
[16] CE, Ass., 21 December 2012, Societe groupe canal Plus, No. 353856.
[17] Cons. const. No. 2011-200, QPC, 2 December 2011.
[18] CE, 9 October 1996, No. 170363.
[19] CE, 2 July 2007, No. 285485.
[20] CE, 3 December 1999, No. 162925.
[21] CE, 23 July 1976, No. 99520.

matters is applicable to administrative and disciplinary sanctions."[22] Only the convicted person should suffer the consequences of the sanction. In other words, personal responsibility implies the individual nature of penalties, which is a general principle of law. These two principles are interrelated and embody the presumption of innocence enshrined in Article 9 of the Declaration of the Rights of Man and of the Citizen of 1789.

2.2.4. Proportionality of penalties. Based on Article 8 of the aforementioned Declaration, which states that "the law should only establish penalties that are strictly and obviously necessary," this principle implies that the sanction provided for by law must be proportionate to the seriousness of the alleged offense. In the context of an appeal for abuse of power, the administrative judge simply verifies any manifest error of judgment by the administration.[23] The principle therefore applies both to the author of the text and to the one who implements it. Both national[24] and European[25] judges are particularly vigilant regarding automatic sanctions that leave very little room for administrative discretion in their implementation.

2.2.5. *Non-bis in idem*. A general principle of law, the non-accumulation of administrative sanctions is broadly applied. It means that "the same offense can only give rise to one administrative sanction, unless the law provides otherwise.[26]" While two administrative sanctions cannot be imposed simultaneously, the judge may take into account the fact that a sanction has already been imposed when assessing the severity of a subsequent sanction resulting from further conduct.[27] Furthermore, the imposition of an administrative sanction is not incompatible with that of a criminal sanction "provided that the institution of each of these types of sanctions is based on a different objective and aims to safeguard values or interests that are not identical."[28] To respect the principle of proportionality, the Constitutional Council requires, however, that "the total amount of any sanctions imposed must not exceed the highest amount of any one of the applicable sanctions".[29]

2.3. Implementation

Various avenues of appeal exist for controlling the use of administrative fines. Once exercised, they are now subject to in-depth review.

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[22] CE, 29 October 2007, No. 307736.
[23] CE, 30 May 2012, No. 351551.
[24] CE, 30 November 2007, No. 292705.
[25] ECtHR judgment, 7 June 2012, Segame SA c/ France, No. 4837/06.
[26] CE, 30 December 2016, No. 395681.
[27] CE, 14 June 1991, No. 107365.
[28] CE, 29 April 2004, No. 370136.
[29] Cons. const. 18 March 2015, No. 2014-453/454, QPC.

Expanded judicial review

2.3.1. Traditional appeals. Appeals to the administrative judge can be made through the traditional methods of an appeal for abuse of power or a full appeal. The former is mandatory when challenging an administrative sanction imposed by the administration on one of its employees. The judge will then conduct a factual review of the facts to ensure their veracity and seriousness, verifying compliance with the principle of proportionality. The latter is reserved for reviewing sanctions imposed by administrative authorities. The judge can then adjust the amount of the penalty without being solely required to annul the sanction or dismiss the appeal. While lower court judges have broad discretionary power, they remain subject to review by the Council of State.[30]

2.3.2. Emergency appeal. Despite its enforceable nature, the request for a suspension of an administrative sanction is subject to the constitutionally protected rights of the individual. The Council affirms: "The right of a litigant filing an appeal against a decision of this body (the Competition Authority) to request and obtain, where applicable, a stay of execution of the contested decision constitutes an essential guarantee of the rights of the defence.[31]" This interim injunction[32] allows, in cases of urgency and doubt regarding the legality of the measure, the suspension of the administrative decision until a judgment is rendered. The individual may also opt for an interim injunction, which allows for the preservation of fundamental rights in cases of manifestly unlawful infringement of the individual's basic rights.[33] The judge rules within 48 hours of being seized of the matter.

2.4. In-depth judicial review

2.4.1. Judicial review of abuse of power. To limit the scope of jurisdictional immunity, public authorities have increased the number of acts that can be subject to judicial review. This is particularly true of measures taken with regard to military personnel.[34] Under pressure from the European Court of Justice and the Constitutional Court, the Council of State has also strengthened its oversight of the principle of proportionality between the offense and the penalty, no longer limiting itself to verifying the factual accuracy of the facts but now also assessing the legality of the measure. This review is comprehensive for all sanctioned public officials.[35]

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30 CE, ass. 30 December 2014, No. 381245.

31 Cons. const. 23 January 1987, No. 86-224 DC.

32 C. adm. Art. L. 521-1.

33 C. adm. Art. 521-2.

34 CE, 17 February 1995, No. 107766 et No. 97754.

35 CE, ass. 1 June 2015, No. 380449.

2.4.2. Full jurisdiction review. The administrative judge has progressively broadened the scope of full jurisdiction to include cases previously excluded. This is the case for the unemployed[36] or motorists penalized with points deductions. Beyond the personal sphere, while the review focuses on the sanction itself, it has also extended to its publication and any prior administrative inquiry.[37] Furthermore, in the context of full judicial review, and unlike an appeal for abuse of power, the administrative judge conducts a case-by-case analysis of the sanction imposed, particularly its financial repercussions. This point is especially important in labour law.[38]

2.4.3. Post-litigation review. The jurisprudential development highlighted is all the more remarkable given that the identified violation of a fundamental right of the individual constitutes a new element that can allow for the early termination of the administrative sanction.[39] This termination is not always definitively established.

3. Imposing administrative fines in French labour law

3.1. Legislative context

To expedite the enforcement process while limiting legal proceedings,[40] public authorities have granted the labour inspectorate the power to impose sanctions, independently and easily, for violations of certain behaviours observed during inspections. The possibility of imposing administrative fines stems from the slowness and cumbersome nature of the criminal justice system, or even its neglect, as labour law is rarely a priority in the courts' criminal policy. Thus, a specific Chapter V on "administrative fines" was created in the Labour Code, itself inserted into Title I concerning the jurisdiction and means of intervention of the labour inspectorate. The provisions in question are derived from Article 5 of Ordinance No. 2016-413 of 7 April 2016, concerning the enforcement of labour law,[41] as amended by Law No. 2018-727 of 10 August 2018, for a State serving a society of trust.[42]

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[36] CE, 23 February 2011, No. 332837.

[37] CE, 12 June 2013, No. 349185.

[38] CE, 27 June 2007, No. 276076.

[39] CE, ass. 30 July 2014, No. 358564. – CE, 9 March 2016, No. 392782.

[40] Coeuret A., Duquesne F., Jonin D. Punir sans juger en droit du travail [Punishing without trial in labour law]. RJS, 2016, p. 555.

[41] Ord. No. 2016-413 du 7 April 2016, relative au controle de l'application du droit du travail [relating to the monitoring of the application of labour law], JO 8 April 2016. – decret No. 2016-510 du 25 April 2016 (JO 27 April 2016) – (Circ. 18 July 2016 : BO Justice No. 2016-07, 29 July 2016).

[42] L. No. 2018-727 du 10 aout 2018, pour un Etat au service d'une societe de confiance [for a state at the service of a society of trust], JO 11 aout 2018.

3.2. Tools

The labour administration has other tools at its disposal to penalize violations of social standards. In matters of occupational health and safety, it can order the suspension of an activity to protect workers' health. Regarding the dismissal of protected employees, it can prohibit the termination of the employment contract if the conditions of its implementation are discriminatory, unjustified, or disregard procedural rules. Financial penalties are simply an additional tool enabling state agents to enforce labour law within companies. The objective is to ensure greater effectiveness of labour law by allowing the administration to directly penalize a number of violations of the Labour Code and collective bargaining agreements.

3.3. Statistics

The number of fines issued is increasing year after year.[43] While only 453 fines were issued in 2016, totalling €2.4 million, this number rose to over 1200 fines representing nearly €7 million by 2020, and is projected to exceed 2000 fines by 2024. The construction and public works sector, as well as the road transport sector, alone account for nearly 75% of prosecutions. Regulations concerning working time and health and safety are the areas most affected. Therefore, it is necessary to examine the framework for intervention before considering its modalities.

4. Context of the intervention

This framework requires examining the scope of administrative fines and the procedures for prosecution.

4.1. Scope

4.1.1. Framework. Article L. 8115-1 of the French Labour Code specifies the persons authorized to impose an administrative fine and the types of conduct that may be subject to it.

4.2. Personal scope

4.2.1. Competent authority. Paragraph 1 of the aforementioned Article L. 8115-1 specifies that "the competent administrative authority may, upon a report from the labour inspector mentioned in Article L. 8112-1…" take the measures analysed below. The relevant administrative authority is the Regional or Departmental Directorate for Employment, Labour, and Solidarity (DREETS). This department can only intervene, however, on the basis of a report from a labour

[43] Statistiques consultables sur le site de la DGT [statistics can be viewed on the digital website].

inspector, whose status is defined by Article L. 8112-1, guaranteeing them, in particular, independence in their actions.

4.3. Scope of application

4.3.1. General and limited framework. Article L. 8115-1 of the French Labour Code authorizes the labour administration to impose administrative fines in strictly defined areas: violations of maximum working hours, failure to respect rest periods, failure to keep records of working hours, violations of provisions relating to the statutory or collectively agreed minimum wage, and violations of certain applicable health and safety standards at work.[44] From this short list, three areas stand out: working hours, the minimum wage, and worker safety. While these three themes are essential, they are far from covering all the mandatory rules of labour law. Thus, the rules relating to employee recruitment, the misuse of temporary contracts, violations of the rules governing the transfer of employment contracts in the event of restructuring, discrimination, or harassment are not targeted. No aspect of collective relations is addressed either, even though the administration is likely to intervene in each of these areas, whether it concerns the right to employee representation, collective bargaining agreements, or collective disputes. Therefore, the entire scope of fundamental freedoms is not targeted. Two reasons explain this choice. First, violations of these provisions are already subject to specific criminal or civil penalties. Not granting the labour administration independent sanctioning powers does not mean the absence of impunity, as the legislature has provided for numerous minor offenses and misdemeanours in this area. Second, Article L. 8115-1 is particularly flexible regarding the conditions for potential administrative sanctions. Indeed, there is no need to establish intentional misconduct on the part of the employer, as is the case in criminal law. The finding of a simple "breach", which the supervisory authority assesses at its sole discretion, is sufficient. Therefore, further broadening the scope of the law risked subjecting companies to excessive arbitrariness that might not have passed the Constitutional Council's scrutiny. Nevertheless, the legislature retains the power, if it so chooses, to expand the scope of the current legislation.

4.3.2. Specific breaches. The legislation also provides for the possibility of imposing administrative fines in various areas: breaches of posting rules, such as those relating to the declaration[45] or posting of applicable regulations; failure by the employer to comply with a formal notice to cease a situation of serious breach of regulations concerning working hours, rest periods, wages, or working

[44] On peut citer les prescriptions relatives aux installations sanitaires, a la restauration et a l'hebergement, ainsi qu'aux techniques de protection durant l'execution des travaux de batiment et genie civil (C. trav., art. L. 8115, al. 6) [Examples include regulations relating to sanitary facilities, catering and accommodation, as well as protection techniques during the execution of building and civil engineering works].

[45] C. trav. Art. L. 1264-1 à L. 1264-3.

or accommodation conditions contrary to human dignity;[46] and violations of the provisions relating to the construction industry identification card.[47]

4.3.3. Strict interpretation of the scope. Given that the aforementioned Article L. 8115-1 and the other provisions cited establish a limited list of possible offenses, the administrative judge decided, based on the principle of strict interpretation of criminal law, not to broaden the material scope of the provision. The administration therefore does not have the right to impose an administrative fine to penalize an employer who has failed to declare some of their employees,[48] as undeclared work is not a specific offense. This analysis seems appropriate. According to established administrative case law, offenses subject to administrative sanctions are to be interpreted strictly, particularly in tax matters.[49] There is no reason why this should be any different in labour law. Like the criminal court, the administration must simply apply the law strictly and cannot grant itself the prerogative of giving it a meaning or scope that the public authorities have not foreseen or even intended. The principle of the separation of powers and the preservation of individual liberties dictate such a solution.

4.3.4. Strict interpretation of the offense. Not only can the administration not impose a fine for conduct not covered by the public authorities, but for conduct that is covered, it must be careful to interpret it strictly. Thus, in a company where some employees work according to regularly posted collective schedules,[50] the authorities cannot infer that the other group works individual schedules, obligating the employer to establish individual records of working hours,[51] when these employees also work collectively but according to schedules distinct from the other group. While the authorities did respect the scope of Article L. 8115-1, they could not impose a fine based on employer conduct that is not prohibited by any law. An employer can have employees work in two groups, each with distinct schedules, without the existence of a group implying that those not belonging to it should be subject to individual schedules with the constraints that accompany this system. To assert the contrary would amount to calling into question the employer's management and leadership authority,[52] as well as the theory that the employer is the sole judge protecting the constitutionally protected freedom to conduct business. From this observation, case law deduces that the principle of legality of offenses and penalties prevents the administration from imposing a sanction if, at the time of the disputed events, it did not appear reasonably foreseeable to the individual concerned that the conduct in question was liable to be sanctioned.[53]

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46 C. trav. Art. L. 1263-6.

47 C. trav. Art. L. 8291-2.

48 TA Marseille, 19 November 2019, No. 1704847, SAS Manexe : JCP S 2020, 1022, concl. X. Haili.

49 CE, 16 April 2010, No. 313456, M. Kaspereit : JurisData No. 2010-004214 ; RJF 2010, No. 680, concl. L. Olleon.

50 C. trav. Art. L. 3171-1 et D. 3171-1.

51 C. trav. Art. D. 3171-7.

52 Cass. ass. plen. 8 December 2000, No. 97-44.219, SAT, JCP E 2001, p. 426, note F. Duquesne.

53 CE, 1er February 2023, No. 457116 : JCP S 2023, 1068, note F. Duquesne.

The administration cannot replace the applicable working hours system with one it deems more appropriate given the working conditions. With regard to punitive mechanisms, it is the right to a fair trial, as enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that is guaranteed by the judge.

5. Prosecutions

5.1. Framework. Prosecutions initiated by the labour administration are governed by several standard rules concerning the appropriateness of prosecution, the framework of a report drafted by the labour inspector, and the risk of combining administrative and criminal proceedings.

5.2. Principle: Discretionary power

5.2.1. Advantage of prosecution. Conventions No. 81 and 129 of the International Labour Organization, in Articles 17 and 81 respectively, guarantee significant discretionary power to labour inspectors in exercising their enforcement authority. Thus, those concerned can choose a middle ground between no sanctions and the purely punitive approach of imposing fines. Indeed, since the aforementioned 2018 law, the administration can opt for a middle ground by issuing a warning, which offers two advantages. Firstly, the measure in question expands the range of actions the administration can take. It strengthens its discretionary power, allowing it to closely align with the social reality and the alleged behaviour. In this respect, the administration is encouraged to consider the good faith of the accused party by asking very practical questions: Is the breach isolated or repeated? How many employees does it affect? Had the employer taken measures to prevent it or prevent it from worsening? What was the extent of the harm, if any? The administration must take into account any efforts made. Secondly, while a warning allows one to avoid a financial penalty, this is no longer the case in the event of a repeat offense. Indeed, if the employer repeats the prohibition within one year of receiving the warning, they are liable to a fine increased by 50%, amounting to 6000 euro. The initial tolerance granted can prove particularly punitive if the accused party does not take advantage of it, especially since the legal conditions for repeat offenses do not need to be met. Paradoxically, the administrative sanction proves more severe than the criminal penalty, even though the warning was intended to limit the use of coercion.

5.3. Procedural limitations: the agent's report

5.3.1. Cumulation of proceedings, coordination of sanctions. The administration's decision to impose an administrative fine does not have

the force of *res judicata*. Because it does not extinguish the right to prosecute,[54] this decision does not prevent the Public Prosecutor's Office from initiating criminal proceedings for the same facts, especially since the provisions giving rise to the fines in question have not been decriminalized,[55] except in matters of posting of workers. The accumulation of criminal and administrative penalties is therefore theoretically possible,[56] provided that the former follows the execution of the administrative sanction. While some texts provide for this accumulation, the 2016 ordinance does not. In the absence of specific provisions, administrative and judicial authorities must apply the principles established by the Constitutional Council, including the principle of proportionality.[57] To support the administration, regulations[58] suggest that the Public Prosecutor's Office respond to the Directorate General for Labour to inform them of its intentions, adding that a lack of response within one month signifies the Public Prosecutor's Office's lack of objection to the potential imposition of an administrative sanction. This complementary, dual approach, which is optional,[59] fulfils the requirement set by public authorities for "common objectives that are both deterrent and punitive.[60]" It does not preclude other administrative sanctions such as exclusion from public procurement contracts, the reimbursement of public subsidies, or the inability to receive new ones.[61]

5.3.2. Implementation of the intervention

The labour administration, when deciding to sanction the accused, must issue a decision and meticulously identify the debtor.

5.3.2.1. Decision

Fine. The administration's decision entails the imposition of a fine, the amount of which was initially increased by law and then by the judge. Companies must

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[54] C. trav. Art. L. 8291-2.

[55] CE, 24 July 2019, No. 431243 : « L'article L. 8113-7 du code du travail ne fait pas obstacle a la faculte pour le ministere public, qui doit etre informe des procedures administratives engagees en application de l'article L. 8115-2 du meme code, de diligenter des poursuites penales s'il l'estime necessaire » [Article L. 8113-7 of the French Labour Code does not preclude the public prosecutor, who must be informed of administrative procedures initiated pursuant to Article L. 8115-2 of the same code, from initiating criminal proceedings if deemed necessary].

[56] C. com., art. L. 465-2 VI : « Lorsqu'une amende administrative est susceptible de se cumuler avec une amende penale infligee a raison des memes faits a l'auteur du manquement, le montant global des amendes prononcees ne depasse pas le maximum legal le plus eleve » [When an administrative fine is likely to be combined with a criminal fine imposed for the same offense on the perpetrator, the total amount of the fines imposed does not exceed the highest legal maximum].

[57] Cons. const., 22 July 2016, No. 2016-556 QPC. – Cons. const., 24 June 2016, No. 2016-545 QPC et No. 2016-546 QPC. – Cons. const., 13 March 2014, No. 2014-690 DC, consid. 96.

[58] Circ. Min. Justice, 18 July 2016, No. II-C-2, 1. – Instr. DGT No. 2016/03, 12 July 2016, III, 3.3.1 in fine.

[59] C. trav. Art. L. 8115-1 : L'autorite administrative « peut » prononcer un avertissement ou une amende… [The administrative authority "may" issue a warning or a fine…]

[60] Cons. Const., 24 June 2016, No. 2016-546 QPC, consid. 20.

[61] C. trav. Art. L. 8272-1.

be aware of this administrative risk, of which they are not always conscious, and whose fines are often higher than those imposed by a criminal court.

5.3.2.2. Amount of the fine increased by law

Increased penalty. Administrative sanctions, like criminal sanctions, have a deterrent and punitive function, especially since the aforementioned law of 10 August 2018, which doubled the maximum penalty. The ordinance of April 7, 2016, had stipulated a maximum amount of €2000, which, two years later, increased to €4000[62] per employee affected by the prohibition. Indicative of greater severity, these amounts are significant, especially when compared to those incurred for committing a minor offense[63] or a more serious crime.[64] This point is all the more important given that the fine, like the financial penalty in criminal matters,[65] can be applied as many times as there are workers affected by the breach.[66] For the public authorities, protecting the social safety net required such severity.

Temporal aggravation. The tightening of the applicable regime is all the more evident given that the aforementioned law of 10 August 2018, imposed immediate effect on the imposition of the fine, since any objection to enforcement no longer suspends the debt recovery action.[67]

Tempered aggravation. The new penalties adopted correspond to the maximum applicable sentences. If it is not possible to impose a sentence heavier than the aforementioned maximums, the competent administrative authority has the right to individualize[68] the sanction imposed. Article L. 8115-4 of the French Labour Code states: To determine the amount of the fine, the aforementioned authority must take into account the circumstances and seriousness of the breach, the conduct of the offender, as well as their income and expenses. This requirement implies an obligation to provide reasons for the decision, allowing the debtor, as in

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[62] C. trav. Art. L. 8115-3, al. 1er : "Le montant maximal de l'amende est de 4000 euros et peut etre applique autant de fois qu'il y a de salaries concernes par le manquement" [The maximum fine is 4000 euro and can be applied as many times as there are employees affected by the breach].

[63] A titre d'illustrations : amende de 750 euros d'amende en cas de violation de la duree maximale quotidienne (C. trav. Art. R. 3124-3) ou hebdomadaire (C. trav. Art. R. 3124-11) de travail ; amende de 1500 euros en cas de violation des règles relatives au salaire minimum (C. trav. Art. R. 3233-1-1°). [For example: a fine of 750 euro for violating the maximum daily (Labour Code Art. R. 3124-3) or weekly (Labour Code Art. R. 3124-11) working hours; a fine of 1500 euros for violating the rules relating to the minimum wage (Labour Code Art. R. 3233-1-1°)].

[64] A titre d'illustrations : amende de 10 000 euros en cas de violation des regles relatives aux installations sanitaires, a la restauration et a l'hebergement (C. trav. Art. R. 4534-1 et s.). [For example: a fine of 10 000 euro in the event of a violation of the rules relating to sanitary facilities, catering and accommodation (C. trav. Art. R. 4534-1 et seq.)].

[65] C. trav. Art. L. 4741-1 : « L'amende est appliquee autant de fois qu'il y a de travailleurs de l'entreprise concernes… » [The fine is applied as many times as there are employees of the company concerned…].

[66] C. trav. Art. L. 8115-3, al. 2.

[67] C. trav. Art. L. 8115-7.

[68] Cons. Const. 2 March 2018, No. 2017-694 DC : Dr. Pen. 2018, Etude 9, No. 4, obs. Guerin D. – Cons. Const., 21 February 2008, No. 2008-562 DC : JCP G 2008, II, 10077, note J. P. Feldman.

criminal matters,[69] to understand its rationale. In this respect, the administration must, "in particular", consider the good faith of the individual, as well as their income and expenses; this list of criteria is not exhaustive. In addition to these objective criteria, the administration may also consider the individual's personal circumstances, such as their health or family situation. In this regard, any observations made by the employer may shed light on the employer's difficulties.

5.3.2.3. Amount of the fine increased by the judge

Stricter case law. The question arose as to whether the number of fines imposed should be determined by the number of categories affected by the violation of the rule (in this case, exceeding the daily and weekly working hours and failure to respect minimum rest periods) or whether it should depend on the number of breaches observed of the provisions relating to these categories. Case law has ruled in Favor of the second solution, which is unfavourable to the defendant.[70] By granting lower court judges the power "to sanction [...] each observed breach," the judge empowers them to individualize the sanction. If the labour administration decides against issuing a warning, it can opt for a particularly punitive approach. Legal doctrine states: "The legislator's repressive intent, which permeates the entire system of administrative sanctions in labour law, leads to the appropriateness of such a method, which prevents completely intolerable behaviours from going unanswered."

5.3.3. Debtor

Targeting. Identifying the debtor clarifies the scope of their rights.

5.3.3.1. Identifying the debtor

Identification. According to Article L. 8115-7 of the French Labour Code, "fines are collected according to the procedures established for state receivables unrelated to taxes and public property." In other words, the fine falls under the employer's liabilities, a term that can be ambiguous, although the existence of a subordinate relationship must always be noted.[71] The debtor may be a legal entity or a natural person. This concerns the possibility of delegated powers or a lack of legal entity. Case law has clarified that, due to the responsibilities incumbent upon corporate employers, breaches committed by the directors of these companies or their agents under the provisions of Article L. 8115-1 cited above can be directly attributed to them in their capacity as legal entities, provided they acted within the scope of their duties, without violating the constitutional principle of personal liability.[72] This assertion is important: it allows the administration to impose the sanction on either party, provided both have the status of employer. However, the administration must ensure that the attribution respects the principle of personal liability, which prevents another person from being prosecuted and

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[69] C. pen. Art. 132-20 et 132-24. – Cass. crim., 30 May 2018, No. 16-85.777 : JCP G 2018, 703, obs. Collet P. – Dreyer E. La motivation des peines : quoi et comment ? [The motivation behind sentences: what and how?]. JCP G 2018, 330.

[70] CE, 11 February 2022, No. 448372 : JCP S 2022, 1166, note Duquesne F.

[71] Cass. soc., 13 November 1996, No. 94-13.187 : RJS 1996, No. 1320.

[72] TA Marseille, 19 November 2019, No. 1704847, SAS Manexe: JCP S 2020, 1022, concl. X. Haili.

sanctioned in place of the perpetrator. In this regard, case law has already established that the principle of personal liability applies to all administrative sanctions.[73] This point is all the more important given that a company is not merely an abstraction. It is first and foremost an economic entity with assets that administrative fines are specifically designed to target. Indeed, it is often in the company's interest, rather than that of its legal representative or delegate, that regulations concerning working hours, remuneration, or health and safety are violated.

Issues. Identifying the debtor is crucial. It determines who is responsible for paying the fine, given that legal entities are generally more solvent than natural persons. However, this distinction is irrelevant to the severity of the penalty. The debtor, regardless of whether they are a legal entity or a natural person, is subject to the same sanction. The rule that the maximum fine applicable to legal entities is five times that stipulated for natural persons by the regulations governing the offense applies specifically to criminal fines.[74] Not only have the public authorities not foreseen such an extension, but the principle of strict interpretation of criminal law would prohibit both the administration and the judge from imposing this rule on fines issued by the labour administration. Legal scholars affirm that "the identity of the accused does not affect the amount of the penalty incurred."[75]

5.3.3.2. Rights of the debtor

Rights of the defence. According to case law, a fine can only be imposed following an adversarial procedure that allows the court to make a decision taking into account the observations of the employer concerned. Respect for this procedure, which constitutes a safeguard for the employer, requires that the employer be clearly informed, within a reasonable timeframe before the fine is imposed, of the charges against them and have access to the documents on the basis of which the alleged violations were established.[76] The employer must be informed of the potential measure; they must be able to access their file,[77] including the labour inspector's report, and they must be able to submit their observations. These are the principles of the right to a fair trial.

Appeals. Once the report has been received, the accused party may submit any observations they deem relevant to the administration within fifteen days or one month, which may be extended. The principle of adversarial proceedings must be respected. The regional employment office that demands payment of a fine must inform the individual concerned by any means that provides proof of

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[73] CE, 29 October 2007, No. 307736, Societe sportive professionnelle LOSC Lille Metropole : JurisData No. 2007-072593.

[74] C. pen. Art. 131-41.

[75] Coeuret A. et Duquesne F. La pratique de l'amende administrative en droit du travail [The practice of administrative fines in labour law]. JCP S, 2016, 1327.

[76] CAA Marseille, 2 October 2020, No. 19MA03613.

[77] TA Dijon, 28 May 2019, No. 1802213.

the date of notification,[78] as well as the works council.[79] The appeal procedures must also be clearly defined.[80] The individual who is aggrieved by the decision may contest the decision through an informal appeal followed by a formal appeal to the administrative court within the standard two-month period, excluding any hierarchical appeal.[81] According to the Constitutional Council, the judge must "ensure compliance with the procedure" and verify that the fines imposed are not manifestly disproportionate.[82] The judge ensures compliance with the external legality of the decision, to which the employer must pay close attention. This includes the signature, date, and justification, as well as the procedure followed. As this dispute falls under the full jurisdiction of the court,[83] the judge may overturn the legality of the fines imposed and replace them with fines of a different amount.[84] The judge may also reduce the fine to a more "fair proportion".[85] Recourse to the administrative court is not incompatible with bringing a case before the civil court to obtain damages as compensation for harm suffered.

Repeat offense. The conviction of the accused potentially triggers the mechanism of repeat offenses addressed in the aforementioned ordinances of 7 April 2016, and 10 August 2018. However, the latter only considers repeat offenses in cases of repeated violations of one of the core protected values, whereas the earlier 2016 text defined repeat offenses more broadly, encompassing the failure to comply with any rule.[86] While the 2018 ordinance reduces the material scope of repeat offenses, it expands their temporal scope. Indeed, the penalty can now be increased when a new violation is observed within two years – rather than one – of a first conviction, that is, from the date the fine is notified.[87] A simple repetition of the material element is sufficient. The accused then faces a fine doubled to € 4000 per employee concerned.

Conclusions

The development of administrative fines in French labour law is not surprising. It is expanding in this branch of law, just as it has expanded in administrative

[78] C. trav. Art. L. 8511-5, al. 2 et R. 8115-2.

[79] C. trav. 8115-5, al. 3 et L. 4751-2.

[80] C. trav. Art. R. 8115-3.

[81] C. trav. Art. L. 1264-3 et L. 8115-6.

[82] Cons. Const., 13 March 2014, No. 2014-690 DC, consid. 69, 72 et 73.

[83] Le juge administratif se doit « d'examiner tant les moyens tires des vices propres de la decision de sanction que ceux mettant en cause le bien-fonde de cette decision » [The administrative judge must "examine both the arguments based on the inherent flaws in the sanction decision and those challenging the merits of that decision"]. (CE, 11 February 2022, No. 448372).

[84] CE, 26 July 1985, No. 64718 : Lebon 1985, Tables, p. 698.

[85] CAA Lyon, 2 April 2020, No. 18LY03401. – CAA Nantes, 23 October 2020, No. 18NT04123.

[86] C. trav. Art. L.

[87] C. trav. Art. L. 8115-3, al. 2.

law. While the legislature sees undeniable advantages, the judge remains bound by the fundamental principles of fair trial law, particularly those established by European law. Its effectiveness, however, should guarantee it a bright future.

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7. Circ. Min. Justice, 18 July 2016, No. II-C-2, 1. – Instr. DGT No. 2016/03, 12 July 2016, III, 3.3.1 in fine.
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9. C. pen. Art. 131-41.
10. C. des relations entre le public et l'administration, art. L. 122-1 et L. 122-2.
11. C. trav. Art. L. 8115, al. 6).
12. C. trav. Art. L. 1264-1 à L. 1264-3.
13. C. trav. Art. L. 3171-1 et D. 3171-1.
14. C. trav. Art. D. 3171-7.
15. C. trav. Art. L. 8115-1.
16. C. trav. Art. L. 8115-3, al. 3.
17. C. trav. Art. L. 8291-2.
18. C. trav. Art. L. 8272-1.
19. C. trav. Art. L. 8115-3, al. 1er.
20. C. trav. Art. R. 3124-3
21. C. trav. Art. R. 3124-1.
22. C. trav. Art. R. 3233-1-1°.
23. C. trav. Art. R. 3124-11.
24. C. trav. Art. R. 4534-1 et s.
25. C. trav. Art. L. 4741-1.
26. C. trav. Art. L. 8115-3, al. 2.
27. C. trav. Art. L. 8115-7.
28. C. trav. Art. L. 8511-5, al. 2 et R. 8115-2.
29. C. trav. Art. L. 8115-5, al. 3 et L. 4751-2.
30. C. trav. Art. R. 8115-3.

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60. CE, 17 February 1995, No. 107766 et No. 97754.
61. CE, ass. 1er June 2015, No. 380449.
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71. CE, 29 October 2007, No. 307736, Societe sportive professionnelle LOSC Lille Metropole : JurisData No. 2007-072593.
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83. Cons. const. 23 January 1987, No. 86-224 DC.
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90. Cons. const., QPC, 13 Martch 2014, No. 2014-690 DC, consid. 96.
91. TA Dijon, 28 May 2019, No. 1802213.
92. TA Marseille, 19 November 2019, No. 1704847, SAS Manexe : JCP S 2020, 1022, concl. X. Haili.

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Jurgita Pauzaite-Kulvinskiene, *Dr. iur., Professor*
Vilnius University, Faculty of Law, Lithuania

Edvins Danovskis, *Dr. iur., Associate Professor*
University of Latvia, Faculty of Law, Latvia

LEGAL ACQUIS OF ADMINISTRATIVE LIABILITY OF PRIVATE COMPANIES IN LATVIA AND LITHUANIA: MATERIAL AND PROCEDURAL ASPECTS IN COMPARATIVE PERSPECTIVE

Key words: administrative offence, legal entity, administrative penalties, fines, comparative law

Summary

This publication seeks to continue scholarly research in the field of the administrative liability acquis by attempting to systematically highlight the key aspects of the reform of administrative liability regulation specifically applicable to private economic companies implemented in the Baltic states (Latvia and Lithuania) as transitional legal systems.

Introduction

This article presents research on the development of the legal acquis of administrative liability applied to business entities in the Baltic states. The relevance of the research is demonstrated by the fact that, within both European Union and national legal frameworks, administrative sanctions imposed on business entities often significantly exceed the maximum fines provided for in national criminal legislation, particularly in cases where fines are calculated as a certain percentage of the annual turnover of the business entity subject to liability. Moreover, other sanctions applicable to legal persons, such as the suspension or revocation of licences held by economic operators, closely resemble penalties imposed on legal persons under criminal law that involve restrictions on economic activity.

Nevertheless, in its efforts to strengthen the protection of public interests related to environmental protection, financial stability, public health, and other social and economic concerns, the national legislator continuously expands

the areas in which administrative liability of business entities is provided for. As a result, the application of administrative liability to business entities may produce legal and economic consequences that are sometimes even more severe than those resulting from criminal proceedings.

Legal scholarship increasingly highlights the repressive[1] and punitive[2] nature of economic sanctions. Scholars also note the blurring boundary between criminal and administrative liability.[3] In addition, the evolution of competition law from the field of administrative law towards criminal law has been described by the concept of "criministrative law" – a hybrid of criminal and administrative law.[4] It has also been argued that administrative law frameworks are sometimes used by public authorities as a procedural bypass allowing them to avoid the procedural guarantees typically required in criminal law.

For these reasons, the legal model governing the supervision of business entities and liability for administrative offences constitutes a significant component of national public law. At the same time, unlike criminal liability, the liability of business entities for administrative offences represents a dynamic institution of ordinary law, the legal regulation of which is constantly evolving in response to new regulatory ideas in economic governance. Examples include the General Data Protection Regulation (GDPR), the EU Artificial Intelligence Act, and the Digital Markets Act, all of which establish new standards of administrative liability for business entities.

The consistency of regulation concerning liability for violations committed by economic operators and its compliance with international standards have become particularly important for Lithuania and Latvia following their accession to the Organisation for Economic Co-operation and Development (OECD). International practice demonstrates that the legal regulation of business liability varies significantly across national legal systems. In some jurisdictions, the legal framework governing supervisory procedures is consolidated within a single legal act, whereas in others it is dispersed across multiple legislative instruments. Supervision may be carried out by numerous authorities, while in certain systems a dedicated institution is established to coordinate inspection activities.

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1 Raizys D., Urbonas D. Administraciniu bylu teisenos infrastrukturinis modelis [The infrastructural model of administrative proceedings]. Visuomenes saugumas ir viesoji tvarka, No. 3, 2010, p. 69.

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3 Weyembergh A., Joncheray N. Punitive Administrative Sanctions and Procedural Safeguards. A Blurred Picture that Needs to Be Addressed. New Journal of European Criminal Law, Vol. 7, Issue 2, 2016, pp. 190–209. https://doi.org/10.1177/203228441600700208

4 Bailleux A. The fiftieth shade of grey. Competition law, "criministrative law" and "fairly fair trials". In: Galli F., Weyembergh, A. (eds.). Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU. Brussels: Publications de l'Universite Libre de Bruxelles, 2014, pp. 146–147.

Furthermore, the very concept of administrative sanctions varies considerably among different states. In some jurisdictions, the concept of an administrative offence is not explicitly distinguished, and liability of business entities is instead subsumed within the framework of criminal liability. It may therefore be argued that the administrative liability of business entities represents a relatively recent addition to the systems of liability existing in national legal orders. Its development has been driven by the intensification of state supervision over economic activities at the national level, as well as by the expansion of common regulatory standards at the level of the European Union aimed at strengthening consumer protection and promoting broader economic and social welfare.

1. The genesis of basic legal acquis for administrative liability in Latvia and Lithuania

In Latvia, as in Lithuania the legal normative understanding (legal acquis)[5] of administrative liability, the principles of administrative liability, the main fines and the procedural aspects originally were regulated by Codes of Administrative Offences.[6]

In mid 1980ties all soviet republics adopted codes on administrative offences which were drafted in accordance with uniform guidelines adopted in 1980 by the Supreme Soviet of the USSR.[7] In both countries in accordance with the Code of Administrative Offences, only natural person was subject of administrative fines. Although in the Soviet legal system various types of legal entities existed, basically all of them were in direct control of the state and were considered "organizations of socialistic character".[8] All legal entities were considered as "public legal organizations" and all of them – a manifestation of the will of the working people

[5] The concept of acquis is used to denote the continuing development of law in the field of administrative liability. Although the term acquis was originally used primarily in reference to the body of European Union law (acquis communautaire – the Community acquis), its scope of use has since broadened. The concept has been adopted by other institutions (e.g., the "Council of Europe acquis") and is also used in academic literature to emphasize a continuing legal heritage (or body of law) that has been accumulated and further developed within a particular legal system or legal field, see Gedmintaite A. The legal framework for administrative liability in Lithuania: lifting legal barriers to the efficient regulation of administrative offences. In: Svedas G., Murauskas D. (eds.). Legal developments during 30 years of Lithuanian independence: overview of legal accomplishments and challenges in Lithuania. Cham: Springer International Publishing, 2021, pp. 19–41.

[6] Liability for violations of public law committed by individuals in foreign legal systems is attributed to the institutions of administrative offences and administrative sanctions (Ger. Ordnungswidrigkeit; Fr. les sanctions administratives).

[7] Osnovy zakonodatel'stva Sojuza SSR i sojuznyh respublik ob administrativnyh pravonarushenijah. Vedomosti Verhovnovo Soveta SSSR, No. 44, 1980.

[8] Vebers J. Padomju civiltiesibas. Vispariga dala. Ipasuma tiesibas [Soviet Civil Law. General Part. Property Rights]. Riga: Zvaigzne, 1979, p. 66.

through the state.[9] Hence, it would have been counterproductive and contrary to ideology to punish soviet legal organizations.

In accordance with the Art. 1 of the Code of Administrative Offences of the Latvian SSR, the purpose of administrative liability law, inter alia, was to educate citizens in the spirit of precise and rigorous obedience of the soviet laws. Therefore the whole legal framework was built around a natural person as the only subject of administrative liability, including the fault in the form of intent and negligence as manifestations of mental attitude towards the offence. In Lithuania, the Soviet-era Code of Administrative Offences also regulated only the administrative liability of natural persons. It established administrative liability for acts prohibited by law that were similar to those regulated under criminal law but were considered less socially dangerous and therefore did not fall within the scope of the Criminal Code. Administrative liability under the Code of Administrative Offences had a clear law-enforcement character and established a broad list of administrative enforcement and public administration institutions[10] authorised to impose administrative penalties. Interestingly, these Codes of Administrative Offences for a long time retained a special status within the legal systems of the already independent States of Latvia and Lithuania. They were the last laws adopted and entering into force during the Soviet period – adopted in 1984 (entering into force in 1985)[11]. But after the restoration of independence in Latvia and Lithuania, these acts remained in force for a considerable period within the legal systems of the newly independent states following 1990, that is, for almost another two decades.

In Lithuania the drafting of the new Code of Administrative Offences for a long time constituted one of the priorities of several Governments that operated after the restoration of the independent Lithuanian State, within the broader framework of activities related to the reform of the legal system. A more advanced regulation of administrative liability was included from the very outset in the Guidelines for the Reform of the Legal System,[12] which established that Lithuanian law should be developed in accordance with the European legal tradition, Lithuania's historical

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[9] Agarkovs N., Bratuss S., Genkins D. et al. Civiltiesibas. I. [Civil Law I]. Riga: Latvijas Valsts izdevnieciba, 1946, pp. 185–186.

[10] Administrative offences are also examined by municipal administrative authorities. Since 1 October 2008 – the municipal council established an administrative commission for the duration of its term of office. Following the entry into force of the new Code of Administrative Offences on 1 January 2017, the competence of municipal administrations and municipal institutions to impose administrative liability for the administrative offences specified in the Code has been explicitly established.

[11] Latvian Code of Administrative Offences was adopted in 1984 and was in force until 2020, Latvijas PSR Administrativo parkapumu kodekss [The Administrative Violations Code of the Latvian SSR]. Adopted 7 December 1984. Lithuanian Code of Administrative Offences was adopted in 1985 and was in force till 2017, Lietuvos Respublikos administraciniu nusizengimu kodeksas, 2015. TAR, 2015–11216.

[12] Resolution of the Seimas of the Republic of Lithuania of 25 June 1998 No. VIII-810 "On the Guidelines for the Reform of the Legal System (New Edition) and Their Implementation". Official Gazette, No. 61-1736, 1998.

legal experience, and contemporary legal standards, while combining different methods of legal regulation.

Despite the fact that, the validity of the Codes of Administrative Offences adopted in Latvia and in Lithuania in 1984, which regulated the application of administrative liability to individual persons, was extended several times after restoration of states independence, it became evident that many provisions of the Codes had become obsolete or outdated due to evolving commitments in the field of human rights protection, the development of constitutional imperatives, changes in state policy, and technological progress. Consequently, in order to modernise the legal basis for administrative liability that had been in force for several decades, it was not sufficient merely to make technical amendments to individual provisions and reproduce them in a new legal act. In reality, the ongoing reform of the regulation of liability for administrative offences addressed a number of conceptual and complex issues arising in areas related to administrative liability in both legal systems. These included questions concerning the relationship between substantive and procedural norms governing administrative liability for a broad range of subjects, including private companies, the creation of an effective institutional model of state institutions, as well as the search for coherence between administrative and criminal liability, among others.

Considering that the effects of legal system reforms often become evident only over a longer period of time, the period from the restoration of Lithuania's independence until 2017, and in Latvia until 2020, when the new Codes of Administrative Offences entered into force, can reliably reveal certain tendencies in the legal regulation governing administrative offences.

It should be noted that the general aspects of administrative liability were regulated in the Codes of Administrative Offences relatively clearly and coherently, and they significantly contributed to the further development of a consistent and well-articulated framework of the administrative liability acquis, as well as to its specific application to the administrative liability of private companies.

After regaining independence in 1990 in both countries, in Latvia and Lithuania, new types of legal entities – various private (business) legal entities – were established. These entities became subjects of legal rights and obligations and therefore a need for sanctions for breach of legal provisions arose rather quickly. First administrative fines for private legal entities were introduced in mid-1990s,[13] but were imposed outside the legal framework of the Code of Administrative Offences. In this way, the legislator in Latvia and Lithuania had established a basic regulatory framework for administrative liability whereby the imposition of administrative liability is governed by the Code of Administrative Offences, while the part of administrative liability for economic operators (business entities) was regulated fragmentated in sector-specific laws of public administration.

[13] For instance, Regulations of the Cabinet of Ministers of 25 January 1994 On State Monopoly of Alcohol provided fines for legal entities.

There are historical reasons for this. Due to the temporary reflection of Soviet legal scolarship, there was no unified doctrinal or academic consensus in Latvia and Lithuania as to whether the administrative liability should be regarded as part of administrative (public administration) law and its regulatory scope, or whether it constitutes an independent field of public law. In Soviet legal order administrative liability was largely understood as the law of enforcement and a system of state coercive measures.[14] Within this legal paradigm, priority was given not to the protection of individual rights against the arbitrariness of the state, but rather to the function of ensuring state and public security and order. For this reason, the positive regulation of administrative liability was developed primarily through Code of Administrative Offences. This understanding corresponded to the model of administrative liability regulation existing in many continental European legal systems, where administrative liability is attributed to the law-enforcement sphere, and the function of imposing such liability is considered as law-enforcement function. In many foreign jurisdictions, administrative liability is associated with the fields of public order law or police law, which are regarded as autonomous branches of public law and fall outside the scope of administrative law understood as the law governing public administration. Consequently, the application of administrative liability is not equated with public administration. Moreover, cases concerning administrative offences in foreign legal systems are generally not examined by administrative courts; instead, jurisdiction belongs to courts of general jurisdiction[15]. Thus, within the European legal model, the adjudication of administrative offence cases is not considered part of administrative justice, which is primarily directed at reviewing the legality of actions taken by public administration authorities (i.e. the legality of administrative acts). By contrast, in proceedings concerning administrative offences and the application of administrative liability, the central focus lies on the assessment of the conduct of private persons and the imposition of sanctions for administrative violations of law.

However, after the restoration of constitutionalism in 1990, the central focus of administrative law in both Latvia and Lithuania became the implementation and protection of human rights. During this period, the system of public administration authorities was significantly expanded and an independent system of administrative justice was established. Consequently, the question arose anew as to how the regulation of administrative liability relates to the newly developed institutions of administrative (governance) law and what place it occupies within the administrative legal system. At present, the regulation of administrative

[14] Andruskevicius A. Administracines teises principai ir normu ribos [Principles of administrative law and the limits of legal norms]. Vilnius: Teisines informacijos centras, 2004, p. 236.

[15] Pauzaite-Kulvinskiene J. Administracine justicija: teorija ir praktika [Administrative Justice: Theory and Practice]. Vilnius: Justitia, 2005, pp. 92–93, 96–99; Pauzaite-Kulvinskiene J. Europos teises itaka veiksmingos teismines gynybos principui Lietuvos teiseje [The Influence of European Law on the Principle of Effective Judicial Protection in Lithuanian Law]. In: Europos Sajungos teises itaka Lietuvos teisinei sistemai [The Influence of European Union Law on the Lithuanian Legal System], Vilnius, 2014, pp. 395–421.

liability in both Latvian and Lithuanian administrative law has not been fully and clearly separated from the regulation of public administration and administrative justice. As a result, a dualistic regulatory framework of administrative liability has emerged. Administrative liability is regulated not only by the Code of Administrative Offences, but also by provisions contained in sector-specific public administration legislation. Therefore, divergences in legal practice may arise when forming a coherent understanding of the application of administrative liability, particularly with regard to the conditions of liability (for example, the fault of the liable subject) and the catalogue of procedural rights afforded in administrative liability proceedings.

2. Legal acquis of administrative liability of private companies in Latvia

Legal entity as a subject of administrative offence was introduced in the Latvian Code of Administrative Offences in 1998 in a most simple manner. The Code was amended with Art. 14^1 "Corporate Liability" which stated: "In special cases provided for in this Code legal entities shall be subject to liability for administrative violations."[16] The wording "in special cases" meant that a legal entity could be punished whenever a fine for a legal entity was directly provided in the sanction of the particular offence. The first offences where a legal entity was provided as a subject where offences in the customs area. However, in rather short time legal entity became a subject of fines in more than 500 offences.[17] No other legal provisions were provided in respect of conditions of liability or procedural rules. It should be noted that this minimalistic approach did not create any observed significant difficulties in practice.

After introduction of legal entities as subjects of administrative offences in the Code of Administrative Offences, a dual system of liability in respect of legal entities was maintained even after in 2018 the Law on Administrative Liability was adopted (in force since 2020), thus replacing the Code of Administrative Offences.[18] Although most of instances, where a legal entity was subject to fine were provided within the framework of the Code of Administrative Offences (presently – the Law on Administrative Liability), a rather small portion of fines applicable to legal entities remained outside this system. As was observed in 2017, the right to apply fines of penalty payments have been granted in approximately

[16] Grozijumi Latvijas Administrativo parkapumu kodeksa [Amendments to the Administrative Violations Code of Latvia]. Adopted 17 June 1998.

[17] Danovskis E. Administrativas atbildibas regulejuma konceptualas problemas [Conceptual Problems of the Administrative Liability Law]. In: Danovskis E. Administrativas tiesibas. Raksti [Administrative Law. Collected Articles]. Riga: Tiesu namu agentura, 2022, p. 18.

[18] Law on Administrative Liability. Adopted 25 October 2018. Available: https://likumi.lv/ta/en/en/id/303007-law-on-administrative-liability [last viewed 10.02.2026].

20 laws to eight institutions of public administration.[19] Basically, the same is true in 2026, except that since Financial and Capital Market Commission was merged with the Bank of Latvia, there are seven institutions entitled to impose such fines, that are outside the general system of administrative liability: the Bank of Latvia, the Competition Council, the Consumer Rights Protection Centre, the National Mass Media Council, the Health Inspectorate and the Food and Veterinary Service.

This dualism is characterised by several practical aspects. The Law on Administrative Liability consists of general provisions (i.e., the concept of an administrative offence, preconditions of liability, types of administrative sanctions etc.) and procedure (both within institutions and the judicial review). The Law on Administrative Offences provide two basic penalties: reprimand and fine. Presently there is a decodified system of offences – offences and sanctions are provided in more than 130 laws and bylaws of municipalities. The decision of an institution imposing a sanction is subject to review in ordinary courts. In contrast, the fines imposed outside the framework of the Law on Administrative Liability do not have any uniform provisions on limitation periods, preconditions of liability or special procedural features. They are adopted in accordance with the general rules of the Administrative Procedure Law[20] and are subject to review in administrative courts.

Presently there are no fundamental, theoretical reasons why the fines imposed by the abovementioned institutions should not be incorporated within the framework of the Law on Administrative Liability. Historically a quasi-argument against such incorporation was the fact that those fines exceeded the maximum fine that was (is) prescribed in the Law on Administrative Liability, presently – 20 000 euro. It is well known that in such areas as competition law or supervision of credit institutions the respective laws provide for much larger penalties. However, this fact is irrelevant, since theoretically it could have been possible to provide exceptions from this maximum amount. Indeed, Part 5 of the Art. 2 of the Law on Administrative Liability provides that "directly applicable legal acts of the European Union and international agreements binding on the Republic of Latvia which regulate administrative liability shall form part of the administrative liability system." Among such acts is the General Data Protection Regulation and the Art. 83 thereof provides administrative fines up to 10 000 000 euro, which in Latvia are subject to application in accordance with the Law on Administrative Liability.

In case of fines provided in the Competition Law[21] several irregularities between the Competition Law and the Law on Administrative Offences have

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[19] Danovskis E. Significance of Principles of Penal Law in Administrative Law. Journal of the University of Latvia. Law, No. 10, 2017, pp. 203–204. https://doi.org/10.22364/jull.10.13

[20] Administrative Procedure Law. Adopted 25 October 2001. Available: https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law [last viewed 10.02.2026].

[21] Competition Law. Adopted 4 October 2001. Available: https://likumi.lv/ta/en/en/id/303007-law-on-administrative-liability [last viewed 10.02.2026].

been identified in respect of application of fines and put forward as arguments that fines imposed by the Competition Council should remain outside the framework of the Law on Administrative Liability.[22] However, in substance the main argument is that the existing system works well and that the competition cases due to their complexity require special competence which have been accrued by the Administrative Regional Court and the Department of Administrative Cases of the Senate. The argument of legal purism do not outweigh the difficulties of incorporating fines imposed by the Competition Council within the framework of the Law on Administrative Liability.

3. Legal acquis of administrative supervision and administrative liability of private companies in Lithuania

In Lithuanian law, the application of administrative liability is based on a dualistic regulatory model, which in many respects can be compared with the model existing in Latvia. The administrative liability of natural persons is governed by the Code of Administrative Offences. Unlike the Latvian system, however, the Lithuanian Code of Administrative Offences does not recognise business entities as subjects of administrative liability. Instead, the administrative liability of legal persons is regulated through the general provisions of Chapter IV of the Law on Public Administration, as well as through *lex specialis* – numerous sector-specific public administration laws establishing inter alia administrative sanctions and economic penalties for legal entities. These sector-specific laws include different areas of economic activity, such as the Law on Competition, the Law on Alcohol Control, the Law on Electronic Communications, and the Law on the Prohibition of Unfair Commercial Practices towards Consumers and etc. These legal acts establish the substantive conditions for liability, the types of sanctions, and the procedures for their application to legal entities. Although it is difficult to provide an exhaustive list of such laws, approximately thirty sectoral statutes currently regulate administrative liability for business entities in Lithuania, while supervisory functions are exercised by roughly fifty public authorities.

The constitutional foundations for the supervision of business entities are established in Art. 46(3) of the Constitution of the Republic of Lithuania,[23] which provides that the State regulates economic activity. This constitutional provision authorises the state to establish the legal framework governing economic activity, including restrictions, conditions, and supervisory mechanisms aimed at

[22] Hitrovs V. Par administrativo piespiedu lidzeklu piemerosanu konkurences tiesibas [On the Application of Administrative Coercive Measures in Competition Law]. Jurista Vards, No. 50/51/52 (1108/1109/1110), 17 December 2019.

[23] Kuris E. Ukines veiklos laisve, sazininga konkurencija ir bendra tautos gerove (konstitucijos 46 straipsnio jurisprudencinis komentaras) [Freedom of Economic Activity, Fair Competition and the General Welfare of the Nation (A Jurisprudential Commentary on Article 46 of the Constitution)]. Jurisprudencija, Vol. 64, No. 56, 2005, pp. 56–73.

safeguarding the public interest and ensuring the proper functioning of the market economy.

For a long time, the supervision of business entities in Lithuania was primarily perceived as the imposition of sanctions for legal violations. However, in order to transform this approach[24] and introduce a more modern regulatory paradigm[25] a reform of the legal framework governing business supervision institutions was initiated in 2009. As part of this reform, the Law on Public Administration[26] was gradually developed as a *lex generalis*.[27] for the supervision of economic operators.

A significant step in this reform was taken in 2014, when Chapter IV of the Law on Public Administration was substantially revised and expanded. This led to the emergence of a distinct model of business supervision and administrative liability of private legal entities. Within this model, economic sanctions serve not only a punitive function but also a preventive one, aiming to avert potential harm and ensure compliance with legal requirements. Accordingly, the traditional understanding of administrative liability law doctrine—according to which the primary purpose of sanctions is the punishment of the offender—has been gradually transformed. In the contemporary model of business supervision, priority is given to preventive and restorative regulatory instruments, while sanctions are regarded as measures of last resort (*ultima ratio*). This approach is reflected in the Art. 30 of the Law on Public Administration, which establish that state institutions supervising economic activity must ensure the sustainability of economic activity and promote business development. Consequently, the application of sanctions to business entities cannot be regarded as the primary objective of regulatory oversight (Art. 31 of Law on Public Administration). Rather, sanctions constitute only one element of supervisory activity, applied only when compliance cannot be achieved through less restrictive means. Art. 30(3) of Law on Public Administration also establishes that the effectiveness of supervisory institutions must not be assessed on the basis of the number or value of penalties imposed.[28] Instead, supervisory authorities are obliged to cooperate with business

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[24] Ambrazeviciute K., Baltrimas J., Maurice-Mackuviene E. Teises i nuosavybe, teises i ukines veiklos laisve ir iniciatyva, vartotoju teisiu uztikrinimo problemos [Problems in Ensuring the Right to Property, the Right to Freedom of Economic Activity and Initiative, and Consumer Rights]. Vilnius: Teises institutas, 2012. Available: https://teise.org/wp-content/uploads/2016/07/Teises_i_nuosavybe_uztikrinimo_problemos.pdf [last viewed 12.08.2026].

[25] Andrijauskaite A. Meduolis ar botagas? Geras administravimas kitaip [Carrot or Stick? Good Administration from a Different Perspective]. Lietuvos vyriausiojo administracinio teismo biuletenis, No. 34, 2018, pp. 401–415.

[26] Law on Public Administration, Viesojo administravimo istatymas, Valstybes zinios, Nr. 60-1945, 9 July 1999.

[27] Poguzinske E. Ukio subjektu veiklos prieziura Lietuvos viesajame administravime [Supervision of Economic Operators' Activities in Lithuanian Public Administration]. Doctoral thesis. Vilnius: Vilnius University, 2023. https://doi.org/10.15388/vu.thesis.507

[28] Planning principle. This principle means that the supervision of the activities of economic entities must be planned. The specified activities of business supervision and the indicators of these activities (number of violations of legal requirements, number, size, value of sanctions) cannot be the object of planning;

entities, provide consultations regarding the interpretation of legal provisions, offer methodological assistance, and contribute to the improvement of the regulatory framework.

Within this Art. 2 of Law on Public Administration the supervision of economic operators is defined as the activity of public administration bodies aimed at ensuring compliance with legal acts and administrative decisions. Such supervision primarily involves preventive measures, including advisory services, methodological support, monitoring of economic activities, and screening (as scheduled and unscheduled inspections) (Art. 30 of Law on Public Administration). Supervisory activities must comply with a number of fundamental principles, including proportionality, non-discrimination, planning, transparency, the provision of methodological assistance, separation of functions, and risk-based supervision. Thus, in contrast to the Code of Administrative Offences, whose regulatory focus lies primarily on the imposition of sanctions, the administrative liability regime applicable to business entities emphasises the *ultima ratio* nature of sanctions. This means that administrative liability is regarded as the final stage of supervisory activity, preceded by a range of preventive administrative procedures.

When administrative liability is nevertheless imposed on business entities, both the general provisions of the Law on Public Administration and the relevant rules of special laws apply. In Lithuanian legal doctrine,[29] such liability is considered a component of public administration, as it is intrinsically linked to the supervision and control of economic activity. Moreover, the sanctions applicable to business entities differ from those provided under the Code of Administrative Offences. They may include monetary fines or other regulatory measures, such as the revocation of licences, the removal of company management, or the appointment of a temporary administrator. These sanctions are imposed through individual administrative acts adopted by public administration authorities rather than by courts. Consequently, their application is governed by administrative procedures rather than by law-enforcement processes, and disputes concerning such decisions fall within the jurisdiction of administrative courts.

The Constitutional Court of the Republic of Lithuania has recognised that administrative liability imposed on natural persons under the Code of Administrative Offences and liability imposed on legal entities under sector-specific legislation represent related regulatory systems of the same legal nature and pursuing similar objectives.[30] Both forms of liability belong to the broader institution of administrative liability and are distinguished from criminal liability. Nevertheless, the regulation of liability for business entities under sector-specific legislation remains highly fragmented in practice. Different sectors of

[29] Deviatnikovaite I. Administracinio poveikio priemoniu taikymas kaip viena is viesojo administravimo subjektu veiklos funkciju [The Application of Administrative Enforcement Measures as One of the Functions of Public Administration Bodies]. Jurisprudencija, No. 3(105), 2008, pp. 84–89.

[30] Ruling of Lithuanian Constitutional Court, 3 November 2005, case No. 02/03-03/03-04/03-05/03-39/03-05 On the Law on Tobacco Control, On the Law on Tobacco Control – Constitutional Court of the Republic of Lithuania.

regulation – such as competition law, consumer protection, and product safety – establish distinct conditions for liability, different types of sanctions, and varying procedural frameworks. As a result, the administrative liability regime applicable to business entities lacks a unified structure.

Given that the Code of Administrative Offences and sector-specific legislation regulate essential conditions of liability in different ways, questions arise regarding the equality of substantive and procedural guarantees applicable to natural persons and business entities in administrative liability proceedings. Thus, the two components of Lithuania's dualistic system of administrative liability—the liability of natural persons under the Code and the liability of business entities under sector-specific legislation—remain insufficiently harmonised. A greater degree of coherence and consolidation of these regulatory frameworks would be desirable in order to ensure greater consistency within the system of administrative liability in Lithuanian law.

4. Legal entity as a subject of an administrative offence in Latvia

As noted before, the inclusion of a legal entity in the Code of Administrative Offences in 1998 was a practical solution determined by a practical need. The simplicity of the solution was remarkable – with only a few sentences the regulation of the Code became applicable to a whole range of legal entities. Although at first legal entity was provided in the Code a subject in only few sanctions, rather soon it became a common practice. In stark contrast – the idea of a legal entity as a subject of a criminal offence was keenly opposed by the leading scholars of criminal law of that time and has never been introduced in the Criminal Law[31] due to the traditional concept of fault as a mental attitude towards an offence. Since a legal entity does not have this attribute, its introduction as a subject of criminal offence would be impossible without altering the concept of a criminal offence.[32] In accordance with the Chapter VIII[1] of the Criminal Law a legal entity is subject only to coercive measure, if a natural person has committed the offence in the interests of a legal person.

Although the Code of Administrative Offences contained a very similar concept to the concept of a criminal offence, including fault and mental attitude in the form of intent and negligence, the introduction of a legal entity as a subject of an

[31] Criminal Law. Adopted 17 June 1998. Available: https://likumi.lv/ta/en/en/id/88966-criminal-law [last viewed 10.02.2026].

[32] Krastins U. Juridiskas atbildibas kolektivais subjekts uznemejdarbiba [The Collective Subject of Legal Liability in Business] In: Kriminaltiesibu teorija un prakse: viedokli, problemas un risinajumi. 1998–2008. [Criminal Law Theory and Practice: Opinions, Problems, and Solutions. 1998–2008], Riga: Latvijas Vestnesis, 2009.
Krastins U. Ka vertet juridisko personu kriminalatbildibu [How to Assess the Criminal Liability of Legal Entities]. Riga: Latvijas Vestnesis, 2009, pp. 164–177; Krastins U. Konceptuali par juridisko personu kriminalatbildibu [Conceptually on the Criminal Liability of Legal Entities]. Riga: Latvijas Vestnesis, 2009, pp. 200–205.

offence happened without modifying these concepts. Thus a situation was created that intent and negligence as a concepts lost any significance in administrative offence cases where a legal person was involved. Only 10 years after introduction of legal entity as a subject did a court address the notion of fault in respect of legal entities: "In legal doctrine, fault is defined as a person's mental attitude – in the form of intent or negligence – toward their committed unlawful act or omission and the resulting harmful consequences. [...] However, this definition characterizes only the culpability of natural persons, as legal entities cannot possess a mental attitude. Therefore, the culpability of legal entities is determined based on two conditions: first, whether the legal entity had the opportunity to ensure compliance with the rules for which administrative liability is prescribed; and second, whether the legal entity took all necessary measures to ensure compliance with these rules."[33]

The abovementioned minimalistic regulation proved to be sufficient for 22 years, when in 2020 the Law on Administrative Liability replaced the Code of Administrative Offences. In respect of regulation of legal entities as subjects of administrative offences, the Law on Administrative Liability continued the approach established in 1998, namely, that a legal entity is a subject of administrative offences only when provided in the sanction. The only addition was a description that a legal entity may be provided in the sanction in two different cases: "1) the legal entity has failed to perform or has improperly performed any of the duties applicable thereto; 2) an offence has been committed by a natural person in the interests of the legal entity, for the benefit thereof or as a result of improper supervision or control thereof by acting individually or as a member of collegial institution of this legal entity, on the basis of the right to represent the legal entity, act on behalf thereof or take decisions on behalf of the legal entity, or by exercising control within the legal entity."[34] These criterions have already been identified in the legal scholarship as two different explanations behind the reasoning of providing a legal entity in the sanction for a particular offence.[35]

It should be noted that the Law on Administrative Liability has omitted the old concept of fault and introduced a uniform concept of culpability both for natural persons and legal entities. The concept of culpability has not been defined in the law, but has been constructed in legal scholarship and successfully used in practice. Culpability is a legal concept that denotes the link between an act or omission and its perpetrator. Culpability comprises two elements: 1) the objective element – the fact that the specific act or omission is attributable to the specific person; 2) the subjective element – the fact that at the time of committing the offense, the person was capable of comprehending the significance of their actions, as well as the fact that there are no legally significant circumstances

[33] Judgment of the Senate of 5 March 2009 in case No. SKA-19/2009, A42450305, para.19.

[34] Article 7 of the Law on Administrative Liability.

[35] Danovskis E. 2022, pp. 18–19.

whose existence would provide grounds for exempting the person from liability.[36] Basically, it means that if a subject has committed an illegal omission, it is culpable unless circumstances precluding culpability exist.

The introduction of a legal entity as a subject of administrative offence in the Latvian legal system did not create any doctrinal or practical problems neither from the material nor procedural aspects. Essentially, natural persons and legal entities have the same procedural guarantees.

Unlike in Latvia, in Lithuania there is currently no unified catalogue of procedural guarantees for business entities. This is because supervisory authorities overseeing business activities operate not only under the general legal regime established in Chapter IV of the Law on Public Administration of the Republic of Lithuania, but also under parallel legal regimes provided for in sector-specific legislation.

The general law formulates in a rather abstract and concise manner certain procedural rights of business entities, such as: the right to be informed about the investigation of a violation; the right to access the investigation file; the right to submit explanations, evidence, and requests; and the right to challenge the decision. However, these procedural rights cannot be regarded as constituting an exhaustive catalogue.

Moreover, the application of these rights may be subject to certain limitations established by EU legislation and other sector-specific laws in particular areas of economic regulation, such as taxation, financial markets, competition, data protection, and others.

Thus, a certain paradox arises: the Law on Public Administration, which should function as a standard-setting act of principles and rules (a quasi-code) in the field of public administration, does not always allow business entities to rely on the fundamental procedural guarantees set out therein. In practice, the aforementioned catalogue of procedural guarantees is fully applicable only in those areas of business regulation that are not specifically governed by sector-specific legislation.

Conclusions

The development of administrative liability of private companies in Latvia and Lithuania reflects the broader transformation from former legal understanding "zero acceptance of legal entities" into modern regulatory frameworks regarding the administrative liability of private companies influenced by constitutional principles, European legal traditions, and European Union law. Administrative liability of private companies has become an increasingly important instrument of economic regulation and protection of public interests.

[36] Briede J., Danovskis E., Kovalevska A. Administrativas tiesibas. Macibu gramata. Tresais izdevums [Administrative Law. Textbook. Third Edition]. Riga: Tiesu namu agentura, 2023, p. 223.

Both countries have developed a dualistic model of administrative liability, where the general framework governing administrative offences coexists with sector-specific regulation applicable to private companies. The comparative analysis demonstrates that Latvia has developed a relatively coherent regulatory framework, as legal entities were incorporated directly into the system of administrative offences legislation. In contrast, Lithuania has adopted a supervisory model, where the liability of business entities is primarily regulated through public administration law and sector-specific legislation, with sanctions functioning as an ultima ratio measure within the broader framework of economic supervision.

The research shows that the regulation of administrative liability of business entities remains fragmented, particularly in Lithuania, due to the coexistence of multiple sector-specific legal regimes. Greater systematisation and harmonisation of administrative liability rules – especially with regard to liability conditions and procedural guarantees – would strengthen legal certainty and ensure a more coherent development of the administrative liability acquis in both legal systems.

Traditional concept of fault (intent/negligence as mental attitude) has been an important factor with different consequences on regulation for liability for private legal entities in Latvia and Lithuania. In Latvia, intent and negligence has played no role in introduction of legal entity as a subject of liability and these concepts have disappeared in administrative offence law, whereas in Lithuania the concept of fault has been an obstacle to introduce legal entities in the general framework of administrative liability.

In both Latvia and Lithuania, private legal entities became subjects of fines that were applicable outside the general legal framework. In Latvia most fines imposed to legal entities are applicable within a general legal framework on administrative liability which does not provide for any differences regarding material preconditions or procedural safeguards. Only a small portion of fines are applicable outside the general legal framework within the ordinary administrative procedure. In turn, Lithuanian regulation has a distinct separation of administrative liability of natural persons and private legal entities.

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Kathi Gassner, *Dr. iur., Professor*
Federal University of Applied Administrative Sciences, Germany

THE IMPACT OF EU LAW ON GERMAN ADMINISTRATIVE OFFENCE LAW CHALLENGES AND OPPORTUNITIES

Key words: administrative fines of a criminal nature, different legal nature of fines in European and German law, the German criminal law perspective and the European administrative law perspective on administrative fines, lack of a European doctrine of administrative sanctions

Summary

Whereas in Germany administrative fines are viewed from a criminal law perspective, in the EU they are viewed from an administrative law perspective. Although the EU's competence to introduce norms such as Art. 83 GDPR or Art. 74 DSA must be questioned with regard to Art. 5 TEU, the German doctrine should be extended to include the administrative law perspective. My claim is that the network of European and national norms can only function if a European doctrine of administrative sanctions is developed.

Introduction

On 11 November 2020 the Bonn Regional Court announced the first verdict[1] of a German court on a fine under Art. 83 GDPR.[2] The judgment is remarkable in many respects, especially in these following two: First, instead of over nine million euros imposed by an administrative authority, the court decided that the provider only had to pay a fraction of that amount. Second, for the first time, a German court recognised a legal person as a perpetrator. The latter remained controversially

[1] Judgment of the Bonn Regional Court of 11 November 2020 in case No. 29 OWi 1/20 LG. Available in German: https://nrwe.justiz.nrw.de/lgs/bonn/lg_bonn/j2020/29_OWi_1_20_Urteil_20201111.html [last viewed 04.01.2026].

[2] 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).

disputed[3] until three years later the CJEU ruled[4] as the Bonn Regional Court had decided.

By studying the GDPR and two more European data legal acts, namely the DSA[5] and the Whistleblowing Directive,[6] this contribution examines the impact of European law on German administrative offence law, including the challenges it has posed to German law to date and the opportunities it presents for Germany.

The criteria for the research of these three reference European legal acts are their impact on the German doctrine of punitive administrative sanctions, on German administrative organizational law and on German proceeding and material law. In addition, I have examined how the administrative sanction law regulated in these three European legal acts is discussed in Germany from a constitutional law perspective.

This research paper is a first summary of a comprehensive study in German that has not yet been published. In a first step I had to find a concept of administrative sanctions and fines (2). After investigating the EU's competence to enact sanction norms (3) and working out a short country report regarding the above mentioned criteria (4), I present my research findings on the question of the impact of Art. 83 GDPR (5), of Art. 23 Whistleblowing Directive (6) and of Art. 52 DSA (7) on German law and the conclusions that can be drawn (8).

1. Terminology

Neither in European law nor in German law there is a universally valid legal definition of "administrative sanctions" or "administrative fines".[7] Thus, in the first step of my research I had to find an appropriate concept of terms for this research.

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[3] See judgment of the Berlin Regional Court of 18 February 2021 in case No. (526 OWi LG) 212 Js-OWi 1/20 (1/20), 526 OWi LG 1/20. Available in German: https://gesetze.berlin.de/bsbe/document/NJRE001457043 [last viewed 04.01.2026].

[4] CJEU judgments of 5 December 2023 in case No. C-683/21 Nacionalinis visuomenes sveikatos centras and in case No. C-807/21 Deutsche Wohnen.

[5] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[6] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (Whistleblowing Directive).

[7] Waldhoff C. § 44 Vollstreckung und Sanktionen [Sec. 44 enforcement and sanctions]. In: Vosskuhle A., Eifert M., Moellers C. (eds.). Grundlagen des Verwaltungsrechts. Vol. 2. 3rd ed. Munich: C. H. Beck, 2022, p. 1529 (marginal No. 208).

1.1. German law

According to the case law of the ECHR,[8] a "Geldbusse"[9] (translated: "regulatory fine"[10] or "administrative fine"[11]) under Sec. 1(1) Ordnungswidrigkeitengesetz (OWiG)[12] is always a financial sanction of a criminal nature by means of the Engel criteria.[13] It is imposed by an administrative authority, a prosecutor or a court for an unlawful, reprehensible legal violation committed by a natural person and determined by statute as a regulatory offence.[14] As punitive measures regulatory fines are clearly to be distinguished from any other administrative sanctions for legal violations, especially from coercive measures which are, according to prevailing opinion, only preventive measures by the purpose of the law.[15]

1.2. European law

Based on the TFEU[16] and the DSA[17], "administrative fines" and "periodic penalty payments" may be defined as two forms of "administrative penalties" imposed by the Commission or national administrative authorities for a legal

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[8] ECHR judgment of 21 February 1984 in case Ozturk v. Germany (application No. 8544/79).

[9] Verwarnungsgelder (cautionary fines) under Sec. 56 OWiG are not the subject of this investigation.

[10] Cf. the translation of Sec. 1 OWiG. Available: https://www.gesetze-im-internet.de/englisch_owig/englisch_owig.html#p0014 [last viewed 04.01.2026].

[11] Cf. the translation of Sec. 81 GWB Available: https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p1034 [last viewed 04.01.2026].

[12] German Act on Regulatory Offences (also translated as German Administrative Offences Act). Available: https://www.gesetze-im-internet.de/englisch_owig/index.html [last viewed 04.01.2026].

[13] Cf. ECHR judgment of 08 June 1976 in Case Engel and Others v. the Netherlands (application No. 5100/71 et al.).

[14] Buerger S. Commentary on Sec. 1 of the Act on Regulatory Offences. In: Gassner K., Seith S. Ordnungswidrigkeitengesetz. Nomos Handkommentar. 3rd ed. Baden-Baden: Nomos, 2025, pp. 85–86 (marginal No. 4–6); Gassner K. Introduction. In: Gassner K., Seith S. Ordnungswidrigkeitengesetz. Nomos Handkommentar. 3rd ed. Baden-Baden: Nomos, 2025, pp. 40–41 (marginal No. 2–6).

[15] Deusch A., Burr B., Blackstein Y. Commentary on Sec. 13 of the Administrative Enforcement Act. In: Bader J., Ronellenfitsch M. (eds.). BeckOK VwVfG. 69th ed. Munich: C. H. Beck, 01.10.2025, VwVG, marginal No. 28; Troidl T. Commentary on Sec. 11 of the Administrative Enforcement Act. In: Engelhardt H., App M., Schlatmann A. (eds.). VwVG/VwZG. Kommentar. 13th ed. Munich: C. H. Beck, 2025. marginal No. 1a; Waldhoff C. 2022, p. 1479 (marginal No. 113).

[16] See Art. 103(2) let. a of the Treaty on the Functioning of the European Union of 13 December 2007 – consolidated version (OJ C 202, 07.06.2016, pp. 47–360) (= Art. 83 TEC) (=Art. 87 EEC).

[17] See Art. 52, 74, 76 DSA.

violation. Based on the Council Regulation (EC) 2988/95,[18] "administrative sanctions" may be defined as any administrative measure in case of a legal violation which incladdressed ministrative penalties and other administrative measures. According to the case law of the CJEU,[19] fines under European law are not necessarily of a criminal nature within the meaning of Art. 49, 50 CFR[20] and Art. 6, 7 ECHR[21]. Therefore, it is important to first clarify their legal nature separately for each individual legal act of the EU. Even though neither the CJEU nor the ECHR have yet decided precisely on this, fines under Art. 83 GDPR and Art. 74 DSA are of a criminal nature by means of the Engel criteria.[22] The same applies to the fines introduced in Germany pursuant to Art. 52 DSA and to Art. 23 of the Whistleblowing Directive.

1.3. The concept of administrative fines of a criminal nature

For the purpose of this research, "administrative sanctions" shall be sanctions imposed by an administrative authority in the first instance under public law, whereas "criminal sanctions" shall be sanctions imposed for a criminal offence by a criminal court and "civil sanctions" shall be sanctions imposed by civil law. The focus is on administrative sanctions in the form of "administrative fines of a criminal nature by means of Engel criteria" imposed by the Commission or a national administrative authority in the first instance.

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[18] The Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests is referred to in parts of the literature as the General Part of European law on administrative sanctions. Cf. Dannecker G., Buelte J. 2. Kapitel. Die Entwicklung des Wirtschaftsstrafrechts unter dem Einfluss des Europarechts. [Chapter 2. The development of economic criminal law under the influence of European law.] In: Wabnitz H. B., Janovsky T., Schmitt L. (eds.). Handbuch Wirtschafts- und Steuerstrafrecht. 6th ed. Munich: C. H. Beck, marginal No. 255.

[19] CJEU judgment of 11 July 2002 in case No. C-210/00 Kaeserei Champignon Hofmeister GmbH & Co. KG and Hauptzollamt Hamburg-Jonas.

[20] Charter of Fundamental Rights of the European Union.

[21] European Convention on Human Rights. Signed in Rome on 4 November 1950.

[22] Cf. CJEU judgment of 11 April 2024 in case No. C-741/21 GP v. juris GmbH; CJEU judgment of 21 December 2023 in case No. C-667/21 ZQ v. Medizinischer Dienst der Krankenversicherung Nordrhein, Koerperschaft des öffentlichen Rechts; Gassner K. 2025, p. 61 (marginal No. 67).

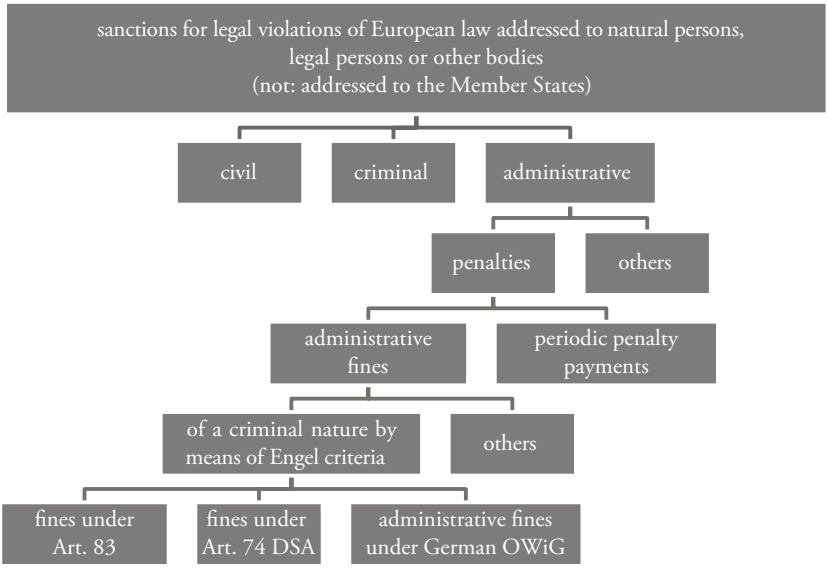


Figure 1. The concept of administrative fines of a criminal nature by means of Engel criteria

2. The legislative authority to apply sanctions

The obligation of the Member States to apply sanctions for violations of obligations foreseen under EU law already follows from Art. 4(3) TEU.[23] Additionally, corresponding sanction provisions have become standard provisions in EU's secondary law as, until 24 May 2018, provided by Art. 24 Directive 95/46/EC (Data Protection Directive).

As long as secondary law just required Member States to provide sanctions for violations of Union law, however, there was only an obligation of result (effet utile); the type (criminal, administrative, civil), severity or scope of the sanctions were not prescribed.[24] In Germany, as sanctions in the field of public law, criminal penalties or regulatory fines were then introduced at the discretion of the competent legislator.

It is problematic under what conditions the EU, by invoking the competences primarily granted to it under primary law to regulate behavioural norms, is at the same time entitled to require Member States to enact and apply certain administrative sanctions (as under Art. 52 DSA) or even to introduce supranational sanction norms that must be enforced by the Member States (as under Art. 83 GDPR) or the Commission (as under Art. 74, 76 DSA).

[23] CJEU judgment of 21 September 1989 in case No. 68/88 Commission of the European Communities and Hellenic Republic.

[24] Waldhoff C. 2022, p. 1537 (marginal No. 244).

With regard to the principle of subsidiarity (Art. 5(3) TEU) and proportionality (Art. 5(4) TEU), parts of the literature call for restraint, because according to the standard model of indirect implementation by the Member States, the administrative procedure and also administrative sanction law are, in principle, considered part of the Member States' implementation autonomy.[25] However, the EU is subject to fewer restrictions here than in the harmonization of criminal law (see Art. 83(2) TFEU and Art. 325 TFEU).

3. A brief introduction into German administrative offence law

3.1. Legislative authority

According to the case law of the Federal Constitutional Court regarding the legislative authority[26], the substantive administrative offence law is part of the criminal law within the meaning of Art. 74 GG[27] for which the Federation has concurrent legislative authority.[28] This is historically justified, as the law of administrative offences originated from criminal law.[29]

3.2. Administrative offence Law from a scientific perspective

The law of administrative offences, contrary to its practical significance, is still awaiting an independent assessment of its position.[30] Administrative offence law does traditionally not belong to material public administration law and the German doctrine of administration action does not include the imposition of fines as an administrative measure which leads to a dogmatic deficit.[31]

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[25] Dannecker G., Buelte J. 2025, marginal No. 245; Waldhoff C. 2022, p. 1530 (marginal No. 210).

[26] Judgment of the Federal Constitutional Court of the Federal Republic of Germany of 22 February 1968 in case No. 2 BvO 2/65, 2 BvO 1/66. Available in German: BVerfGE 23, 113-126 (p. 123); Judgment of the Federal Constitutional Court of the Federal Republic of Germany of 16 July 1969 in case No. 2 BvL 2/69. Available in German: BVerfGE 27, pp. 18-36.

[27] See Art. 74 para. 1 No. 1 ("criminal law") of the Basic Law for the Federal Republic of Germany. Available: https://www.gesetze-im-internet.de/englisch_gg/index.html [last viewed 04.01.2026].

[28] In detail (also regarding the Federation's competence for the administrative and court procedural law): Gassner K. 2025, pp. 48–50 (marginal No. 24–27).

[29] Uhle A. Kommentierung von Art. 74 GG [Commentary on Art. 74 of the Basic Law of the Federal Republic of Germany]. In: Duerig G., Herzog R., Scholz R. Grundgesetz. Kommentar. 107th ed. Munich: C. H. Beck, March 2025, marginal No. 97.

[30] Gassner K. 2025, pp. 48–50 (marginal No. 24–27).

[31] Waldhoff C. 2022, p. 1422 (marginal No. 12).

3.3. The current legal framework

3.3.1. Legal sources

So far, the German administrative offence law is regulated in a very uniform manner: The procedure law and the general provisions are generally regulated in the Federal Act on Regulatory Offences[32]. There are a few, but significant exceptions here, namely in the Fiscal Code of Germany[33] and in the German Competition Act[34]. The administrative offences themselves, precisely the factual elements, are regulated in various other acts and statutory instruments. Only a few are regulated in the Act on Regulatory Offences[35].

3.3.2. The legal definition of a regulatory offence

There is a legal definition of a regulatory offence[36] which is based on a formal understanding of terms as it is linked to the imposition of an administrative fine in order to distinguish the administrative offence from a criminal offence.[37]

The question whether there is a substantive distinction between criminal offences and administrative offences is very controversially disputed[38] and probably a "never-ending story". However, the obligation to protect fundamental rights through procedures and the principle of optimizing the rule of law prohibit assigning the initial decision on guilt and the pronouncement of sanctions entirely to the administration once a certain level of severity is reached.[39]

3.3.3. Material law

Sec. 1 of the Act on Regulatory Offences defines a regulatory offence as an unlawful and reprehensible act, constituting the factual elements set forth in a statute that enables the act to be sanctioned by imposition of a regulatory fine.

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[32] Sec. 1–110c of the Act on Regulatory Offences.

[33] Sec. 409–412 of the Fiscal Code of Germany. Available: https://www.gesetze-im-internet.de/englisch_ao/index.html [last viewed 28.10.2025].

[34] Sec. 81a-86 of the Competition Act. Available: https://www.gesetze-im-internet.de/englisch_gwb/index.html [last viewed 28.10.2025].

[35] Sec. 111-130 of the Act on Regulatory Offences.

[36] Sec. 1 para. 1 of the Act on Regulatory Offences.

[37] Gassner K. 2025, p. 40 (marginal No. 2); Klesczewski D. § 1 Grundlagen. C. Der Begriff der Ordnungswidrigkeit [Sec. 1 Basics. C. The concept of a regulatory offence]. In: Klesczewski D., Krenberger B. (eds.). Ordnungswidrigkeitenrecht. 3rd ed. Munich: C. H. Beck, 2022, p. 4 (marginal No. 7).

[38] In detail: Klesczewski D. 2022, pp. 4–21; Mitsch W. Einleitung [Introduction]. In: Mitsch W. (ed.). Karlsruher Kommentar zum Ordnungswidrigkeitengesetz. 6th ed. Munich: C. H. Beck, 2025, marginal No. 50–118; Waldhoff C. 2022, pp. 1507–1510 (marginal No. 165–170).

[39] Brodowski D. Die Verwaltung darf nicht strafen – warum eigentlich nicht? Zugleich eine Vorstudie zu einer rechts-evolutionaeren, weichen Konstitutionalisierung strafrechtsdogmatischer Grundannahmen [The administration must not impose penalties – but why not? At the same time, a preliminary study on a legally evolutionary, soft constitutionalisation of fundamental assumptions in criminal law doctrine]. Zeitschrift fuer die gesamte Strafrechtswissenschaft (ZStW), Vol. 128, Issue 2, 2016, p. 393. https://doi.org/10.1515/zstw-2016-0016

According to the German classical legal understanding, regulatory offences can only be committed by natural persons[40].

Nevertheless, according to Sec. 30 OWiG fines can also be imposed on legal persons and on associations of persons if one of their executives has committed the administrative offence as a so-called triggering or reference act and the other requirements of Sec. 30 OWiG are met. Sec. 30 OWiG is based on the legal entity principle and not, as Art. 23 Council Regulation (EC) No. 1/2003[41], on the functional principle or respectively the economic concept of a company.[42]

Administrative fine law and criminal law are closely related to each other. By virtue of the Act on Regulatory Offences[43], either a criminal penalty or a regulatory fine may be imposed for the same act and normally criminal law takes precedence.[44]

3.3.4. Organizational law

German administrative organizational law distinguishes between whether an authority performs tasks of material public administration[45] or whether it, as a so-called administrative fine authority, prosecutes and sanctions administrative offences[46]. In the capacity of an administrative fine office, an administrative authority is subject to ministerial supervision.[47] This ensures an appropriate level of democratic legitimacy. As a rule, technical supervision is carried out,[48] in exceptional cases legal supervision[49]. Thus, even the Deutsche Bundesbank, which

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[40] Gassner K. 2025, p. 80 (marginal No. 131).

[41] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[42] Schmitt-Leonardy C. Commentary on Sec. 30. In: Gassner K., Seith S. (eds.). Ordnungswidrigkeitengesetz. Nomos Handkommentar. 3rd ed. Baden-Baden: Nomos-Verlagsgesellschaft, 2025, pp. 305–306 (marginal No. 13).

[43] See Sec. 21 of the Act on Regulatory Offences.

[44] Habetha J., Ulrich A. Commentary on Sec. 21 of the Act on Regulatory Offences. In: Gassner K., Seith S. (eds.). Ordnungswidrigkeitengesetz. Nomos Handkommentar. 3rd ed. Baden-Baden: Nomos-Verlagsgesellschaft, 2025, pp. 247–248 (marginal No. 2–5).

[45] See Sec. 1 para. 4 VwVfG [Administrative Procedure Act]. Available in German: https://www.gesetze-im-internet.de/vwvfg/index.html#BJNR012530976BJNE002102301 [last viewed 04.01.2026]; Sec. 6 para. 1 AO [The Fiscal Code of Germany]. Available: https://www.gesetze-im-internet.de/englisch_ao/index.html [last viewed 04.01.2026]; Sec. 1 para. 2 SGB X [Tenth Book of the Social Code – Social Administration Procedures and Social Data Protection]. Available in German: https://www.gesetze-im-internet.de/sgb_10/index.html#BJNR114690980BJNE002302308 [last viewed 04.01.2026].

[46] See Sec. 35-36 OWiG.

[47] Wolff H. A. Kapitel F. Durchsetzung des Datenschutzrechts. Friktionen mit deutschem Organisationsrecht. [Enforcement of data protection law. Frictions with German corporate law]. In: Schantz/Wolff, Das neue Datenschutzrecht. 1st ed. Munich: C. H. Beck, 2017, marginal No. 1002.

[48] Inhofer D. Commentary on Sec. 35 OWiG [Act on Regulatory Offences]. In: BeckOK OWiG. 48th ed. Munich: C. H. Beck, 1.10.2025, marginal No. 5; Buecherl A. Commentary on Sec. 47 OWiG [Act on Regulatory Offences]. In: BeckOK OWiG. 48th ed. Munich: C. H. Beck, 1.10.2025, marginal No. 12.

[49] E.g. sanctioning of administrative offences by a municipality according to Sec. 142 Municipal Code of Baden-Wuerttemberg, c.f. Sec. 118 Municipal Code of Baden-Wuerttemberg.

is independent and free from directives only insofar as it performs tasks related to monetary policy and currency policy or participates in the ESCB, is subject to ministerial supervision in the performance of duties as a fine-imposing authority.[50]

3.3.5. Procedural law

Important procedural law features are the principle of opportunity,[51] the applicability of criminal proceeding statues[52] and the jurisdiction of criminal courts.[53]

The person against whom an administrative fine was imposed has the right to a complete determination by a court and not just the right of full jurisdiction as under Art. 261 TFEU,[54] Art. 47 CFR,[55] Art. 23 and 24 VO (EG) No. 1/2003 Council Regulation (EC) No. 1/2003[56]. In German law, a strict distinction is made between the taking of evidence in administrative proceedings and in court, thereby ensuring the independent and autonomous examination of the charges by the court as a neutral authority.[57]

Thus, administrative fining notices are of a provisional nature. If the person concerned files a permissible objection, the fining notice just becomes the bill of indictment to describe the alleged act and the question of the legality of the administrative fine notice is not the subject-matter of the court proceedings.[58]

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[50] Cf. Ibler M. Commentary on Art. 86 GG [Basic Law]. In: Duerig G., Herzog R., Scholz R. Grundgesetz. Kommentar. 108th ed. Munich: C. H. Beck, August 2025, marginal No. 59; Berger H., Ruebsamen K. Commentary on Sec. 12 BBankG [Law on the Deutsche Bundesbank]. In: Berger H., Ruebsamen K. Bundesbankgesetz. Kommentar, 2nd ed. Baden-Baden: Nomos, 2014, marginal No. 11.

[51] Sec. 47 of the Act on Regulatory Offences.

[52] Sec. 46 para. 1 of the Act on Regulatory Offences.

[53] Sec. 62, 67, 103 of the Act on Regulatory Offences.

[54] Treaty on the Functioning of the European Union. Signed in Lisbon 13.12.2007 [in the wording of 26.10.2012].

[55] Art. 49 para. 3 of Charter of Fundamental Rights of the European Union. Signed in Nice on 08.12.2000. [in the wording of 26.10.2012].

[56] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[57] Dannecker C. Die Beweisaufnahme im Kartellordnungswidrigkeitenverfahren: Verfassungsrechtliche Anmerkungen zum Unmittelbarkeitsgrundsatz, Beweisantragsrecht und kontradiktorischen Charakter der Beweisaufnahme [The Taking of Evidence in Cartel Administrative Offence Proceedings: Constitutional Law Remarks on the Principle of Immediacy, the Right to Submit Evidence Requests, and the Adversarial Nature of Evidence Taking], Neue Zeitschrift fuer Kartellrecht (NZKart), 2015, No. 1, pp. 30–43 (pp. 30, 40, 42).

[58] Niehaus H. Commentary on Sec. 65 of the Act on Regulatory Offences. In: Mitsch W. (ed.). Karlsruher Kommentar zum Ordnungswidrigkeitengesetz, 6th ed. Munich: C. H. Beck, 2025, marginal No. 5–9.

4. The GDPR

4.1. Milestones from national fine law to supranational fine law

National data protection penalty regulations had existed in Germany for nearly 50 years,[59] until Article 83 of the GDPR applied on May 25, 2018 as the first European supranational sanction norm to be directly enforced by authorities of the member states. When implementing Art. 83 GDPR into national law in 2017, the German legislator felt empowered to enact procedural rules and to fill any gaps in general substantive law,[60] believing it had found the magic formula for this in Sec. 41 BDSG.[61] This raises the question for the legal practitioner as to which legal issues the GDPR conclusively regulates. This question is currently being clarified in preliminary ruling proceedings before the CJEU,[62] possibly even at the expense of the accused.[63] However, the CJEU has already ruled that the German legislator was wrong and that the substantive legal requirements are exhaustively regulated in Art. 83(1)-(6) GDPR.[64]

4.2. The concept of an administrative offence

Although neither the GDPR nor any other European legal act provides a legal definition of an administrative offence, the administrative offences described under Art. 83(4)–(6) GDPR are also based on a formal understanding (cf. Art. 83(9) GDPR), just like in German law. Thus, just as in Germany, the unresolved problem arises as to whether there is a substantive distinction between criminal offences and administrative offences. In addition, it is questionable whether the Member States are entitled to subject the acts described in Art. 83 GDPR to criminal penalties.[65]

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[59] Starting with Sec. 16 of the Data Protection Act of the State of Hesse of 7.10.1970. Available in German: https://starweb.hessen.de/cache/GVBL/1970/00041.pdf [last viewed 04.01.2026].

[60] German Bundestag, Drucksache 18/11325 of 24.02.2017, p. 108. Available in German: https://dserver.bundestag.de/btd/18/113/1811325.pdf [last viewed 04.01.2026].

[61] Sec. 41 Federal Data Protection Act. Available: https://www.gesetze-im-internet.de/englisch_bdsg/index.html [last viewed 04.01.2026].

[62] Cf. the tabular overview in: Leibold K. DS-GVO-Vorlagefragen an den EuGH [GDPR-requests to the CJEU]. Newsdienst ZD-Aktuell, 2025, No. 3, 01154.

[63] Cf. Sec. 38(2) Act on the Remuneration of Lawyers. Available: https://www.gesetze-im-internet.de/englisch_rvg/index.html [last viewed 04.01.2026].

[64] CJEU judgment of 5 December 2023 in Case C-807/21 Deutsche Wohnen, para. 65.

[65] Agreeing: Bergt M. Commentary on Art. 84 GDPR. In: Kuehling J., Buchner B. (eds.). Datenschutzgrundverordnung/BDSG. Kommentar. 4th ed. Munich: C. H. Beck 2024, marginal No. 11–13; rejecting: Nemitz P. Commentary on Art. 84 GDPR. In: Ehmann E., Selmayr M. (eds.). DS-GVO. Kommentar. 3rd ed. Munich: C. H. Beck 2024, marginal No. 4–7.

4.3. The Impact of Art. 83 GDPR on German law

There are significant differences between European and German administrative offence law.

4.3.1. The legal nature of fines under Art. 83 GDPR from a German perspective

Firstly, the legal nature of fines under Art. 83 GDPR has to be distinguished from the legal nature of fines under the German Act on Regulatory Offences. There are similarities and differences: Just like regulatory fines in German law, fines under Art. 83 GDPR are also of a criminal nature[66] and, according to the case law of the CJEU,[67] solely in the public interest[68].

Unlike in German law, imposing a fine under Art. 83 GDPR is defined as one of several recordable administrative corrective powers (cf. Art. 58(2) GDPR) and exists as an alternative to the so-called reprimands[69].

Thus, the following can be concluded: Whereas in Germany fines traditionally are viewed from a criminal law perspective, [70] European law considers fines form an initially purely administrative law perspective.

4.3.2. Organizational law

Secondly, for the first time fines have to be imposed by authorities that are not subject to state supervision.

The independent status of the supervisory authorities was initially secured by secondary law[71] and later, since 1 December 2009, by primary law.[72]

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[66] Cf. CJEU judgment of 11 April 2024 in case No. C-741/21 GP v. juris GmbH; CJEU judgment of 21 December 2023 in case No. C-667/21 ZQ v. Medizinischer Dienst der Krankenversicherung Nordrhein, Koerperschaft des oeffentlichen Rechts; Gassner K. 2025, p. 61 (marginal No. 67).

[67] Cf. CJEU judgment of 26 September 2024 in case No. C-768/21 TR v. Land Hessen, marginal No. 41.

[68] Petri T. EuGH: Keine generelle Pflicht der Aufsichtsbehörde zur Abhilfe bei DS-GVO-Verstoss [CJEU: No general obligation for the supervisory authority to remedy GDPR violations]. Neue Juristische Wochenschrift (NJW), 2024, p. 3431; 33. Taetigkeitsbericht fuer den Datenschutz und die Informationsfreiheit 2024 des BfDI [33rd Activity Report on Data Protection and Freedom of Information 2024 of the Federal Commissioner for Data Protection and Freedom of Information], p. 78. Available: https://www.bfdi.bund.de/SharedDocs/Downloads/EN/Taetigkeitsberichte/33TB_24.pdf?__blob=publicationFile&v=2 [last viewed 03.01.2026]; see also Opinion of Advocate General Pikamaee P. delivered on 11 April 2024 in case No. C-768/21 TR v. Land Hessen. ECLI:EU:C:2024:291.

[69] See Art. 58(2) let. b GDPR.

[70] For example, the Stuttgart Administrative Court continues to interpret the imposition of fines under Art. 83 GDPR not as a substantive administrative activity: VG Stuttgart, judgment of 29.9.2022 in case No. 14 K 5332/20, juris marginal No. 38–45. ECLI:DE:VGSTUTT:2022:0929.14K5332.20.00.

[71] Art. 28 para. 1, subpara. 2 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[72] Art. 16 para. 2 sentence 2 TFEU and Art. 8 para. 3 CFR.

In 2010, Germany was condemned by the CJEU for not exempting supervisory authorities completely from state supervision.[73] However, until 25 May 2018, the member states were not obliged to transfer sanctioning powers to these independent supervisory authorities. That changed when the GDPR applied.

The independence of administrative fine offices according to Art. 51 GDPR must be observed due to the primacy of EU law, whereas a purely German regulation that would equip the supervisory authorities with the power to issue fines to private individuals without this authority at least being subject to ministerial legal supervision would be unconstitutional with regard to the principle of democracy.[74] This is because, pursuant to Art. 20 para. 2 sentence 1 GG, the exercise of all state power requires continuous traceability back to the people as the subject of legitimacy and thus fundamentally a factual-substantive legitimisation, which makes ministerial supervision generally constitutionally obligatory. According to pluralistic theories of legitimacy, other factors of legitimacy are permissible if there is a reason recognised in the constitutional structure, parliamentary control is maintained and the deviation is provided for by law. .[75] However, neither are the conditions for a deviation met, nor is it clear which factor of legitimisation should replace state legal supervision here. In addition, according to Art. 59 GDPR, the supervisory authorities are only entitled to present the sanctions and measures imposed pursuant to Art. 58(2) GDPR in their mandatory activity report, but are not obliged to do so.

4.3.3 Material law

Thirdly, for the first time, in cases of violations of obligations imposed on legal persons or other bodies, it is not necessary to identify the employee who committed the act.[76] The legal person itself is recognised as perpetrator. In this respect, the German legal entity principle according to Sec. 30 OWiG does not apply.

But unlike in European competition law, a distinction must be made between the addressee of the norm and the addressee of liability. Thus, the concept of 'undertaking' (cf. Art. 101-102 TFEU) is not relevant for the question who committed an offence described in Art. 83 GDPR, but it is only relevant in order to determine the amount of the fine.[77]

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[73] CJEU judgment of 9 March 2010 in case No. C-518/07 Commission v. Germany.

[74] Wolff H.A. 2017, marginal No. 1001-1003.

[75] Kahl W. § 45 Kontrolle der Verwaltung und des Verwaltungshandelns [Sec. 45 Control of administration and administrative actions]. In: Vosskuhle A., Eifert M., Moellers C. (eds.). Grundlagen des Verwaltungsrechts. Vol. 2, 3rd ed. Munich: C. H. Beck, 2022, pp. 1589–1594 (marginal No. 66–72).

[76] Bergt M. Commentary on Art. 83 GDPR. In: Kuehling J., Buchner B. (eds.). Datenschutzgrundverordnung/BDSG. Kommentar, 4th ed. Munich: C. H. Beck, 2024, marginal No. 20.

[77] CJEU judgment of 13.2.2025 in case No. C-383/23, ILVA A/S, marginal No. 19, 36.

4.3.4. Procedural law

Finally, Art. 83 GDPR also has impact on the German administrative proceeding law. Germany is obliged to pay more attention to administrative procedures than before.

As far as the supervisory authority imposes a fine under Art. 58(2)(i) GDPR in conjunction with Art. 83 GDPR, there is also an obligation to provide reasoning for the decision, particularly for the reasoning behind the calculation of the fine.[78] This is a novelty for German fine law, as hitherto fines under national law have only to be justified in accordance with Sec. 66 OWiG, which in particular does not provide an obligation to justify the calculation of the fine.[79]

The 18 supervisory authorities in Germany only use fines under Art. 83 GDPR as a last resort, namely when there is a public interest in prosecution and sanctioning, that is, in cases of serious misconduct, repeated violations or lack of insight.[80] And the reprimand was introduces as a new legal institution.

As far as the court proceedings are concerned, no influence has been observed there so far.

4.4. Challenges

Art. 83 GDPR is in a tense relationship with the organisational and procedural autonomy of the Member States[81] as never before. The commentary literature on the GDPR regards Article 16(2) TFEU not only as the regulatory competence for substantive data protection law but also as the EU's annex competence to enact

[78] Art. 41(2) let. c CFR; Recital 129 sentence 7 of the GDPR; Art. 296(2) TFEU.

[79] Expresses criticism of the current configuration of national law with regard to EU law and German constitutional law: Gassner K. 2025. Commentary on § 66 marginal No. 26 and Introduction marginal No. 55, 68, 135.

[80] Cf. the practice in Baden-Wuerttemberg: LfDI BW 34. Taetigkeitsbericht 2018 [State Commissioner for Data Protection and Freedom of Information of Baden-Wuerttemberg. 34th Activity Report, 2018]. Available in German: https://www.baden-wuerttemberg.datenschutz.de/wp-content/uploads/2019/02/LfDI-34.-Datenschutz-T%C3%A4tigkeitsbericht-Internet.pdf [last viewed 04.01.2026.], pp. 72–74; LfDI BW, 39. Taetigkeitsbericht 2023 [State Commissioner for Data Protection and Freedom of Information of Baden-Wuerttemberg. 39th Activity Report, 2023]. Available in German: https://www.baden-wuerttemberg.datenschutz.de/wp-content/uploads/2024/02/TB_39_DS_barrierefrei.pdf [last viewed 04.01.2026], pp. 74–78; LfDI BW 40. Taetigkeitsbericht 2024 [State Commissioner for Data Protection and Freedom of Information of Baden-Wuerttemberg. 40th Activity Report, 2024]. Available in German: https://www.baden-wuerttemberg.datenschutz.de/wp-content/uploads/2025/03/TB_40_Datenschutz-2024_barrierefrei.pdf [last viewed 04.01.2026], p. 152; investigating the practice in Hesse: Rossnagel A., Rost M. C. Eine Geldbusse kommt selten allein [A fine rarely comes alone]. ZD 2023, p. 502.

[81] Sydow G. Einleitung [Introduction]. In: Sydow G., Marsch N. (eds.). DS-GVO/BDSG. 3rd ed. Baden-Baden: Nomos-Verlag 2022, marginal No. 22.

supranational administrative sanctions in the field of data protection.[82] In other commentary literature, the issue is often not addressed.[83] In my opinion, the EU's competence to impose supranational fines for data violations has to be questioned. I justified my position by arguing that the limits of Union competences are governed by the principle of conferral (Art. 5(1) sentence 1 TFEU).[84] From today's perspective, my reasoning relies too much on German perspective and is likely untenable with regard to Article 325(4) TFEU, according to which the EU has even been granted powers to establish substantive criminal law.[85]

However, at least from a factual-legal perspective and based on an evaluation of the violations identified and penalized with fines by the German supervisory authorities since the GDPR came into force,[86] the EU's competence to enact Art. 83 GDPR must be questioned with regard to the principles of subsidiarity (Art. 5(3) TFEU)[87] and the principle of proportionality (Art. 5(4) TFEU).

In any case, implementing supranational sanctions should remain the exception.

The complete independence of administrative authorities with powers to impose fines must be questioned with regard to the principle of democracy.

The power of administrative authorities to impose very high fines in first instance outside of a normal criminal trial should be questioned with regard to the principles of criminal procedures.

The EU has introduced penalty provisions without introducing general substantive law regulations. From a German perspective, many regulations are too vague. The unresolved legal questions are currently being clarified in preliminary ruling proceedings before the CJEU, possibly even at the expense of the accused (Sec. 38 para. 2 Law on the Remuneration of Lawyers).

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[82] Boehm F. Commentary on Art. 83 GDPR. In: Simitis S., Hornung G., Spiecker gen. Doehmann I. Datenschutzrecht. 2nd ed. Baden-Baden: Nomos, 2025, marginal No. 5; Hollaender C. Commentary on Art. 83 GDPR. In: Wolff H. A., Brink S., von Ungern-Sternberg A. BeckOK Datenschutzrecht. 54th ed. Munich: C. H. Beck, 01.11.2025, marginal No. 4; Hustus L. § 34 Strafgerichtsbarkeit [Sec. 34 Criminal jurisdiction] In: Karpenstein U., Kotzur M. T., Vasel J. J. (eds.). Handbuch Rechtsschutz in der Europaeischen Union. 4th ed. Munich: 2024, marginal No. 22; Sydow G. 2022 (marginal No. 22).

[83] Cf. Mitsch, 2025, marginal No. 251.

[84] Gassner K. 2025, p. 60 (marginal No. 64).

[85] Cf. in detail about the EU's competence for criminal law: Dannecker G., Buelte J., 2025, marginal No. 193–196.

[86] Ihwas S. R. Datenschutzstrafrecht: Eine Uebersicht ergangener Bussgelder und gerichtlicher Entscheidungen (2023–2024) [Data Protection Criminal Law: An Overview of Imposed Fines and Court Decisions (2023–2024)], CCZ 2025, pp. 33–43; Ihwas S. R. Datenschutzstrafrecht: Eine Uebersicht ergangener Bussgelder und gerichtlicher Entscheidungen (2022–2023) [Data Protection Criminal Law: An Overview of Imposed Fines and Court Decisions (2022–2023)], CCZ 2024, pp. 41–50; Ihwas S. R. Datenschutzstrafrecht: Eine Uebersicht ergangener Bussgelder und gerichtlicher Entscheidungen (2021–2022) [Data Protection Criminal Law: An Overview of Imposed Fines and Court Decisions (2021–2022)], CZ 2023, pp. 23–31.

[87] Cf. Dannecker G. Zur bussgeldrechtlichen Verantwortung der Unternehmen in der Europaeischen Union [On the administrative liability of companies in the European Union], NZWiSt, 2022, p. 99.

4.5. Opportunities

However, Art. 83 GDPR also brings many valuable impulses for the further development of German law.

The German doctrine of the forms of administrative action should be extended in order to include the imposition of fines as an administrative corrective power (see Art. 58 GDPR) and in order to include legal persons as perpetrators.

The legal institution of a reprimand (see Art. 58 para. 2 lit. b GDPR) as a corrective power of a preventive nature should be incorporated into German administrative law as a fee-based administrative act for an unlawful, not necessarily reprehensible act.

In the future, Section 66 of the German Act on Regulatory Offences (OWiG) should provide for a comprehensive obligation to give reasons, especially regarding the exercise of discretion and the determination of fines.

5. The Whistleblowing Directive

Art. 23 of the Directive (EU) 2019/1937 obliges the Member States to provide for effective, proportionate and dissuasive penalties for the enumerated legal violations. It was transposed into German law by Sec. 40 *Hinweisgeberschutzgesetz* (HinSchG)[88] which is in force since 2 July 2023.

So far, Art. 23 has had little impact on German administrative offence law in the books:[89] As far as possible, Germany is sticking to the existing system:[90] Germany continues to distinguish between material public administration law (Chapter III: "external reporting and follow-up" of the Directive) and administrative offence law (Art. 23 of the Directive) and between the competence for these two different tasks. Thus, whereas the external reporting office (Federal External Reporting Office) is established at the Federal Office of Justice (Bundesamt fuer Justiz), in most cases the Federal Office of Justice does not have the competence for imposing fines for violations of Directive (EU) 2019/1937.[91]

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[88] Act for the Better Protection of Whistleblowers. Available: https://www.gesetze-im-internet.de/englisch_hinschg/index.html [last viewed 04.01.2026].

[89] Since there are currently no published fine decisions or court rulings, no statement can yet be made about the law in action.

[90] Cf. German Bundestag Drucksache 20/3442 of 19 September 2022, Draft bill of the Federal Government, pp. 97–100. Available in German: https://dserver.bundestag.de/btd/20/034/2003442.pdf [last viewed 13.11.2025].

[91] The competence of the Federal Office of Justice (Bundesamt fuer Justiz) only includes such administrative offences that are committed in the execution of the HinSchG by the BMJV or an authority within its area of responsibility. See Hinweisgeberschutzgesetz-Ordnungswidrigkeiten-Zustaendigkeitsverordnung – HinSchGOWiZustV [Whistleblower Protection Act Administrative Offenses Jurisdiction Regulation]. Available in German: https://www.recht.bund.de/bgbl/1/2025/111/VO.html [last viewed 13.11.2025].

Finally, legal persons and other bodies[92] only can be sanctioned if the above mentioned requirements of Sec. 30 OWiG are met. It remains to be seen whether the CJEU will tolerate in the long run that perpetrators in Germany can only be human beings.

However, it is particularly noteworthy that North Rhine-Westphalia is the first federal state to assign responsibility for imposing fines in the first instance not to an administrative authority,[93] but to the Senior Chief Public Prosecutors.[94]

6. The DSA

6.1. Milestones from national fine law to supranational fine law

In Germany, the first fine regulation for sanctioning violations of provider obligations came into force in 2017.[95] The German legislator broke new ground, as it provided for a judicial preliminary review if the administrative authority intended to base its decision on the fact that content which has not been removed or blocked was unlawful within the meaning of the German Network Enforcement Act.[96] However, this regulation is no longer in force and the national fine regulation itself had not gained practical significance[97] until the DSA applied on 17 February 2024.

6.2. The impact of the DSA on German law

As already observed with the Whistleblowing Directive, Germany also adheres to its own legal system when implementing Art. 52 DSA.

Although the DSA contributes to developing an even better understanding of the terms by distinguishing between administrative fines for administrative

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[92] Other legal bodies: association without legal capacity or partnership with legal capacity, see Sec. 30(1) No. 2–3 OWiG.

[93] In the other States the fine authorities are still the State Ministries of Justice. The jurisdiction of the Federal Office of Justice (Bundesamt fuer Justiz (BMJV)) only includes such administrative offences that are committed in the execution of the HinSchG by the BMJV or an authority within its area of responsibility.

[94] Verordnung ueber die Zustaendigkeit fuer die Verfolgung und Ahndung von Ordnungswidrigkeiten nach dem Hinweisgeberschutzgesetz (HinSchG-VO). Available in German: https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=2&bes_id=53969&aufgehoben=N [last viewed 13.11.2025].

[95] Sec. 4 German Network Enforcement Act (Netzwerkdurchsetzungsgesetz) of 1 September 2017 (BGBl. I S. 3352). Available in German: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s3352.pdf#/text/bgbl117s3352.pdf?_ts=1763131973301 [last viewed 04.01.2026].

[96] For a detailed critique of this regulation, see Kubiciel M. Neuartige Sanktionen fuer soziale Netzwerke? Der Regierungsentwurf zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Novel sanctions for social networks? The government draft for improving law enforcement on social networks], jurisPR-StrafR 7/2017 Anm. 1.

[97] Liesching M. Fuenf Jahre Netzwerkdurchsetzungsgesetz [Five years of the Network Enforcement Act], MR 2023, pp. 56–60.

offences (Art. 52(3) DSA and Art. 74 DSA) and periodic penalty payments (Art. 52(4) DSA and Art. 76 DSA) as two alternative measures which can only be imposed for the same act in accordance with the principle of proportionality,[98] according to the German Digital Services Act[99], fines and coercive measures are not just alternative administrative measures. They are still completely to be distinguished.

Furthermore, Germany maintains that only humans can be perpetrators and legal persons only can be punished according to Sec. 30 OWiG.

The only innovation is the fact that the fine authorities are independent (cf. Art. 50 DSA and Sec. 15 German Digital Services Act).

6.3. Challenges and opportunities

The challenges posed by the DSA are in one respect even greater than the challenges caused by the GDPR: Apart from the fact that the EU's competence to enact the DSA is already disputed[100], the Union competence beyond Art. 16(2) TFEU, Art. 103(2)(a) TFEU and Art. 132(3) TFEU to regulate supranational fines, which are imposed by the Commission, is very controversial in German legal scholarship.[101]

The DSA also provides very valuable new impulses for German law in addition to the impulses already brought by Article 83 GDPR. Thus the German doctrine of penalties must be further developed with regard to the principle of proportionality and the limits of the simultaneous imposition of fines and periodic penalty payments.

Conclusions

1. So far, Art. 83 GDPR does not represent a turning point.
2. The EU's competence to regulate administrative sanctions itself must be critically discussed.
3. The introduction of independent fine authorities is problematic with regard to the principle of democracy.

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[98] Different opinion (fines and periodic penalty payments exist independently alongside each other): Henn S. Commentary on Art. 76 DSA. In: Mueller-Terpitz R., Koehler M. Digital Services Act. Kommentar, 1st ed. Munich: C. H. Beck, 2024, marginal No. 4.

[99] See Sec. 27 para. 4 and Sec. 33 para. 4–5 Digitale Dienste Gesetz (German Digital Services Act). Available in German: https://www.gesetze-im-internet.de/ddg/index.html#BJNR0950B0024BJNE000100000 [last viewed 04.01.2026].

[100] Mast T. Platform Law as EU Law. GRUR Int. 2024, pp. 607–616 (pp. 609–610).

[101] Dannecker G., Mueller N. § 39 Strafgerichtsbarkeit [Sec. 39 Criminal jurisdiction]. In: Rengeling H.-W., Middeke A., Gellermann M. (eds.). Handbuch des Rechtsschutzes in der Europaeischen Union. 3rd ed. Munich: C. H. Beck, 2014, marginal No. 19; Hustus L. 2024, marginal No. 25.

4. It must be discussed in which cases a court, rather than an administrative authority, is mandatorily competent in the first instance.
5. The German doctrine of administrative measures should be extended and include the imposition of fines as a corrective administrative power. Reprimands as a less intrusive measure should be introduced into German law. More attention should be paid to administrative proceeding.
6. A European doctrine has to be developed. Due to the lack of such a European doctrine of administrative sanctions the clarification of European law comes at the expense of the defendant.

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Bijan Nowrousian, *Dr. jur., Professor*
University of Applied Sciences for Police and Public Administration
in North Rhine-Westphalia, Germany

ADMINISTRATIVE FINE PROCEEDINGS – ADMINISTRATIVE PROCEDURE OR "MINOR CRIMINAL TRIAL"?

Key words: administrative offences, OWiG, administrative fine proceedings, criminal procedure, expediency principle, Section 47 OWiG, Germany

Summary

German administrative offence proceedings occupy an ambiguous position between administrative and criminal law. While administrative offences are commonly understood as violations of regulatory norms, the German legislator has deliberately structured both substantive and procedural law in close alignment with criminal law. Proceedings are conducted by administrative authorities in a repressive capacity and are subject to review by ordinary courts rather than administrative courts.

This article traces the historical development of this model and examines its normative rationale and practical consequences. It highlights both its strengths, particularly procedural safeguards and doctrinal consistency, and its weaknesses, including deficits in specialised expertise and risks of procedural fragmentation. Special attention is given to the principle of expediency (Section 47 OWiG), which allows discretionary discontinuation of proceedings and raises concerns regarding its practical application. The paper concludes that the classification of administrative fine proceedings as either administrative procedure or a "minor criminal trial" remains a fundamentally open question requiring further doctrinal and empirical analysis.

Introduction

Administrative offences are often referred to as "administrative wrongdoing". This term implies that, unlike criminal offences, they generally do not protect higher-ranking subjective rights such as health, property, or the inviolability of the home. Instead, they sanction violations of administrative regulations, such as breaches of traffic rules or reporting obligations. Accordingly, administrative

offences are closely linked to the numerous administrative regulations that typically come with their own specific penalty provisions. Without detailed knowledge of the relevant administrative framework, it is often simply impossible to handle administrative offences properly.

This substantive proximity may suggest that the entire administrative fine procedure should be conducted like a standard administrative procedure – based on administrative procedure laws and with administrative courts as the legal venue.

However, the German legislator has taken a different path. The entire administrative fine procedure in Germany is closely modelled on criminal law and criminal procedure. The assessment framework for administrative offences mirrors that of criminal offences one-to-one. The procedure itself is also based on criminal procedure. The investigative powers of the administrative fine authorities are primarily derived from references to the Code of Criminal Procedure. Furthermore, the administrative fine notice is not structured like a typical administrative act but rather like an indictment. Notably, judicial review is not the responsibility of the administrative courts but of the ordinary courts – specifically, the local courts (*Amtsgerichte*) and the regional supreme courts (*Oberlandesgerichte*).

1. Historical development of administrative offence law in Germany

The reasons for the German legal situation described above are essentially historical. The decisive point is that German administrative offence law evolved from criminal law over a long process spanning the late 19th century to the 1970s.[1]

The starting point in the 19th century was the "unitary solution". This meant that there was no distinction between criminal offences and administrative offences.[2]

The Imperial Penal Code of 1871 adhered to this principle, providing for crimes (*Verbrechen*), misdemeanours (*Vergehen*), and petty offences (*Uebertretungen*) as forms of criminal acts, but no provisions for administrative offences (*Ordnungswidrigkeiten*).[3] So whatever would be an administrative offence today would have been a crime according to these definitions. However, a first substantive differentiation was already implicit: in the case of petty offences, there was a kind of preliminary administrative decision through police "penalty orders". This did not exist for crimes and misdemeanours.[4]

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[1] Nowrousian B. Ordnungswidrigkeitenrecht [Administrative Offence Law]. 2nd ed. Munich: C. H. Beck, 2025, p. 2.

[2] Mitsch W. Karlsruher Kommentar zum Gesetz ueber Ordnungswidrigkeiten. OWiG [Karlsruhe Commentary on the Administrative Offences Act (OWiG)]. 6th ed. Munich: Beck, 2025, Einleitung Randnummer [introduction para.] 4 et seq.

[3] Mitsch W. 2025, Einleitung Randnummer [introduction para.] 6.

[4] Mitsch W. 2025, Einleitung Randnummer [introduction para.] 8.

A purely administrative penal law developed alongside this in the field of economic criminal law. In some areas, not only were sanctions imposed by authorities, but judicial review was sometimes excluded altogether.[5]

Further calls for a complete separation between criminal law and administrative offence law initially went unheard.[6]

The National Socialists advanced the development by creating a so-called "administrative penal law" (*Ordnungsstrafrecht*) in the economic sphere. For example, in the field of price control, supervisory authorities were granted extensive powers to impose sanctions.[7] However, the motives behind this were highly problematic: the aim was primarily to restrict judicial review, which was perceived as obstructive and inconvenient.[8]

After the formation of the Federal Republic of Germany in 1949 a major milestone was the Administrative Offences Act of 1952 (*Gesetz ueber Ordnungswidrigkeiten*). For the first time, the legislator consolidated the principles of administrative sanctions in a framework law. The administrative fine was explicitly defined as something different from a criminal penalty, and its imposition was fundamentally the responsibility of administrative authorities. The provisions of the general part were largely adopted verbatim from the Penal Code.[9]

At the same time, fewer and fewer petty offences were created, while more and more administrative offences were added. Increasingly, offences previously classified as petty crimes – and thus, as criminal acts – were transformed into administrative offences. Parallel to this, the maximum fines for administrative offences were continuously raised.[10]

This development culminated in the Administrative Offences Act of 1968 and the reform of the Penal Code in 1975. The latter abolished the practically obsolete category of petty offences, while the former completed the establishment of a distinct administrative offences system.[11]

The motives for the continuous strengthening of administrative offence law were quite different from those in the Third Reich. The goals were, on the one hand, **decriminalization**, particularly in the area of traffic violations, and on

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5 Mitsch W. 2025, Einleitung Randnummer [introduction para.] 16 et seq.

6 Gerhold L. BeckOK zum OWiG [Beck Online Commentary on the Administrative Offences Law], 01.10.2025, Einleitung Rn. 15 [introduction para.] 15; Mitsch W. 2025, Einleitung Randnummer [introduction para.] 11 et seq.

7 Mitsch W. 2025, Einleitung Randnummer [introduction para.] 24 et seq.

8 Mitsch W. 2025, Einleitung Randnummer [introduction para.] 24, 30.

9 Gerhold L. 01.10.2025, Einleitung Randnummer [introduction para.] 16 et seq.

10 Goehler M. R. Das neue Gesetz ueber Ordnungswidrigkeiten [The new Administrative Offences Act]. JuristenZeitung (JZ), 1968, p. 583.

11 Gerhold L. 01.10.2025, Einleitung Randnummer [Introduction para.] 18 et seq.

the other hand, **procedural efficiency**, to avoid tying up excessive resources in mass proceedings.[12]

Notably, both the 1952 and 1968 Administrative Offences Acts largely adopted the statutory provisions of criminal law and criminal procedure.[13] This applied to the general part of substantive criminal law – such as the distinction between intent and negligence, between completion and attempt, participation and complicity, as well as justification and grounds for exclusion of guilt. Furthermore, it applied to procedural law: after an objection to a fine notice, jurisdiction lay with the ordinary courts rather than the administrative courts.

Although administrative offence law is intended to stand alongside, and not beneath, criminal law, in practice it constitutes a "minor criminal procedure" – dealing with less serious offences and sanctions, yet following largely comparable procedural structures, just simplified and executed by administrative authorities.

2. Advantages of the link to criminal procedure

Aligning the administration offence procedure with criminal procedure has both advantages and disadvantages.

The advantages are, as follows:

Administrative offences, like criminal offences, are prohibitory norms that allow for sanctions. They differ in terms of the severity of sanctions but are structurally equivalent to criminal provisions. The gradual separation from criminal law did not alter this fact.

Accordingly, the administrative fine procedure, like criminal procedure, is **repressive** rather than **preventive**. It does not aim at eliminating existing unlawfulness for the future – as preventive administrative procedures for averting danger do – but rather at sanctioning past wrongdoing through a normative appeal to the citizen.

Against this background, the jurisdiction of the ordinary courts, rather than the administrative courts, also appears appropriate: the ordinary courts are responsible for criminal matters as well and thus have the necessary competence and experience to handle administrative fine proceedings as "minor criminal trials".

In particular, in the numerically significant area of traffic-related administrative offences, they also possess the expertise needed to distinguish them from criminal traffic offences.

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[12] Nowrousian B. Bussgeldtatbestand und Bussgeldverfahren – eine Kurzeinfuehrung ins Recht der Ordnungswidrigkeiten [Administrative Offences and Administrative Offence Proceedings – A Brief Introduction to the Law of Administrative Offences]. Juristische Arbeitsblaetter (JA), No. 4, 2020, p. 241.

[13] Nowrousian B. 2020, p. 241.

3. Disadvantages of the link to criminal procedure

The disadvantages are, as follows:

In many administrative offence proceedings, the violations concern rather "exotic" administrative norms. In such cases, the administrative courts have better subject-matter expertise than the ordinary courts.

In the not infrequent cases where an administrative fine proceeding runs parallel to a preventive administrative procedure, the German model creates another problem: if both the fine notice and the administrative decision are contested, the same factual situation must be examined in two independent proceedings before different branches of the judiciary. This is problematic for procedural efficiency and carries the risk of conflicting decisions.

Moreover, practitioners frequently criticize a general tendency among local courts to regard administrative fine proceedings as marginal and to discontinue them too readily based on considerations of expediency.

4. Excursus: Discontinuation at discretion in German administrative offence proceedings

In order to properly situate the aspect mentioned last, it is necessary to take a closer look at the provision that permits the discontinuation of administrative offence proceedings at the discretion of the competent authority. This competence is regulated in Section 47 of the German Administrative Offences Act (OWiG).[14] According to this provision, administrative offence proceedings may be discontinued without legal consequences at the discretion of the authority. Section 47 (1) OWiG authorises the administrative authority to do so as long as the proceedings are still pending before it. Section 47 (2) OWiG also allows the court to discontinue proceedings at its discretion, both during and outside the main hearing.

This provision is based on a procedural principle that characterises German administrative offence proceedings, namely the principle of expediency (*Opportunitaetsprinzip*). This means that prosecutable administrative offences do not necessarily have to be prosecuted in every case. In particular, in cases of minor offences, the competent authority – or the court – may decide on an individual basis whether there is any need for prosecution at all. At least in principle, this constitutes a difference between administrative offence proceedings and criminal proceedings, as the latter are governed by the so-called principle of legality (*Legalitaetsprinzip*), which generally entails a duty to prosecute (even though this duty has meanwhile been significantly relaxed for minor criminal offences).

[14] Gesetz ueber Ordnungswidrigkeiten (OWiG) [Administrative Offences Act]. Available: https://www.gesetze-im-internet.de/owig_1968/ [last viewed 07.01.2026].

Section 47 OWiG grants the prosecuting authorities and courts a remarkably wide margin of discretion. Beyond the requirement that the discretionary decision must be free from errors of discretion, the statute does not lay down any substantive prerequisites. Rather, the legislator relies on the authorities and courts to make appropriate use of this provision and to apply it properly in the realm of mass proceedings, as administrative offence proceedings frequently are. In this context, both authorities and courts are, as a matter of principle, also permitted to take considerations of procedural economy into account when discontinuing proceedings under Section 47 OWiG. This, too, demonstrates that the provision is designed to enable a pragmatic and appropriate handling of mass proceedings. As a rule, a discontinuation under Section 47 OWiG is effectuated without stating reasons.

As already outlined, Section 47 OWiG confers these powers in subsection (1) upon the administrative authority, and in subsection (2) upon the court. However, the court's powers to discontinue proceedings are subject to certain limitations. Outside the main hearing, the court may discontinue proceedings without the consent of the public prosecution office only if no fine exceeding 100 euro has been imposed and the public prosecution office has declared that it will not participate in the hearing. In all other cases, a discontinuation pursuant to Section 47 (2) OWiG outside the main hearing requires the consent of the public prosecution office. Pursuant to Section 75 (2) OWiG, this does not apply in the same way within the main hearing. In the event of a discontinuation during the main hearing, the consent of the public prosecution office is required only if a representative of the prosecution office is present at the hearing. The public prosecution office is not obliged to attend, but merely entitled to do so, and it makes use of this right only in rare cases. As a result, the court may discontinue the proceedings pursuant to Section 47(2) OWiG at any time during the main hearing, even in cases involving substantially higher fines, without requiring any consent whatsoever. In addition, no consent of the administrative authority is required for a discontinuation by the court, neither within nor outside the judicial main hearing. The administrative authority can therefore never prevent a discontinuation under Section 47(2) OWiG.

Practical experience suggests that courts occasionally find it difficult to resist the temptation to dispose of complex and cumbersome proceedings – which would require not only a lengthy main hearing but also the drafting of an extensive judgment – by simply issuing the formulaic decision: "Order: The proceedings are discontinued pursuant to Section 47(2) OWiG". This should not be misunderstood. It should be expressly emphasised that, of course, not all judges apply the relevant provisions in this problematic manner. Practical experience also shows that, in the vast majority of cases, administrative offence proceedings are conducted conscientiously by the courts. As already noted, however, problematic applications of this provision are by no means entirely uncommon.

This issue is in urgent need of further academic scrutiny. Such research would, on the one hand, have to address the number of cases in which the principle of

expediency is applied in a problematic manner. On the other hand, it would require an analysis of the reasons that might give rise to such problematic applications.

Against this background, comparative law studies would also be of great interest. They might reveal patterns indicating which types of procedural structures and which kinds of judicial decision-making powers tend to promote or inhibit such problematic uses of discretion.

Conclusions

As the saying goes, all roads lead to Rome – but not all are equally good. The question of the fundamental structure of administrative fine proceedings is therefore both highly theoretical and of great practical relevance. Even though legal practice continues to function under whichever model the legislator has chosen, the fundamental issue should nevertheless remain open for discussion.

At the same time, it should be emphasised that the German model has, in principle, proven effective in practice. Its close alignment with criminal law ensures a coherent doctrinal framework and generally provides an appropriate procedural setting for the sanctioning of administrative wrongdoing. However, one element of the system requires more critical scrutiny: the broad discretion to discontinue proceedings under Section 47 OWiG. While the principle of expediency is indispensable for handling mass proceedings efficiently, its current formulation allows for a degree of flexibility that may encourage overly extensive use in practice. A more clearly structured and restrictive framework for discretionary discontinuation would therefore be desirable in order to prevent excessive application and to safeguard the consistent enforcement of administrative offence law.

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