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* We mourn the loss of prof. Rainer Arnold from the University of Regensburg, a valued member of our Editorial board who passed away on January 9, 2025. His contributions to the legal community and our journal were immense. Professor Arnold will be deeply missed.

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ARTICLES

The EU Protection of Human Rights – a Unique System in the Unique Times (What it is and What it Could Be)

Naděžda Šišková*

Summary: The Union´s protection of human rights is often associated entirely with the Charter of the Fundamental Rights of the EU. In fact, the protection of the rights of the individual is provided by the sophisticated combination of various mechanisms of the different nature. Each of these mechanisms is characterized by its own peculiarities and certain limits. Their mutual interconnection and balanced interaction create a unique system of human rights regulation at the level of the EU. The aim of this contribution is to analyse the nature and weak points of these mechanisms including: Mechanism of the Charter of the Fundamental Rights of the EU, the Common European Values, Judicial Doctrine of Fundamental Rights, Certain instruments of soft law character. The objective is to outline the eventual ways of their future eligible regulation, which will enable to eliminate (at least partly) the mentioned pitfalls.

Key words: human rights, fundamental rights, rule of law, Common European Values, Charter of the Fundamental Rights of the EU, judicial doctrine of the fundamental rights, general principles of law.

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1. Introduction

The Union´s protection of human rights is often associated entirely with the Charter of the Fundamental Rights of the EU. In fact, the protection of the rights of the individual is provided by the sophisticated combination of various mechanisms of the different nature. Each of these mechanisms is characterized by its own peculiarities and certain limits. Their mutual interconnection and balanced interaction create a unique system of human rights regulation at the level of the EU.

In particular, the list of the key mechanisms of this system which will be the subject of this analysis consists of:

I. Mechanism of the Charter of the Fundamental Rights of the EU
II. Mechanism of the Common European Values, including the Human Rights and Rule of Law (Art.2 TEU)
III. Judicial Doctrine of Fundamental Rights as a part of the general principles of law, elaborated by the Court of Justice of the EU
IV. Certain instruments of soft law character focused on the field of human rights

The aim of this contribution is to analyse the nature and weak points of these mechanisms and to outline the eventual ways of their future eligible regulation, which will enable to eliminate (at least partially) the mentioned pitfalls.

2. Mechanism of the Charter of the Fundamental Rights of the EU

The Charter of Fundamental Rights of the EU occupies a central place and creates an iconic and powerful symbol of the entire EU system of the human rights regulation. As the first coherent catalogue of human rights of the European Union´s standard it has become the most quoted and munificently mentioned instrument in this field.

It also very often serves as one of the main reference points in the reasonings of drafts and proposals for the adoption of new legislative acts and non-binding documents of the EU, as well as in the international agreements and treaties concluded by the Union.

Merely a fleeting glance at this document enables to notice that the Charter is characterized by its own very unusual, original and unique structure, which cannot be found in case of other human rights catalogues. In this respect it can be pointed out that the Charter abandons the traditional sequence in the classification and hierarchy of human rights that can be seen in other constitutional and international human rights instruments.

The authors of the Charter came up with their own innovative concept rejecting the usual hierarchization, where personal and political rights are superior to economic, social and cultural rights. On the contrary to this the main leitmotiv for the structural classification and sorting of individual rights in the Charter becomes their value mutual interconnection and their ideological affinity. "The Charter comes with its own original concept characterized by the fact that although each chapter brings the rights of different generations, which are nevertheless ideologically and philosophically connected (this is confirmed in particular by the chapters "Freedoms", "Equality" and "Solidarity, which gathered from the legal philosophy of Immanuel Kant and the following additional considerations of Wienfried Brugger[1].This approach to the subdivision of rights is undoubtedly intended for a greater accentuation and emphasis on the value and ideal aspects of the Charter".[2]

One of the most distinct features of the Charter consists in its extremely extensive material scope. The *ratione materiae* of this catalogue covers the very wide spectrum of human rights of different nature, including the personal rights, political rights, economic rights, social rights and so-called modern rights.

In other words, the whole concept of this document reflects the intention to create a really comprehensive, modern and innovative list of human rights of European Union´s standard capable for protection of rights of the individual in the 21th century.

The jurisprudence[3] makes the classification of these rights in the 3 main categories.

– Fundamental rights and freedoms as well as basic procedural rights guaranteed by the ECHR and derived from the constitutional traditions common to the Member States, as general principles of Community law;
– Fundamental rights that pertain only to the Union's citizens;
– Economic and social rights as contained in the 1961 European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers

To the mentioned categories of rights by Jean Claude Piris, it is necessary to add also the fourth category, which covers the new entitlements and rights (or modern rights), which are stemming from the latest scientific and technical progress, and which were declared for the first time just by the Charter of Fundamental rights of the EU as a part of a coherent catalogue of human rights.

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2 ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 77.

3 PIRIS, J. C. *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge University Press, Cambridge, 2010. p. 152.

To such entitlements belongs primarily so-called bio-ethical provisions of the Charter, which are contained in Art.3 (right to the integrity of person), including: the prohibition of eugenics practices, in particular those aiming at the selection of persons; the prohibition on making the human body and its parts as such a source of financial gain; the prohibition of the reproductive cloning of human beings. In other words, the mentioned provisions reflect the norms and principles brought mostly by the Convention on Human Rights and Biomedicine.[4]

To the same category of new rights belong also Art.37 (Environmental protection), Art.38 (Consumer protection) and some others, which go far beyond the analogical rights protected by ECHR, European Social Charter and Community Charter of Fundamental Rights of Workers, which are covered by the previously mentioned categories.

In general, the modernization, innovation and adaptation for the changing conditions of the new age are one of the most characteristic and inherent features of this EU binding list of human rights, as it can be seen from the formulations of its articles and the commentaries to them contained in the Explanations Relating to the Charter.[5]

It is also confirmed *inter alia* by the declaration expressed in the Preamble of the Charter that " it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter". In this respect it is worth thinking on the novelization of the text of this Union´s catalogue and on incorporation of other new rights, which has occurred after the adoption an entering of the Charter into the force. It relates especially to the entitlements and rights which stemmed from the digital transformation, introduction of the AI in the everyday life, and from the related changes of the general *modus vivendi* of the society. These rights just now are in the process of their shaping, crystallization and final formulation, and even their title itself is not being definitive, as we can meet with such names as *digital rights, cyber rights, modern technologies rights, internet rights*, etc. Nevertheless, it seems that the notion of *"the digital rights"* is the most appropriate, eligible and the most widely used in the last months both in the scientific doctrine and in legislative acts and thus worth to be used for the incorporation into the Charter. Nevertheless, the key issues consist not only in the finding of the correct title of such rights, but primarily in the elaboration of their proper list, which will be capable for introduction into the Charter, and the drafting of their optimal formulations and their precise content. In this connection it can be pointed out on some already sound proposals concerning the mentioned list of rights, eligible for the incorporation into the

[4] ETS/164http//conventions.coe.int/treaty/en/treaties/html/164.htm.

[5] Explanations (*) Relating to the Charter of Fundamental Rights (2007/C 303/02) Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF.

Charter, which would in particular cover the following entitlements of the individual, as for instance: Right to the access to Internet; Right to the communication in cyber space (via email, social media, chats); Right to be forgotten (right to erasure); Right for information, clear explanation and truthful information in e -commerce; Right to communication with a human operator and not to be the subject of the automated decision; Prohibition of discriminatory conditions in the transactions made online, especially in e-commerce (personalized pricing, geo-blocking, etc.).[6] Such catalogue of digital rights could consist of both already declared rights, as well as entirely new entitlements of the individual. The Charter as a document, which was put by the Lisbon Treaty at the level of the primary law, and which is of a constitutional character, under its own nature must be formulated in a brief and clear form, and thus cannot comprise all the digital entitlements of the individual in a such short text. That is why the precise choice of the key and the most essential digital rights capable for their introduction into the Charter, is so important. As a good example can serve the right to be forgotten (right to erasure), which was declared as such by the Court of Justice of the EU and which is supported by rigorous regulation of it in the GDPR. For the mentioned reason this digital entitlement can be considered to be a fully capable for incorporation into the Charter as a real right, not only as a mere principle.

The entire group of digital rights ambiguously deserves their introduction into the Charter, which would be eligibly completed by them and thus would significantly enrich and actualize this modern catalogue of rights of the European Union´s standard. The detailed mapping and specification of all the related human rights, entitlements and principles connected with the digital transformation must be rendered to the acts of the secondary legislation, which thus *de facto* completes already declared rights within the mechanism of the Charter.

The first step in this direction was already made, which can be found in the text of European Declaration on Digital Rights and Principles for the Digital Decade (2023/C/23/01).[7] Nevertheless, as non-binding document, which "has declaratory nature and, as such, does not affect the content of legal rules or their application (Preamble of Declaration, point 9)[8] and thus cannot serve as a whole text for this purpose. Besides, the actual wording and formulations in Declaration do not enable to incorporate these entitlements in their current form into the Charter. Another problem with this Declaration is connected with the fact, that

6 ŠIŠKOVÁ, N. (ed.) *Legal Issues of Digitalisation, Robotisation and Cybersecurity in the Light of EU Law*, Kluwer Law International, Alphen aan den Rijn, 2024. p. 59.

7 European Declaration on Digital Rights and Principles for the Digital Decade (2023/C/23/01) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023C0123(01).

8 European Declaration on Digital Rights and Principles for the Digital Decade , Official Journal C 23, 23. 1. 2023

it is not quite obvious what are (from the declared entitlements) the real rights and what are the merely principles? If some of them are the autonomous rights which were already found and declared by Court of Justice of the EU or was regulated by the binding act of the secondary legislation, their incorporation into the Charter is quite reasonable and desirable and thus would complete and enrich the current list of binding rights of the European Union's standard.

Some of the latest EU acts of secondary legislation are already focused on the regulation of the issues of digital transformation, but not in the connection with individual rights (The Artificial Intelligence Act[9]adopted by the European Union in 2024 is not an instrument specifically addressing human rights, though it refers to ensuring a high level of fundamental rights as enshrined in the Charter of Fundamental Rights of the EU).

Regardless of the above mentioned and other possible additions and improvements in its text, it can be stressed that already now the Charter of the Fundamental Rights of the EU is characterized by one of the broadest concepts of protected rights in the form of a single comprehensive document which was elaborated at the international level. It is just striking in the comparison with the European Convention of Human Rights, which is principally focused on the regulation of only personal rights, political rights and the rights of the mixed character, and thus brings the catalogue *de minimis*.

On the contrary to the Convention, in case of the Charter the cataloguing was subjected not only to fundamental rights forming the very core of human rights (which would strictly correspond to the name of the Charter of Fundamental Rights), but also to economic and social rights as well as the fourth-generation rights. [10]

It is necessary to stress *expressis verbis* that the Charter has its own distinct added value, which is focused not only on the codification of the rights declared before, but is also intended to be a document which bring the political, ideological and value dimension of the Union and thus creates "the new image for the project of European integration."[11]

In other words, concerning its material scope, the Charter is a very ambitious, generous, munificent and amiable document towards the individual. Paradoxically, this generosity towards the individual in terms of the scope of protected rights creates also the main source of the greatest difficulties in the legal life of the Charter and in enforcement of its provisions.

9 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng.

10 ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 76.

11 KERIKMAE, T. (ed.) *Protecting Human Rights in the EU. Controversies and Challenges of the Charter of Fundamental Rights.* Munchen: Springer, 2014.

This is because the Member States are very cautious about taking on such extensive obligations in the human rights field. In other words, what was easily accepted by the Member States as a mere political declaration, in the case of a legally binding document has come to be seen as an excessive encumbrance and potentially great burden for the national governments. This was also the main reason why the Charter could not obtain the legal status over the course of almost a decade, and why this Union´s "Bill of Rights" was not incorporated directly in the text of the Lisbon Treaty (as it was proposed in the case of the Constitutional Treaty), but became legally binding only on the basis of the reference in Article 6 of the TEU.

For the same reason, the Lisbon concept towards the Charter counts on 3 means that partially limit its effects and reduce the entitlements of individual, which were generously granted in the political declaration. They are: a) Explanations Relating to the Charter, b) Protocol No 30 to Lisbon Treaty, c) horizontal provisions of the Charter.

2.1. Explanations related to the Charter

From the formal point of view Explanations do not create a source of EU law, but, as it is stated in this document, "they are a valuable tool of interpretation intended to clarify the provisions of the Charter".[12] This commentary of the experts under the authority of the Praesidium of the Convent is considered to be a very important instrument, as its legal status is derived from the repeated references to Explanations both in the text of the EU Treaty itself (Art.6 (1) TEU, as well as in the provisions of the Charter (Art. 52, para. 7).

The increased attention to this instrument within the Lisbon concept is given by the fact that Explanations had made a division of all previously declared rights into the *rights* and *principles*. In case of *rights* Explanations speaks about the "subjective rights which may be directly invoked as such by the individuals in Courts, while *principles* define an objective to be respected by the EU legislative and which can be invoked once they have been implemented through legislation".[13] Further specification of principles are contained in Art.52 para 5, which states: *"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable*

[12] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF.

[13] PIRIS, J. C. *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge University Press, Cambridge, 2010. p. 153.

only in the interpretation of such acts and in the ruling on their legality." Another provision concerning Explanations is contained in Art.7 para 7:

"The Explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

In other words, some of the entitlements of individual in the Charter are perceived as the real and genuine rights, and some as the mere program provisions or certain definitions of objectives to be respected by secondary law and which enforcement is possible only if they have been implemented by the EU legislation. Thus, the Lisbon concept through Explanations has, on the one hand, considerably reduced the obligations of the Member States, while, on the other hand, it has removed from the list of previously declared individual rights a considerable category of entitlements declared as the *principles*, which cannot be enforced. This significantly weakened the effects of the Charter, as the rights which were originally generously granted to the individuals were substantially reduced at the level of their legal effects.

Moreover, this concept had become in contravene with the very purpose of the Charter, which was intended to be a document that is clear, understandable, and close to the citizen. At present, on the contrary, the list of real rights is hardly grasped and not easily understandable not only for laymen, but even for lawyers, despite the proclaimed purpose of Explanations. It therefore can be concluded that, although the Charter had become legally binding by the Reform Treaty, nevertheless it was achieved by a "high cost" in the form of the radical restrictions imposed by Explanations and their verification in the Treaty and in the Charter.

2.2. Protocol No 30 On the Application of the Charter of Fundamental Rights of the EU to Poland and the United Kingdom.

That restriction was not the only one. The Protocol No 30, annexed to the Lisbon Treaty, was negotiated as a further mean of limiting the effects of the Charter. Its adoption was initiated by the United Kingdom in view of the fact that two provisions of the Charter (Art. 28 –" Right of collective bargaining and action" and Art. 30 – "Protection in the event of unjustified dismissal") were formulated as the *rights* and not as the *principles*, and thus their direct applicability cannot be excluded. This opinion was expressed in the Report of the European Committee of the House of Lords of the British Parliament[14] and had become an official

[14] EU Committee, 10th Report of Session 2007- 2008, the Lisbon Treaty: An Impact, Assessment, Published on 13 March 2008, HL Paper 62, www.parliament.uk/lords.

position of the Great Britain in negotiations on the Lisbon Treaty and in adoption of this additional guarantee concerning the reduction of the legal effects of the certain provisions of the Charter.

On the contrary to Explanations, which are characterized by its universal territorial scope towards all the Member States of the Union, in case of Protocol No 30 its *ratione loci* was limited towards the selected States. Besides the United Kingdom, the signatory became also Poland. The Czech Republic, although had expressed its intention, but had never acceded this Protocol.

The motivations of these potential signatories were different. In case of UK, as it was already mentioned, it was the efforts to reduce the impacts of social rights, the Polish motivation was connected with the issues of public morality and family law, which under the opinion of the Polish authorities could be doubted while interpreting the Union´s catalogue of rights.[15]

In the case of the Czech Republic, it was the fear of breaking of the Beneš Decrees on the basis of the Charter. [16]

However, today, a decade and a half after the entry into force of the Protocol, we are talking about a significant reduction in the territorial scope of this document, caused by Brexit and by the definitive decision of the Czech Government not to accede to the Protocol.

In relation to a single State, to which the Protocol is still applied (Poland), the basic question lies in ascertaining the nature of the mentioned document, in particular whether this instrument creates an opt-out from the Charter or, or is it rather an interpretation instrument that promotes the application of the Charter, but within the certain limits? In this respect it must be pointed out that despite the fact that media often refer to the Protocol No.30 as an opt-out, in jurisprudence prevails the opposite opinion.[17] A number of arguments lead to this conclusion. First, an opt-outs as a deviation from the EU law are permissible only in those areas of the Union law which are not central.

The second argument is supported by the semantic interpretation, as the Protocol bears the title "On application of the Charter" and does not contain any notion on the opt-out, as for instance "exemption", "non-participation", "non-applicability", etc.(citace- ibid).

The third argument is the main one. It is above all the fact that while the Charter creates a fundamental source of human rights protection at EU level,

[15] For more details see ŠIŠKOVÁ, N. New Challenges for the EU in the Field of Human Rights (Focusing on the Mechanism of the Charter), *European Studies. The Review of European Law, Economics and Politics*, 2014, vol. 1, pp. 12–21.

[16] Ibid.

[17] See for example: SCHWARTZ, J. Protokol o uplatňování Charty základních práv Evropské Unie, *Jurisprudence*, 2010, vol. 19., no. 2, pp. 19–20.

nevertheless it is not the only one source. Therefore, even the adoption of the mentioned Protocol cannot call into question the existing judicial doctrine of fundamental rights of the EU as part of the general principles of law, a deviation from which is inadmissible.

These considerations expressed in legal science were also confirmed by the conclusions of Luxembourg judiciary. In particular, the Court of Justice in its decision C-411/10 had pointed out that[18]: "*In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.*"

It can therefore be concluded that the Protocol is de facto an additional, albeit superfluous "safeguard" guaranteeing that the Charter does not create new rights and does not extend the possibility of challenging of Member States for violation of fundamental rights.

In other words, as it has been aptly observed in legal science, "against an illusory danger the Protocol provides an illusory protection".[19]

So, in legal terms, the effects of this document are very limited and can be assumed only in those hypothetical cases, when the Court of Justice by mean of interpretation should decide to broaden the duties of the Member States beyond the existing obligations.[20]

Nevertheless, in political terms the Protocol indicates a very strong signal concerning the unwillingness to accept the Charter in the entire scope.

Besides the Protocol under the European Parliament, undermined the efforts of the EU to reach and maintain a uniformly high level of the "protection of fundamental rights".[21]

All the aforementioned reservations about the Protocol lead to unequivocal conclusions that at present it is a document of a very little effect, redundant and not serving for the aims of European integration. Its further legal life thus no longer makes any sense.

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[18] C-411/10, N.S and others, ECLI:EU:C:2011:865

[19] KOMÁREK, J. Česká "výjímka" z Listiny základních práv Evropské unii. *Právní rozhledy*, 2010, vol. 18, no. 9, pp. 322–331.

[20] For more details see: ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 95.

[21] European Parliament resolution of 22 May 2013 on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union) (00091/2011 – C7-0385/2011 – 2011/0817(NLE)), point K.

2.3. Horizontal provisions in the Charter

Horizontal provisions are considered to be those clauses in the European Bill of Rights which serve "for determination for the scope of its application in its relationship to other sources of law, essentially most of these provisions fulfil two purposes: they seek to ensure that the Charter can be accommodated within the community legal order without threatening its coherence, and also control the supremacy of fundamental rights ie. Balance their enhanced protection with government discretion." [22] In other words, they are the restrictive provisions which prevent an overly broad interpretation of the rights and thus serve to eliminate the potential responsibility of the Member States in the area of human rights. We can say that these are certain other additional "safeguards" which had ensured the smooth adoption of the Charter and the gaining of its legal binding force. The Lisbon Treaty had extended the number of these clauses over the original list of horizontal provisions contained in the political declaration, as well has made a certain modification in the text of the "old" ones. The entire current list of them can be found in Chapter 7 "General Provisions of the Charter".

The Lisbon Treaty had extended the list of clauses beyond the original ones and had included also other horizontal provisions, which are primarily intended to avoid an overly broad interpretation of the rights contained in the Charter. These clauses consist in the incorporation, as it was already mentioned, of paragraph 5 of Article 52 (a distinction between rights and principles) as well as paragraph 7 of the same article (a reference to the Explanations). Besides two other horizontal provisions were introduced (Art.53 Level of protection and Art.54 Prohibition of abuse of rights), which create other guarantees against the excessive "burden" for the Member States in the human rights area.

So, it can be concluded, that all the mentioned measures towards the Charter brought by the Lisbon Treaty, had significantly deepen the limitations in its application.[23]

In relation to the mechanism of the Charter, another very important aspect must be explicitly mentioned. It is the fact that, unlike the European Convention, this Union catalogue of human rights does not provide its own control mechanism. Although the Charter contains a Chapter VI entitled 'Justice', in fact it does not regulate the procedural rules for the special challenge concerning the enforcement of rights protected by the Charter, but contains only the material provisions related to the right for fair trial.

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[22] TRIDIMAS, T. *The General principles of Law*. 2nd edition, Oxford University Press, Oxford 2006. p. 362.

[23] For further details see: CRAIG, P. *The Lisbon Treaty. Law, Politics and Treaty Reform*, Oxford University Press, Oxford and New York, 2010. pp. 222–226.

This can be seen as one of the greatest weaknesses of the Charter and the shortcomings of its mechanism, especially in its comparison with the Convention.

3. Mechanism of Common European Values

Common European Values currently belong to the widely spread and used notions both in the scientific literature,[24] as well as in non-scientific sources and in media. Despite the fact, that this concept is almost daily referred to, its content still remains more or less uncertain and partly elusive.

This is mainly due to the vague wording of Article 2 TEU, which forms the basis and starting point of this concept.

A year ago, the author of this article had published a detailed analysis of this concept in the framework of European Studies,[25] therefore, in view of the purposeless reason of its repetition, only the main arguments and considerations regarding the mentioned postulates will be presented in the current article and in their brief form.

Primarily, it should be pointed out that the concept of Common European Values is not just merely a legal concept but creates also a moral and ideological-political basis for the entire construction and functioning of the European Union and its law. Moreover, under the observations of the Court of Justice "the values contained in Article 2 TEU define the very identity of the European Union ".[26]

However, we will not deal with these other aspects and focus entirely on the legal side of the term and its relationship to human rights issues.

If we look at the content of this concept in the context of Article 2 TEU,[27] we can find two facts. First, that it is a very general provision of a demonstrative (non-exhaustive) character, which does not provide any definitions and focuses on the relevant concepts in a very superficial and non-specific way.

The second fact that immediately intrigues, is that the most postulates mentioned in this Article have a human rights dimension.

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[24] SCHRÖDER, W. The EU Foudning Values- Constitutional Character and Legal Implications. *European Studies. The Review of European Law, Economics and Politic*s. 2016, vol. 3, pp. 50–64.

[25] ŠIŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 1, pp. 19–40. DOI: 10.2478/eustu-2024-0001.

[26] C-156/21 Hungary v. EP and Council, ECLI:EU:2022:97, para 1.

[27] Article 2 TEU: *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

In other words, here we see both an explicit reference to respect for human rights, as well as the mentioning to other notions that usually create an integral part of the traditional human rights catalogues, such for instance as respect for human dignity, equality, non-discrimination, justice, etc. Besides, the of human rights are de facto enshrined in the concept of the rule of law, as they create the integral component of this notion. So, the most of values enumerated in Art.2 are associated with the human rights.

Therefore, it can be concluded that human rights create the very core of Common European Values and are its quintessence.

At the same time the provision of Article 2 TEU requires the certain improvements and the introduction of other postulates, which are not directly connected with the human rights, but are common for Member states and inherent for the European identity (on which it was already pointed out in jurisprudence).[28]

European law has elaborated a variety of instruments of different nature for the purpose of the protection of Common European values and the enforcement of the compliance with them, including human rights. Nevertheless, any of these tools cannot be considered to be fully effective and applicable in all the cases of the infringement of the mentioned values.

In this respect undoubtedly it should be mentioned at the first place the political procedure under Article 7 TEU, which was intended exclusively for the protection of the aforementioned postulates, and which was tailored especially for this purpose.

3.1. Article 7 TEU and its Procedures

Although the European Commission talks about this instrument as "the most emblematic tool for the EU to act in case of a serious rule of law failings in a Member State", [29] nevertheless, up to now, a quarter of a century since the introduction of this norm, no proceedings under Article 7 have been brought to its end.

This is due to the very complicated and cumbersome procedures referred to in this article and, in particular, the need to achieve unanimity in the vote in the European Council on the alleged violation of these values by the Member State concerned.

Other reservations include unclear wording of the scope of sanctions and the temporal horizon of the entire procedures, as well as vagueness of other relevant

[28] For details see: ŠIŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 1, pp. 24–26. DOI: 10.2478/eustu-2024-0001.

[29] Communication of the Commission to the European Parliament and the Council. Further Strengthening the Rule of Law within the Union. Brussels, 3. 4. 2019, COM (2019), 163 final.

terms. Not negligible role play also the potential impacts of these procedures on the State concerned, as well as on other States of the Union.

In relation to the State against which these proceedings are being conducted, the fact must be taken into account that any State can operate in the long-term period under the conditions of limited membership, when it fulfils its obligation but has only limited rights, especially in decision-making process.

In these terms, the political procedure can be seen as a sort of "ante-room" of a possible exit from the EU.

For the rest of the EU, there is a risk of a split between Member States and a disruption of its unity, which in the worst case may even trigger the process of disintegration of the EU.[30] Just for the mentioned reasons this article is referred to as "the nuclear option" or "the nuclear alternative"[31], which very temperate and judicious application is required beyond all doubts.

3.2. Judicial procedure under Article 258

An alternative legal instrument, which is also comes into consideration for the protection of Common European Values, is the infringement procedure under the Article 258 TFEU. This traditional challenge due its universal nature can be successfully applied in this field as well. Nevertheless, it is significantly limited by the fact, that the breach of these postulates must create at the same time a violation of the specific norm of EU law, which is not always reachable, as it may consist in a pure national dimension. That is why this mechanism cannot serve as a main instrument for the protection of these values and will always remain a "backdoor solution" and surrogate action in this field.[32]

3.3. Mechanism of the Rule of Law Conditionality.

Another instrument, which is worth mentioning in the above context, which has already proved its effectiveness in practice, is the Regulation 2020/2092 "On General Regime of Conditionality for the Protection of Union Budget".[33]However, its application is limited by its material and temporal scope with regard to

[30] ŠIŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 1, p. 37. DOI: 10.2478/eustu-2024-0001.

[31] President Barroso :State of the Union Address. European Parliament , Strasbourg, September 2012; https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596.

[32] ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 293.

[33] Regulation 2020/2092 "On General Regime of Conditionality for the Protection of Union Budget" Official Journal L I 433/1 https://eur-lex.europa.eu/eli/reg/2020/2092/oj/eng.

the purposes of this act. Especially, as Court of Justice has stated, that: “while in the case of Article 7 the subjects are all common values referred to in Art. 2 TEU, in the case of the Regulation, these are exclusively the principles of the rule of law so far as they have an impact on the budget.”[34]

As regards the nature of the measures that may be taken for the protection, in the case of Art.7 involves the suspension of certain membership rights and, in the case of Regulation, they are the measures of a purely budgetary nature. Termination of measures in case of Art. 7 is linked to a change in the situation and, in case of a Regulation, termination may occur even if the breach is still ongoing but no longer has an impact of the Union budget.[35]

4. Judicial Doctrine of Fundamental Rights as a Part of the General Principles of Law Elaborated by the Court

The constant case-law of the Court of Justice creates an original source of “discovering” of human rights at the level of the EC/EU. The Luxembourg Court has become not only the pioneer in the field of human rights at the supranational level, when it had unambiguously applied the protection of these rights as a part of the general principles of law. But it has also formulated in the framework of the development of its doctrine of fundamental rights the most important entitlements of the individual, which can be enforced in the conditions of the functioning of the supranational entities, including the definition of the relevant notions. The Court of Justice has demonstrated a great creativity and independence, while formulating these rights, and in choosing the sources of its inspiration (including the Constitutional law of Member States and International treaties), which would serve in the best way to the specific aims of the Union, including the determination of the conditions for their application.[36] The Court of Justice also takes into account the case-law of the European Court of Human Rights.

In the early days of European integration, in the Stauder judgment,[37] the Court of Justice had invented a way how to protect fundamental rights, even

[34] C-156/21 Hungary v European Parliament and Council of the European Union. ECLI:EU:C:2022:97.

[35] For more details see: ŠIŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics.* 2024, vol. 11, no. 1, p. 36. DOI: 10.2478/eustu-2024-0001.

[36] ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 295.

[37] C-29/69 Stauder v. Ulm; ECLI:EU:C:1969:57.

when the relevant norms were lacking in the "written" law. In the Court's view, these rights are enshrined in general principles of law and as such should be protected by the Court.

The birth of the general principles of law within the judicial doctrine can be expressed in a simplified way through two stages:

– inductive in which the Court derives a general principle from the specific provision from the source of its inspiration (Foundation Treaty, Constitutions of the Member States or International Treaty)
– deductive – here the Court arrives at a solution to the particular issue by applying general principle.[38]

In the hierarchy of EU law, the general principles of law occur at the level of the sources of primary law. This means that in case of conflict between the general principles of law and, for instance, the secondary legislation, the first of them will prevail.

This privileged position within the system of European law stems from the fact that, in the view of the Court, they become a "precondition of lawfulness and legality"[39], i.e. an indicator of the legality of other sources of EU law.

The first judgments of the Court of Justice in the field of human rights were focused on the declaration of the really fundamental rights (in the sense of the most important entitlements of the individual forming the very core of human rights), which were reflected in the title of the judicial doctrine itself (and subsequently in the title of the Charter). At present, however, the extensive set of rights declared and protected by the Court goes far beyond this originally used concept and encompasses in fact the human rights of all four generations. Therefore, the title of *fundamental rights* in this context can be perceived as a well-established terminological custom, but not as a notion, which correspond *stricto sensu* to this term under the theory of human rights.

The results of the Court's decision-making activities in the field of human rights, in the form of an extensive corpus of the declared rights of different generations, had prepared the conditions and the basis for the creation of the Charter of Fundamental Rights of the EU.

However, even after the adoption of this first Union's coherent catalogue of human rights, the importance of the case-law of the Court has not diminished, and this source of European law remains irreplaceable. As Takis Tridimas has noted: "The protection of fundamental rights in the Community legal order has been almost entirely the product of case law. This still remains the case despite

[38] HARTLEY, T.C. *The Foundations of European Union Law*, 7th edition, Oxford University Press, Oxford, 2010. p. 142.

[39] Opinion C-84/95 Bosphorus v Minister for Transport, Energy and Communication and Others, ECLI:EU:C:1996:179, point. 51.

the fact that that there are now express references to their protection in the TEU and the Union has acquired its own catalogue of fundamental rights in the form of the Charter."[40]

The significance of the case-law of CJEU is given at least by two reasons: First, due to the fact that CJEU specifies and does the interpretation of the rights declared in the Charter. Second, the Court is still "finding" and formulating the new rights (for instance, the rights that are connected with the usage of modern technologies, etc.) In other words, the Luxembourg Court is still making complete the original catalogue of rights of the Charter, which in the future can be extended and supplemented with regard to the relevant case-law of the Court.

The fact that the case-law of the CJEU still remains an irreplaceable source of human rights was confirmed, besides others, also in the case of Protocol No 30 of the Lisbon Treaty, when it prevented evaluation of this document as an opt-out just with regard to the existing judicial doctrine of fundamental rights, which as a part of the general principles of law cannot be cancelled. [41]

Besides the extension of the list of the protected rights, the Court has also provided a number of authoritative interpretations of the key notions not only concerning the protected rights but also as regards the conditions for the application and implementation of the Charter. As an example can be mentioned, in particular, that it has specified the concept of "when implementing Union law" in the intention of horizontal provision under Art.51(1)[42] in Aklagaren v. Fransson case (C-617/10)[43], including the partly correction of this concept in its further cases (C-206/13 Siragusa[44], C-198/13 Hernandes[45] and others).[46]

The Court of Justice, over a half-century of developing of its doctrine of fundamental rights, had to also settle and reconcile with the positions of International courts and the practice of the Constitutional courts of the Member States in the human rights field, which has also been duly reflected in its case law and were shaping its conclusions . However, given the limited scope, these essential questions cannot be the subject of this study.

40 TRIDIMAS, T. *The General Principles of EU Law*, second edition, Oxford University Press, Oxford-New York, 2006. p. 298.

41 ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. pp. 295–296.

42 About the Rationale of Art. 51 of the Fundamental Rights of the Charter see: Applying the Charter of the European Union in law and policymaking at national level, Publications Office of the European Union, Luxembourg, 2020.

43 ECLI:EU:C:2013:105.

44 ECLI:EU:C:2014:126.

45 ECLI:EU:C:2014:2055.

46 For further details see: HAMUĽÁK, O. Listina základních práv Evropské unie jako okolí ústavního pořádku České republiky. *Acta Iuridica Olomucensia*, 2015, vol. 10, no. 3, p. 14.

5. EU soft law instruments of human rights nature.

To this category belong the EU documents, which are formally not binding, nevertheless they have a great political authority and are capability to cause the certain impacts and influence on the area of human rights.

This thesis can be illustrated in case, for instance, by one of the instruments of such kind.

In particular, the Community Charter of Fundamental Social Rights of Workers,[47] which was signed on 9. 12. 1989 in Strasbourg by the leaders of the 11 Member States of the EC, can serve as a good example.

This instrument was adopted in the form of the political declaration of the intentions of the Heads of States and Governments of almost all Member States at that time (except UK). The idea and purpose of this document was given by the President of the European Commission Jacquese Delorse, who had pointed out that" The Charter was intended to reveal how far the Member States share common values and how far these can be reflected in rights."[48]

Part I of the Community Charter contains the declaration of fundamental social and economic rights of workers, as well as the formulation of the specific objectives of the Communities in this field. The palette of the declared rights in the Charter partly corresponds to the analogic rights protected by the European Social Charter, but with several differences given *inter alia* by the advantages of the market, as for instance, freedom of movement (including the elimination of obstacles arising from nonrecognition of diplomas or equivalent occupation qualifications) or the right to establishment etc.

Seemingly the control mechanism of the Community Charter in its usual meaning, in view of the non-binding nature of this document, cannot be observed. However in fact, Part II of this declaration establishes a system of annual reporting on the application of the Charter by the Member States, and thereby ensuring a certain control in its embryonic form.

Despite all the weaknesses of this document – the non-binding character and the related impossibility of its enforcement, the fragmentation and incompleteness in the regulation of certain social rights – the adoption of the Charter can be evaluated in general rather positively.

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[47] Community Charter of Fundamental Social Rights of Workers Official Journal COM 89 248, 9. 12. 1989 eur-lex.europa.eu/EN/lega.-context summary-community-charter-of-fundamental-social-rights-of-workers.html

[48] Jacques Delors: Speech to the Parliamentary Assembly of the Council of Europe, October 1989, Council of Europe, Parl. AS/soc/41/21, p. 2

It must be viewed through a prism, that it was an initial attempt to catalogue social and economic rights at Community level and therefore the creation of the first coherent document in this field.

The rights declared by the Community Charter was used as a reference point by the Court of Justice in the deepening and shaping of its doctrine of fundamental rights. [49]

The importance of the Charter is also confirmed by the numerous references to it in other acts of the acquis communautaire – the preamble to the Single European Act, the Treaty of Amsterdam, the Treaty of Nice, the Treaty of Lisbon and the Preamble to the EU Charter of Fundamental Rights. This unambiguously shows that this legally non-binding declaration has influenced very substantially the entire development of the social policy of the EC/EU in recent decades and has definitely determined its direction.

To other instruments of soft-law character in this area could be referred also European pillar of Social rights[50] or European Declaration on Digital Rights and principles.[51] Their content and impacts due to the limited space cannot be analysed in this paper.

6. Conclusions

The provided overview of the relevant instruments shows that human rights regulation at EU level is not limited solely to the Charter but goes much further. It provides a sophisticated system of mechanisms of a different nature that makes it possible to capture the potential violations of human rights at the different levels and under the varied conditions and circumstances. The sum of these mechanisms creates and completes a unique system of protection of human rights at EU level. However, any of the mentioned components of this system is not quite optimal, has some weaknesses and deficiencies, as well as requires some improvements.

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49 See for instance: C-173/99, C-13/05, C-438/05.

50 European Pillar of Social Rights,
HYPERLINK "https://nam04.safelinks.protection.outlook.com/?url=https%3A%2F%2Feur-lex.europa.eu%2Flegal-content%2FEN%2FTXT%2F%3Furi%3DCELEX%3A52017DC0250&data=05%7C02%7Cmarie.novotna%40wolterskluwer.com%7C005ad114e25840284e1908dedb6effee%7C8ac76c91e7f141ffa89c3553b2da2c17%7C0%7C0%7C639189466999136672%7CUnknown%7CTWFpbGZsb3d8eyJFbXB0eU1hcGkiOnRydWUsIlYiOiIwLjAuMDAwMCIsIlAiOiJXaW4zMiIsIkFOIjoiTWFpbCIsIldUIjoyfQ%3D%3D%7C0%7C%7C%7C&sdata=gWFb2Zn0CCyPIm6s%2BT%2BUAOTSTCLKjZ0Zz9FqYdwfYHw%3D&reserved=0"https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0250

51 European Declaration on Digital Rights and principles https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023C0123(01)

For instance, the iconic symbol and the core of this system, the Chapter of the Fundamental Rights of the EU, in order to become really the catalogue of rights "per excellence", as it was originally envisaged, needs the creation of the effective control mechanism of the judicial type. Instead of this, the Lisbon solution provides the certain improvement of *locus standi* of individual under Art. 263 para 4 TFEU, but which is done in the half-hearted manner. In other words, although the fact, that the Charter is very generous concerning the scope of the protected rights, nevertheless it is "limping" and lagging behind concerning their judicial enforcement.

Other reservations are connected with the introduction by the Lisbon Treaty of the restrictive measures in the form of Explanations, adoption of the Protocol No 30 and the widening of the horizontal provisions of the Charter, which have led to a substantial weakening of the effects of the Charter towards an individual. Besides, the lack of clarity and vagueness of these measures caused the collision with the original intention of Charter, which was envisaged to be a document, that is close and understandable for the citizens.

The content of the Charter, which brings the wide palette of the rights of all four generations, could be further expanded by the incorporation of the digital rights, especially those entitlements, which were already declared as such by Court of Justice and/or were regulated by the acts of the secondary legislation. Taking into account that the digital rights will play an increasing role in every-day life, this would really enrich and significantly improve the EU catalogue of human rights.

The concept of common European values constitutes not only a legal concept, but also creates a moral and ideological basis for the construction and functioning of the EU and, in the words of the Court of Justice, also defines the European identity itself. Analysis of Art. 2 TEU, which contains these values, makes it possible to conclude that human rights form the very core and the "heart" of the mentioned concept and they are the *conditio sine qua non* for their implementation. But the wording of the Article 2TEU requires some improvements and introduction of other postulates which are also common for the Member States and are inherent for the European identity. The same refers to the legal instruments for the protection of this values, including the human rights.

The Court of Justice, that had become a pioneer in the protection of human rights at the supranational level, maintains its irreplaceable role in this field even after the Charter has become legally binding. This is because of its doctrine of fundamental rights of the EU as a part of general principles of law, which occupies a privileged position in the hierarchy of the sources of EU law, due to the fact that such principles create "precondition for lawfulness and legality" of other acts of the EU law. The Court not only declares the new rights, but also provides the authoritative interpretation of the key notions concerning the protected rights, as well as regards the conditions for the application of the Charter.

The soft law tools, which are formally non-binding documents, nevertheless are capable to cause certain impacts and to influence the future progress in the field of human rights. This suggestion was proved on the example of the Community Charter of Fundamental Rights of Workers, which, being non-binding declaration, had influenced very substantially the entire development of the social policy of the EC/EU and had determined its direction for several decades.

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Council and the Protection of the Rule of Law in the EU

Petra Měšťánková*

Summary: This article explores the evolving role of the Council of the European Union in safeguarding the rule of law among its Member States, focusing on two key instruments: the annual Rule of Law Dialogue and the hearings under Article 7(1) TEU. While the Council has traditionally been criticized for its passivity, the study reveals a gradual shift in Member States' engagement, particularly among Central and Eastern European countries. Drawing on available Council documents, the article examines Member States' positions on rule of law issues. It finds that the annual Rule of Law Dialogue has become more structured and inclusive, yet remains a soft instrument lacking enforcement power. Its nature contrasts with Article 7 TEU, which was intended as a robust enforcement mechanism. However, the study shows that political divisions have hindered Article 7 TEU from functioning effectively. It highlights the influence of EU membership duration, the quality of democracy, party ideology, and responses to Russia's aggression in Ukraine as key determinants of Member States' behaviour. Ultimately, the article argues that while incremental progress is evident, the Council's capacity to enforce rule of law remains constrained.

Keywords: Council of the European Union, rule of law, annual rule of law dialogue, Article 7 TEU, democratic backsliding, Russian-Ukraine war

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1. Introduction

In its landmark ruling in Case 294/83, Les Verts v Parliament, the European Court of Justice defined the EU as „a community based on a rule of law". Ten years later, the Member States agreed to the largest expansion of the European Union to date, which was finalised in 2004 with the accession of ten new countries, primarily from the former Eastern Bloc. However, concerns were raised about

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the stability and quality of these countries' democratic regimes. This was one of the key reasons why EU Member States deemed it necessary to include Article 2 on EU values in the Treaty on European Union (TEU) in its Amsterdam revision, among them rule of law.[1] Member States recognize that the rule of law is essential for the proper functioning of European law and, therefore, of European policies. It is also about mutual trust between states[2] – namely, trust that a partner in the integration process adheres to the principles of the rule of law.

However, the question is how to ensure compliance with common values, including the rule of law, once a country becomes an EU member. Unlike during the enlargement process, when a country is motivated to implement reforms, it is relatively difficult to address issues concerning the rule of law in a Member State after it has joined the EU. This is because these issues touch on the foundations of national political and legal systems. It is also related to the approach to European integration as such and to the degree of EU involvement in national matters.

Since the introduction of common values in the Amsterdam Treaty, several tools have been developed to safeguard the rule of law. This article will address two such instruments in which Member States play a pivotal role within the Council of the EU. The first is the annual Rule of Law Dialogue within the Council. The second is Article 7 of the Treaty on European Union (TEU), the only instrument directly embedded in primary law to address states' democratic backsliding. Member states are the only ones that can decide whether a breach of common values has occurred in a respective member state, and they also decide on the sanctions. So far, however, they have been reluctant to take decisive action against member states that are backsliding, namely Hungary and Poland. Therefore, analysing the behaviour of the Member States in the Council can help to understand their rather reluctant approach and reveal possible changes.

The article proceeds as follows. First, it reviews the extensive literature on the topic in both political science and law. Second, it analyses the rule of law dialogue within the Council, which has emerged as a soft instrument through which member states can safeguard the rule of law. The article addresses how member states perceive the purpose and the framework of the dialogue and the changes that have occurred since its introduction in 2014. This analysis will primarily be based on Member States' responses to the 2016 and 2023 evaluations of the rule of law dialogue in the Council. Third, it deals with the Council hearings with Poland and

1 PECH, L. and SCHEPPELE, K. L. Illiberalism Within: Rule of Law Backsliding in the EU. In: *Cambridge Yearbook of European Legal Studies*. 2017, vol. 19, December, pp. 3–47. DOI: 10.1017/cel.2017.9.

2 See the discussion in ŠIŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 1, pp. 21–24. DOI: 10.2478/eustu-2024-0001.

Hungary that followed the activation of the Article 7(1) TEU procedure. In the hearings, the Member States ask questions to the state concerned. The hearings were supposed to lead to a decision by Member States on whether there is a risk of breach of common values in these countries. However, no such decision has yet been taken, which highlights the division among Member States. This section of the article focuses on Member States' activity in asking questions, outlining factors that may explain their activity or inactivity. It also highlights shifts in Member States' positions on the EU's protection of the rule of law.

The article is based on publicly available sources, particularly Council of the European Union documents. However, it should be noted that some key documents relating to both instruments are not publicly available. This is detrimental to both researchers and the general public. Consequently, the analysis can only be based on partial information regarding the issue.

2. Literature overview

Effective protection of the rule of law in the Union, as enshrined in Article 7 of the EU Treaty, requires cooperation and consensus between key EU institutions (the Commission, Parliament, and the Council of the European Union/European Council). However, the cases of Hungary and Poland have shown that this is precisely what the Union lacks. Institutions have different approaches to the rule of law protection and the level of EU involvement in this matter. Some scholars[3] have argued that the effective protection of the rule of law is hampered by rivalry between the EU institutions, especially between the Commission and the Council. Coman emphasized that the dissensus is shaping the rule of law policy in the EU.[4]

Article 7 TEU stipulates that a high majority is required for decisions to be adopted. In the Council, the Member States shall first determine whether there is a serious risk of a breach of the rule of law in a Member State (Article 7(1) TEU). Based on the hearings, they may decide that a Member State has seriously violated the principles of the rule of law (Article 7(2) TEU) and impose sanctions (Article 7(3) TEU). In the procedure under Article 7 (1) TEU, a four-fifths majority is required, and the imposition of sanctions must be decided by the European Council unanimously without the state concerned. Scholars,

[3] UITZ, R. The perils of defending the rule of law through dialogue. *European Constitutional Law Review*. 2019, vol. 15, no. 1, pp. 1–16, doi:10.1017/S1574019619000051; OLIVER, P., STEFANELLI, J. Strengthening the Rule of Law in the EU: The Council's Inaction. *Journal of Common Market Studies*. 2016, vol. 5, no. 5, pp. 1075–1084. DOI: 10.1111/jcms.12402

[4] COMAN, R. *The Politics of the Rule of Law in the EU Polity. Actors, Tools and Challenges*. Cham: Palgrave Macmillan, 2022.

especially in the legal field, conclude that precisely the construction of Article 7 TEU reduced in reality its effectiveness[5], thus it could hardly be a real deterrent to the rule of law backsliding.

The practical impossibility of using Article 7 TEU led the Commission to introduce several soft law tools to protect the rule of law, such as the Rule of Law Framework, the EU Justice Scoreboard, or the annual Rule of Law Cycle, which results in Rule of Law Reports.[6] Their effects consist in persuading and exerting pressure on a given state to change its behaviour on its own.[7] The Council responded to the Commission's activity by introducing an annual rule of law dialogue as early as 2014, i.e., before Article 7(1) TEU was activated. However, very soon after its introduction, it was criticized for being too mild and failing to address the rule of law crisis that had emerged in some Member States. The Council was critiqued as passive and inactive[8], contributing to the further deterioration of the rule of law in given member states. The EU policy in general has led to mixed results, and some scholars[9] argue that the EU is avoiding addressing and solving this problem.

One explanation for this is the fact that dialogue has long been considered the main tool for addressing the rule of law backsliding. Dialogue is the backbone of the rule of law framework, but also of the annual rule of law cycle in which the national authorities and other stakeholders are involved. It has drawn on the principle of sincere cooperation, enshrined in the art. 4(3) TEU. In this approach, the EU did not differ from other international organizations, such as

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5 KOCHENOV, D. Busting the Myths Nuclear: A Commentary on Article 7 TEU. In: *EUI Working Papers*, 2017/10. [online]. Available at: https://cadmus.eui.eu/bitstream/handle/1814/46345/LAW_2017_10.pdf?sequence=1; KOCHENOV, D., PECH, L. and SCHEPPELE, K. L. The European Commission's Activation of Article 7: Better Late than Never? In: *Verfassungsblog*, 23. December 2017 [online]. Available at: https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/; AMATO, G. and VEROLA, N. Freedom, Democracy, Rule of Law. In: AMATO, G., MOAVERO-MILANESI, E., PASQUINO, G., REICHLIN, L. (eds.). *The History of the European Union: Constructing Utopia*. Oxford: Hart Publishing, 2019, pp. 57–130.

6 For an overview see ŠIŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 1, pp. 21–24. DOI: 10.2478/eustu-2024-0001.

7 SEDELMEIER, U. Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure. *Journal of European Public Policy*, 2017, vol. 24, no. 3, pp. 337–351. DOI: 10.1080/13501763.2016.1229358.

8 OLIVER, STEFANELLI: *Strengthening the Rule of Law*...p. 1081–1082.

9 GRABOWSKA-MOROZ, B. Constitutional Avoidance and Values Enforcement In *The European Union – Pattern Or Policy?* Democracy Institute WORKING PAPERS 2025/29. [online]. Available at: https://democracyinstitute.ceu.edu/sites/default/files/article/attachment/2025-04/Barbara%20Grabowska-Moroz%20Constitutional%20Avoidance%20and%20Values%20Enforcement%20in%20the%20European%20Union%20Pattern%20or%20Policy%20CEU%20DI%20WP%202025_29.pdf

the Council of Europe.[10] However, the dialogue did not achieve any significant results in terms of halting or even reversing autocratic measures in the Member States concerned. In scholars' view, precisely the good faith in dialogue gave the backsliding governments a time to consolidate internal changes.[11] The activation of Article 7(1) of the EU Treaty therefore came too late and with little hope that the course set on the national level could be changed. The member states in the Council introduced the hearings with the member state concerned, so far with Hungary and until May 2024 also with Poland. But these hearings were just another dialogue, and they did not lead to any decision.

Scholars generally agree that the main reason for the Council's inaction is the division among member states on this issue. This dispute largely stems from differing views on the extent to which the EU should intervene in matters considered to be domestic affairs. One factor influencing member states' behaviour towards backsliding states is the ideological alignment of political parties belonging to the same party family. This applies to both the Council[12] and the European Parliament[13]. The long-term disregard of democratic backsliding in Hungary was, for example, related to Fidesz's long-standing membership in the European People's Party (EPP).

Given that there is not enough political will in the Council to sanction countries that are backsliding, the von der Leyen Commission has taken steps to make greater use of existing economic governance instruments (such as the Conditionality Regulation, the Cohesion Funds, the European Semester, and the Recovery and Resilience Facility). The enforcement mechanism in these cases is stronger as the states can lose European funding. The evaluation of these instruments is, however, out of the scope of this article.

3. Annual Rule of Law Dialogue in the Council

The Council introduced an Annual Rule of Law Dialogue in 2014 in response to the Commission's Rule of Law Framework[14]. In its opinion, the Council's

[10] UITZ: *The perils of defending…*, p. 3–4.

[11] See e.g. KOCHENOV, PECH, SCHEPPELE: *The European Commission's…,* PECH, SCHEPPELE: *Illiberalism Within*…, 7, UITZ: *The perils of defending…*

[12] OLIVER, STEFANELLI: *Strengthening the Rule of Law…*p.1081.

[13] KELEMEN, R. D. Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union. *Government and Opposition*, 2017, vol. 52, no. 2, pp. 211–238. DOI: 10.1017/gov.2016.41, HERMAN, L. E., HOERNER, J. and LACEY, J. Why does the European Right accommodate backsliding states? An analysis of 24 European People's Party votes (2011–2019). *European Political Science Review*, 2021, vol. 13, no. 2, pp. 169–187. DOI:10.1017/S1755773921000023.

[14] On the other hand, there was already a group of states that advocated for a greater protection of the rule of law in the Union. In March 2013, the Ministers of Foreign Affairs of Denmark,

Legal Service sharply criticized the new Commission's tool. According to it, the Commission overstepped the powers conferred on it by the founding treaties and stated that only the peer review is legally valid under EU law.[15] The Member States opted for dialogue, but from the outset it was defined in an unclear and ambiguous manner. The Member States embraced it as a platform for sharing information and best practices, not as a problem-solving mechanism. The discussions were held behind closed doors with limited transparency.[16] The enforcement was not an objective for the Council. In the General Affairs Council Conclusions from 16th of December 2014, the member states stressed that the role of the Council is "promoting a culture of respect for the rule of law within the European Union". The relative difficulty in reaching agreement among Member States on this instrument was also evident in setting the framework for the dialogue. The member states agreed on the timing of the dialogue, once a year. The principles guiding the dialogue were crucial. These were the principles of objectivity, non-discrimination, and equal treatment of all member states. The dialogue had to be conducted "on a non-partisan and evidence-based approach"[17] and avoid duplication with other instruments on the rule of law protection, especially the art. 7 TEU.

Between 2014 and 2018, the dialogues focused on specific topics determined by the Presidency, as digitalisation[18], migration[19], media pluralism,[20] or trust in public institutions[21]. This focus hid problems of compliance with the rule of

Finland, Germany, and the Netherlands sent a letter to the Commission President and asked for more Commission involvement in the rule of law protection.

15 COUNCIL OF THE EUROPEAN UNION. Opinion of the Legal Service. Commission's Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties. 10296/14, 27 May 2014.

16 PECH, L. From "Nuclear Option" to Damp Squib? – A Critical Assessment of the Four Article 7(1) TEU Hearings to Date. In: *Reconnect*, 18. November 2019 [online]. Available at: https://reconnect-europe.eu/blog/blog-fourart71 teuhearings-pech/, EUROPEAN PARLIAMENT. Ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen Rule of Law and its budgetary implications. P9_TA(2024)0367.

17 COUNCIL OF THE EUROPEAN UNION. Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law. 17014/14, 16 December 2014.

18 COUNCIL OF THE EUROPEAN UNION. Ensuring the respect for the rule of law – Dialogue and exchange of views. 13744/15, 9 November 2015.

19 COUNCIL OF THE EUROPEAN UNION. Presidency non-paper for the Council (General Affairs) on 24 May 2016
Rule of law dialogue. 8774/16. 13 May 2016.

20 COUNCIL OF THE EUROPEAN UNION. Presidency conclusions after the annual rule of law dialogue on the topic "Media pluralism and the rule of law in the digital age". 13609/17, 24 October 2017.

21 COUNCIL OF THE EUROPEAN UNION. Presidency conclusions following the annual rule of law dialogue 2018 on the topic "Trust in public institutions and the rule of law". 14678/18, 23 November 2018.

law in certain countries, meaning they could effectively avoid scrutiny. Indeed, the Member states were very reluctant to criticise others.[22] Under the Slovak presidency in the second half of 2016, the first evaluation of the Council's dialogue took place. The Presidency summarised the contributions of the member states[23], which provided valuable insights into the perceived role of the Council's dialogue and its future development. At the time of evaluation, the dialogue had only taken place twice.

Responses from Member States showed that opinions regarding the purpose and direction of the dialogue varied widely. Most countries[24] saw the dialogue as a place to share best practices and identify challenges. Some countries[25] saw the dialogue as a place to find a common approach to core values and the rule of law. And a small group of countries[26] directly considers that the dialogue should be used to safeguard the principles of the rule of law and ensure that member states adhere to them. The last two groups of countries generally agreed that the dialogue should focus more on issues directly related to the rule of law, and that some form of periodic review process should be established[27]. However, there was a strong opposition to such a review by many member states from different geographical areas and with different lengths of membership.[28] They argued that such a review process would either duplicate the work of other EU or international bodies (e.g. the Council of Europe or the UN) or that the founding treaties did not provide a sufficient legal basis for such a step. Especially the Central and Eastern European member states wanted to maintain the established form of thematic-focused dialogue[29] and resisted changes to it. Some[30] needed to emphasise the principle of conferral and the respect for national specificities and national identity.

However, in 2017 and 2018, Article 7(1) TEU was invoked in the cases of Poland and Hungary. Therefore, rule of law issues have become increasingly

[22] COMAN: *The Politics of the Rule of Law*...p. 180.

[23] The document does not include the positions of Bulgaria, Romania, and Cyprus. COUNCIL OF THE EUROPEAN UNION. Rule of Law – Compilation of replies to the Presidency questionnaire 13230/1/16, 3. November 2016.

[24] This was explicitly mentioned by Greece, France, Croatia, Latvia, Lithuania, Hungary, Malta, the Netherlands, Poland, Slovenia, Finland, and United Kingdom.

[25] Germany, Spain, Italy and Sweden.

[26] Belgium, Denmark, and the Netherlands.

[27] The Benelux countries and Italy supported the idea of a periodic peer review process. The Nordic countries (Denmark, Sweden, and Finland) and Portugal proposed regular horizontal discussions focused on general trends in the rule of law within the Union. Germany and France were open to focusing more on the situation in member states during the dialogue.

[28] The Czech Republic, Poland, Estonia, Greece, France, Spain, Sweden, and the United Kingdom explicitly rejected the annual review process.

[29] It was the case of Czech Republic, Estonia, Latvia, Lithuania, Hungary, and Poland.

[30] This was the case of the Czech Republic, Latvia, Lithuania, Hungary, and Poland.

important for member states, as reflected in the European Council's strategic agenda. Regarding the annual rule of law dialogue, in March 2019, a Belgian-German initiative proposed organisational changes and the introduction of a peer review process.[31] The second evaluation of the dialogue under the Finnish Presidency in the second half of 2019 stressed that the dialogue should be more focused on results, better organized, and have some follow-up. The Finnish Presidency wanted the dialogue to be linked to the annual rule of law cycle, conducted by the Commission from 2020. The rule of law reports should become the basis for the dialogue in the Council, a position strongly opposed by both Hungary and Poland. The Council was thus unable to reach a unanimous position on the changes to the rule of law dialogue. The Finnish Presidency nevertheless presented conclusions on this matter, which were accepted by the rest of the 26 member states.[32]

The German Presidency in 2020 pushed through organisational changes, which were previously unthinkable. Rather than holding one debate per year, the rule of law was now discussed three times a year in the General Affairs Council. One debate covers the general situation and trends in the Union. The other two focus on specific Member States based on a peer review mechanism[33]. These debates are based on the Commission's rule of law reports. Moreover, the rule of law is also addressed in other Council settings, particularly in the Justice and Home Affairs Council.

Since 2019, debates on rule of law issues have become more frequent and more focused on individual member states. However, the dialogue remains a political tool as there is no enforcement mechanism.[34] The core of the exercise is the exchange of best practices and experiences. The German presidency in 2020 stated clearly, "… the goal of this dialogue shall be to learn about and from each other, to understand how the rule of law works in every single Member State, to exchange best practices and to reach a common understanding of rule of law principles."[35] This would not be problematic, given that the dialogue is distinct from the Article 7 TEU procedure, which is designed to result in a decision and enforcement. Notwithstanding, the absence of transparency in the dialogue is a matter of concern. The only outcome is very general minutes, which do not

31 COM AN: *The Politics of the Rule of Law…,* p. 181–182.

32 COUNCIL OF THE EUROPEAN UNION. Presidency conclusions – Evaluation of the annual rule of law dialogue. 14173/19, 19 November 2019.

33 In this moment, each country-specific dialogue covered five countries.

34 LOBINA, B. Beating a Dead Horse. Is There Any Value in the Council's Annual Rule of Law Dialogue? In: *Verfassungsblog*, 7. December 2023 [online]. Available at: https://verfassungsblog.de/beating-a-dead-horse/

35 COUNCIL OF THE EUROPEAN UNION. Annual Rule of Law Dialogue. 11094/20, 28 September 2020.

provide insight into the direction of the discussion on the rule of law issues between Member States. In this regard, it is valuable that the responses of the Member States to the latest evaluation of the rule of law dialogue, conducted under the Spanish Presidency in the second half of 2023, are public and available.

The third evaluation of the rule of dialogue revealed that the Member States' positions are converging in comparison to the first evaluation.[36] The vast majority of countries viewed the dialogue as a constructive forum for sharing best practices and identifying challenges. The dialogue was perceived as a political tool that should prevent the deterioration of the rule of law in Member States. Germany also stressed its role in building the democratic resilience of EU member states. Many countries valued country-specific discussions as a source of inspiration[37] and a means of acquiring best practice[38], as well as an accelerator of domestic reforms[39].

Without surprise, Hungary and Poland took a critical stance towards the dialogue, but remained largely isolated in their criticism. It turned out that there had been a shift in attitudes, particularly among southern European and post-communist countries, which had initially been very cautious about dialogue. Nowadays, most countries consider that the dialogue is objective and is consistent with the agreed principles. Poland and Hungary argued that the dialogue duplicated the hearings under Article 7(1) TEU, a view supported only by Lithuania. At the same time, they tried to convince the others that the dialogue is in fact directed by the Commission as it is based on the rule of law reports. They argued that the Commission's reports are biased because they do not adequately reflect the views of government officials. Poland, under PiS government, declared that it would no longer participate in preparing the report. These countries wanted the dialogue to be based on sources other than the Commission's report.[40] Conversely, other countries viewed the structuring of the dialogue around rule of law reports positively because it fulfilled the principles of equal treatment and an evidence-based approach. They differed, however, in the use of the Commission's recommendations. Many countries wanted to incorporate the recommendations in some way, but not as a follow-up to the national reforms. By adopting this stance, Member States have been indicating that dialogue should not be used as

[36] The Member States' replies to the questionnaire sent by the Presidency are available at the webpage asktheEU.org. PECH, L. Responses to Questionnaire for the Member States on the evaluation of the Council's annual rule of law dialogue. In: AsktheEU, August 2023 [online]. Available at: https://www.asktheeu.org/request/responses_to_questionnaire_for_t

[37] Mentioned by Romania.

[38] Mentioned by Slovenia, Austria, Finland, or France.

[39] Mentioned by Lithuania, Luxembourg, Sweden, the Netherlands, or Belgium.

[40] Other countries, such as France, the Czech Republic, and Latvia, requested that the government be consulted more before the recommendation is published to clarify the facts.

a means of enforcement. Most countries wanted to maintain the existing focus on the national level, with only Poland and Hungary pushing for a shift in attention to EU institutions.

The Member States subsequently agreed to partially modify the organisation of the dialogue. In addition to one horizontal debate, three country-specific debates, each covering four Member States, will be held annually. While the number of countries discussed has decreased, the frequency of the dialogue has increased. Another important issue was its transparency and the involvement of the civil society representatives and the experts. But the member states had diverging opinions on this matter. Many states emphasised that the dialogue should remain between states only[41], in order to preserve its confidential nature and strengthen mutual trust. In principle, there is nothing to prevent side events from taking place with the participation of experts and civil society. Ultimately, however, the decision lies with the Presidency.

The Presidency conclusions of 12 December 2023 were not supported by all Member States again. Following the change of government in Poland, however, Hungary was left alone in the opposition. The member states confirmed that they are committed to "strengthening the rule of law and to contribute to the prevention of emerging and existing rule of law challenges, in an inclusive and constructive manner, through discussion and exchange of best practices and lessons learned."[42] The Council's rule of law dialogue continued to be based on the Commission's rule of law reports, with the inclusion of the recommendations in the debate. The next evaluation is scheduled for the end of 2027.

It can be concluded that Member States are paying more attention to the rule of law issues. However, dialogue remains a soft tool for safeguarding the rule of law. It cannot force a Member State to make changes or impose sanctions on it. Its purpose is to encourage Member States to change their approach and adopt reforms that will strengthen the rule of law in their countries, particularly through the exchange of best practices and open debate.

4. Council's hearings under Article 7(1) TEU

The member states introduced the hearings with Poland and Hungary in consequence of the activation of art. 7(1) TEU by the Commission in case of Poland

[41] This point was emphasised by Romania, Italy, Malta, Portugal, Greece, Belgium, the Czech Republic, Germany, and Hungary.

[42] COUNCIL OF THE EUROPEAN UNION. Presidency conclusions = Evaluation of the annual rule of law dialogue. 16547/23, 12 December 2023.

(2017)[43] and the Parliament in case of Hungary (2018)[44]. So far, the hearings can be described as disappointing, as the Member States were unable to reach any concrete decision. Article 7(1) TEU stipulates that the Council must decide by a four-fifths majority whether there is a risk of a serious breach of common values by a Member State. This means that at least 22 Member States must agree, which has not yet been achieved.

Furthermore, the hearings are not transparent. In July 2019, the Member States approved standards for conducting hearings.[45] Since then, the reports of the hearings reflect the procedural aspects, but not the substance. They give a brief account of the Commission's position, the responses of the Member State concerned, and which Member States asked questions. Except for hearings with Poland in 2018 and with Hungary in 2019, it is not possible to ascertain what the Member States asked. The minutes provide only a general scope of topics.

The conduct of the hearing also depends on the Presidency, as it is responsible for organizing them. As the study of Hernández[46] showed, the Presidency could be reluctant to organise hearings under Article 7(1) TEU. This was particularly evident in the initial phase, when the Commission under Jean-Claude Juncker requested that the hearings be included in the GAC agenda during the Bulgarian and Austrian presidencies in 2018. In the case of Hungary, the European Parliament could not request the Council to include this item on the agenda and had to wait for a proactive presidency, which came with Finland in 2019. The Covid-19 pandemic significantly restricted the Council meetings, and no hearings were organised under German and Croatian Presidencies in 2020. Even after that, the Presidency's approach varied. Only Portugal, France, and Sweden organised hearings with both countries involved. The Czech Republic only held a hearing with Hungary, while Spain did not hold any. The Commission under Ursula von der Leyen did not request the organization of hearings and shifted the attention from the art. 7(1) TEU towards other tools as the infringement procedure or economic governance tools.[47] In May 2024, the Article 7(1) TEU proceedings

43 EUROPEAN COMMISSION. Commission's decision of 20 December 2017 to activate Article 7(1) TEU as regards the situation in Poland. COM(2017) 835 final, COM(2017) 835 final.

44 EUROPEAN PARLIAMENT. European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). P8_TA(2018)0340.

45 COUNCIL OF THE EUROPEAN UNION. Standard modalities for hearings referred to in Article 7(1) TEU. 10641/2/19, 9 July 2019.

46 HERNÁNDEZ, G. The Powers of the Presidency of the Council of the EU to Shapethe Rule of Law Enforcement Agenda: The Article 7 Case. *Journal of Common Market Studies*, 2024, vol. 62, no. 5., pp. 1159–1176. DOI: 10.1111/jcms.13551

47 HERNÁNDEZ: *The Powers of the Presidency*…. p. 1169.

with Poland concluded when the Commission withdrew its reasoned proposal, thereby bringing the hearings in the Council to a close. Having analysed Poland's national action plan and the commitments made by the Polish government, the Commission concluded that there was no longer a clear risk of a serious breach of the rule of law in Poland. To date, only the hearings with Hungary are ongoing.

Table 1 below summarises the activity of the Member States in raising questions with the countries concerned. A total of 14 hearings were held: eight with Hungary and six with Poland. Although the setting of boundaries of each category will always be somewhat arbitrary, Table 1 shows that the EU-15 countries are indeed more active in the rule of law agenda, as confirmed by other works on this topic[48]. The new Member States are less active, with some not participating at all.

Table 1: Activity of Member States in the Council's hearings with Hungary and Poland under Article 7(1) TEU

Friends of the Rule of Law	**Supporters of the Rule of Law**	**Observers of the Rule of Law**	**Standby Participants**	**Absent from the Bench**
Questions asked on 12-14 hearings	Questions asked on 8-11 hearings	Questions asked on 4-7 hearings	Questions asked on 1-3 hearings	Never asked
Belgium Denmark France Germany Ireland Luxembourg Netherlands Portugal Sweden	Austria Finland Spain	Estonia Greece Italy	Cyprus Czech Republic Latvia Lithuania Malta Poland Slovenia Slovakia	Bulgaria Croatia Romania
9	3	3	8	3

Source: Author, based on the information provided by Council's reports on the hearings with Poland and with Hungary.

Most of the founding EU member states, the so-called core EU countries (Belgium, France, Luxembourg, Germany, and the Netherlands), are highly active. These countries often raise questions on behalf of others; for example, Belgium

48 COMAN: *The Politics of the Rule of Law*...p. 174, SEDELMEIER, U. Is there an East–West divide on democracy in the European Union? Evidence from democratic backsliding and attitudes towards rule of law interventions. *Journal of European Public Policy*, 2024, vol. 31, no. 3, pp. 825–849. DOI: 10.1080/13501763.2023.2198569.

raises questions on behalf of Luxembourg and the Netherlands, and France raises questions on behalf of Germany and vice versa. Including the medium-active countries (supporters of the rule of law), we see a group consisting of the Nordic countries, Ireland, Austria, and the countries of the Iberian Peninsula. Italy and Greece are the only countries that deviate from this pattern, displaying relatively low activity. This can be attributed to changes in their domestic political situations.

The positions of new member states, coming generally from Central and Eastern Europe, are more diverse. Estonia is undoubtedly the most active of the new Member States. The other countries are relatively inactive. These countries are more sceptical about the EU's involvement in addressing rule of law issues. But their activity is steadily rising in recent years, indicating that they now place greater importance on the rule of law than in the past and are making greater use of the EU level. The length of their membership of the Union and familiarity with EU instruments and procedures may be a factor. Another factor can be the change in the political climate following Russia's aggression against Ukraine (see further). In the last group, there are indeed the countries that are the most recent members of the Union.

Another factor that may influence how active a state is in protecting the rule of law is the state of its democracy. It could be argued that the better the situation, the more the state will uphold the Union's values. In this respect, however, the results are mixed (see Table 2). The state of democracy is measured using various indices, such as the Varieties of Democracy and Freedom House indices. On the democracy scale, we can distinguish between liberal democracy (LD) and electoral democracy (ED). Except for Hungary[49], EU countries fall into one of these categories. However, the quality of democracy differs in each member state.

Table 2: State of Democracy and Regime Categorization in 2018 and 2024

Group	**Liberal Democracy Index (2018)**	**Liberal Democracy Index (2024)**	**Regime Category (V-dem, 2018)**	**Regime Category (V-dem, 2024)**
Friends of Rule of Law	0,8-0,89	0,75-0,88	9 LD	8 LD 1 ED
Supporters of the Rule of Law	0,78-0,85	0,74-0,8	3 LD	2 LD 1 ED

[49] In its 2020 report on the state of democracy, V-Dem classified Hungary as an electoral autocracy. V-DEM INSTITUTE. Autocratization Surges–Resistance Grows – DEMOCRACY REPORT 2020. In: V-dem, 2020 [online]. Available at: https://v-dem.net/documents/14/dr_2020_dqumD5e.pdf

Observers of the Rule of Law	0,77-0,86	0,61-0,85	2 LD 1 ED	2 LD 1 ED
Standby Participants	0,52-0,76	0,62-0,79	4 LD 4 ED	2 LD 6 ED
Absent from the Bench	0,48-0,62	0,45-0,62	3 ED	3 ED

Source: Author based on V-dem Liberal Democracy Index and Democracy Reports (2019, 2025).

According to Table 2, the first two groups meet the assumption that countries with a high rating on the Liberal Democracy Index will be active. Similarly, the final group comprises the EU countries with the poorest quality of democracy. Until recently, Bulgaria and Romania were monitored by the Commission under the Mechanism for Cooperation and Verification (CVM) with regard to the rule of law and fighting corruption. However, it is the middle groups that present the greatest challenge. These include countries that are highly rated in terms of the quality of democracy, yet are less active or almost inactive in Council hearings. One such country is Estonia, the most active new member state on rule of law issues, as mentioned above. Next are the Czech Republic and Latvia, which are also considered liberal democracies but have been rather passive in the hearings. Another exception is Italy, one of the EU's founding members. Although it is considered part of the EU core and a liberal democracy, it has stopped participating in the hearings in recent years. Each of these cases, therefore, requires a more in-depth analysis.

Ideological alignment is a strong explanation for why a particular state is active or passive in protecting the rule of law at the EU level (as mentioned above). For the Council, it is about the affinity of the political parties currently in government. Certain party families, such as the liberal, social democratic, green, and Christian democratic parties, consider issues of the rule of law to be important. These political parties also generally view their country's EU membership positively, with some even advocating deeper integration.

Therefore, it is possible to link the activity of states in hearings with the composition of the parties in government at the moment. This is particularly relevant for groups with states that did not always participate. Table 3 below illustrates the activity of countries in relation to the governments in power at the time. The party composition shows that these were mostly centre-right or centre-left governments comprising parties belonging to the aforementioned party families. Far-left and conservative parties also demonstrate moderate participation. The exception is the participation of far-right parties. However, they have typically been junior coalition partners or have undergone ideological shifts (e.g. the Italian M5S).

Table 3: Countries' activity concerning party composition of governments

Country	Participation Activity/Total number of hearings	In years (number of hearings)	Prime minister (governing parties/ coalition)	Parties in European Parliament Group
Austria	8/14	2021 2022 (1, 2) 2023 2025	Kurz II (ÖVP, Grüne) Schallenberg (ÖVP, Grüne) Nehammer (ÖVP, Grüne) Stocker (ÖVP, SPÖ, NEOS)	EPP Greens/EFA S&D Renew
Cyprus	2/14	2018 (1, 2)	Anastasiadis (DISY)	EPP
Czech Republic	2/14	2024 2025	Fiala (ODS, KDU-ČSL, TOP09, STAN)	ECR EPP
Estonia	5/14	2018 (1) 2022 (1, 2) 2023 2025	Ratas I (EK-SDE-Isamaa) Kallas I (ER-EK) Kallas II (ER-SDE-Isamaa) Kallas III (ER, SDE, E200) Michal (ER, SDE, E200)	Renew S&D EPP ECR
Finland	11/14	2018 (1, 2, 3) 2021 2022 (1, 2) 2023 2025	Sipilä (Kesk, Kok, PS, Korj) Marin (SDP, Kesk, Vihr, Vas, SFP) Orpo (Kok, PS, SFP, KD)	Renew EPP ECR S&D Greens/EFA GUE/NGL
Greece	4/14	2021 2022 (1)	Mitsotakis I (ND)	EPP
Italy	5/14	2018 (3) 2019 (1, 2) 2021 2022 (1)	Conte I (M5S-Lega) Conte II (M5S-PD-Art.1-IV) Draghi (M5S-Lega-PD-Art.1-IV-FI-IpF-A)	EFDD, Non-inscrits ID S&D Renew EPP

Latvia	1/14	2022 (1)	Kariņš I (JKP, AP!, NA, V)	Renew ECR EPP
Lithuania	3/14	2022 (1) 2024 2025	Šimonitė (TS-LKD, LS, LP) Paluckas (LSDP, PPNA, DSVL)	EPP Renew S&D Greens/EFA
Malta	1/14	2022 (1)	Abela II (PL)	S&D
Poland	1/14	2024	Tusk (KO, PSL, PL2050, Lewica)	EPP Renew S&D
Slovakia	3/14	2022 (1, 2) 2023	Heger I (OĽaNO, SaS, Sme Rodina, ZĽ) Heger II (OĽaNO, Sme Rodina, ZĽ) Ódor (technocratic government)	EPP ECR ID
Slovenia	3/14	2022 (1, 2) 2023	Golob (GS, SD, Levica)	Renew S&D GUE/NGL
Spain	10/14	2018 (1, 2, 3) 2019 (1, 2) 2021 2022 (1, 2)	Sánchez I (PSOE) Sánchez II (PSOE, UP)	S&D GUE/NGL

Source: Author.

Some specific examples can help to illustrate this factor. For example, Sebastian Kurz's first government, which was made up of the Christian Democratic ÖVP and the far-right FPÖ, did not participate in the hearings. It was only with the replacement of the FPÖ by the Greens as coalition partners that change came. In contrast, Italy was active during the centre-left governments of Prime Ministers Conte and Draghi, but Meloni's far-right government stopped participating in the hearings.

The final issue that requires closer examination is the impact of Russia's aggression in Ukraine[50], which began on 24 February 2022. Poland and Hungary

[50] For a reflection on the Commission's different approaches to Poland and Hungary following Russia's aggression in Ukraine, see JARACZEWSKI, J. Unexpected Complications: The impact of the Russian invasion of Ukraine on the rule of law crisis in the EU: An anti-rule of law alliance. In: *Verfassungsblog*, 23. December 2022 [online]. Available at: https://verfassungsblog.de/une

have adopted contrasting positions on the war and their approach to Russia. While Poland has emerged as a leader in taking a hard line against Russia and supporting Ukraine, Hungary has adopted a pro-Russian position. As shown in Table 4, hearings with Hungary took place more or less regularly after 24 February 2022, whereas those with Poland gradually ceased. Table 4 excluded the group of rule of law friends, as these countries participated regularly in hearings with both countries, as well as those who never participated. Thus, its focus is on those who have more irregular participation rates (supporters, observers, and standby participants). It can be seen that countries that had not previously participated began to take part in the hearings. These included the Baltic republics (especially Estonia and Lithuania), the Visegrad Group countries (Slovakia and the Czech Republic), and Slovenia. Especially, the remaining Visegrad Group countries have long been seen as supporters of Poland and Hungary[51], turning a blind eye to their rule of law backsliding. But both Slovakia and the Czech Republic participated under governments which have strongly supported Ukraine (under prime ministers Heger and Fiala). These states exclusively focused on Hungary.

Table 4: Countries' activity in hearings before and after the Russian aggression in Ukraine

Hearings (number)/ Country Activity	**Poland before 24. 2. 2022 (4)**	**Poland after 24. 2. 2022 (2)**	**Hungary before 24. 2. 2022 (3)**	**Hungary after 24. 2. 2022 (5)**	**Group**
Austria	1	2	1	3	**Supporter of RoL**
Cyprus	2	0	0	0	**Standby Participant**
Czech Republic	0	0	0	2	**Standby Participant**
Estonia	1	0	0	4	**Observer of RoL**
Finland	4	2	1	4	**Supporter of RoL**
Greece	1	1	1	1	**Observer of RoL**
Italy	1	0	3	1	**Observer of RoL**
Latvia	0	0	0	1	**Standby Participant**

xpected-complications-the-impact-of-the-russian-invasion-of-ukraine-on-the-rule-of-law-crisis-in-the-eu/

51 COMAN: *The Politics of the Rule of Law…,* p. 174.

Lithuania	0	0	0	3	**Standby Participant**
Malta	0	1	0	0	**Standby Participant**
Poland	-	-	0	1	**Standby Participant**
Slovakia	0	0	0	3	**Standby Participant**
Slovenia	0	0	1	3	**Standby Participant**
Spain	4	1	3	2	**Supporter of RoL**

Source: Author.

5. Conclusions

The rule of law is a challenging issue for Member States as it concerns the core principles of European integration and the scope of European institutions' powers in relation to Member States. Protecting the rule of law involves national and supranational levels, as well as a number of actors, including non-governmental ones. At the EU level the effective protection of the rule of law requires close cooperation between EU institutions. The approach adopted by the Member States in the Council of the EU is crucial to the effective protection of the rule of law. Member States have agreed to hold an annual dialogue on this issue. The activation of the Article 7(1) TEU procedure has also prompted them to hold hearings with the concerned countries.

The article showed that, in the initial period of addressing the rule of law backsliding, the attitudes of member states were very cautious. These issues were considered a matter of national politics. In the early years, the annual rule of law dialogue was more of a general exchange of views and did not address the core of the problem. Despite Article 7(1) TEU being invoked in the cases of Poland and Hungary, member states were reluctant to hold hearings. The countries concerned were thus able to effectively avoid any kind of scrutiny.

However, noticeable changes in the attitudes of Member States have emerged since 2019. The organisation of the annual dialogue has changed, with rule of law issues now being discussed more frequently. This process is largely based on peer review and linked to the annual rule of law cycle. It is evident that countries now view the dialogue positively as a source of best practice and a catalyst for national-level reform. Nevertheless, as a political tool and preventive mechanism, the dialogue cannot be expected to enforce change at a national level. Like other soft instruments, it relies on soft pressure and persuasion. Ultimately, it is up to the countries themselves to decide whether they are willing to strengthen the rule of law at home.

Article 7 (TEU) was designed to be an EU instrument for effectively enforcing changes regarding the rule of law in member states. However, no results have been achieved in this regard. Nevertheless, it is clear that Member States have changed their approach to the procedure, as reflected in their activity at Council hearings. Initially, it seemed that the hearings were only taking place between the Member States concerned and the 'old' Member States (EU-15). The new Member States, mainly from Central and Eastern Europe, were inactive, confirming the view of a division between East and West in terms of EU values. Over time, however, these countries have also become more active. This raises the question of what explains the behaviour of states in the Council. One possible explanation is length of membership, as most EU-15 countries have participated in these hearings regularly. This is also supported by the fact that these countries have higher quality of democracy. However, the importance of quality of democracy as a factor is less evident among the new Member States, which include countries that are considered to be liberal democracies, yet have been rather reluctant in their approach towards backsliding countries. Another factor is party-ideological orientation. The study showed that governments were generally more active when their governing parties belonged to the Christian Democratic, Social Democratic, Green or Liberal party families. To a lesser extent, parties from conservative or far-left groups were also involved, but these were usually junior members of governments. The same can be said of the very rare participation of political parties associated with the far right.

In the case of new Member States, particularly those from Central and Eastern Europe, it has become clear that the impact of Russian aggression on Ukraine must be addressed. These states were divided in their support for Ukraine, and it was precisely those that unequivocally stood behind Ukraine that began to take action in Article 7(1) TEU hearings against Hungary, which took a pro-Russian stance. In this regard, it is worth mentioning a change in the Visegrad Group countries.

Russia's aggression in Ukraine has shown that this agenda is influenced not only by domestic factors, but also by the international situation. However, according to the author, domestic factors remain decisive. The political situation in member states may change. Political parties are largely polarised in terms of both the degree of protection of the rule of law and the acceptable level of intervention by EU institutions. Changes at the national level are reflected logically in the approach of EU institutions, primarily the Council of the EU as an intergovernmental institution. Therefore, it is very difficult to predict whether the EU will move towards a more robust protection of the rule of law.

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Temporary Protection in International and EU Law: Historical Evolution, Legal Frameworks, and Contemporary Challenges

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Summary: This article provides a comprehensive analysis of the concept, history, and legal frameworks of temporary protection as a response to mass influxes of displaced persons. It traces the evolution of temporary protection from early international and national practices to the European Union's codified Temporary Protection Directive and its first operational activation because of the full-scale Russian invasion of Ukraine in 2022. The study compares temporary protection regimes in the EU, United States, and Turkey, highlighting their distinct legal bases, eligibility criteria, and practical challenges. Emphasis is placed on the balance temporary protection seeks between humanitarian needs, state capacity, and political considerations, as well as its role as a complement to traditional asylum. The article further explores ongoing implementation issues, including variation in national practices and the tension between temporary relief and longer-term solutions for displaced populations. By synthesizing legal, policy, and operational perspectives, the article enriches understanding of temporary protection's critical function in contemporary international refugee and migration law.

Key words: temporary protection, migration, asylum, refugee, non-refoulement, EU law, Directive 2001/55/EC.

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1. Introduction

Temporary protection has a long-standing historical presence as a legal mechanism for responding to mass influxes of displaced persons caused by factors such as armed conflicts, epidemics, and environmental disasters, which has been used multiple times. Throughout history, temporary protection has repeatedly emerged globally as states and international organisations sought practical frameworks to manage urgent displacement and uphold humanitarian principles.

Nonetheless, modern international law does not include a universal legal convention or act designed to govern temporary protection. Formalization and legal codification of temporary protection have evolved over decades in different states, including the United States, Turkey, and the member states of the European Union, each reflecting distinct political and social contexts.

The European Union encountered a similar predicament in the 1990s, when Bosnian refugees arrived in large numbers to EU Member States as a result of the armed war in the former Yugoslavia. This compelled the European Union to draft a specific directive in order to provide a uniform legal framework for all Member States. Nonetheless, the directive was never activated until 2022 when the Russian aggression against Ukraine began.

A decade earlier, in 2011 the same fate struck Turkey when millions of displaced individuals started arriving from Syria. Having started with no special legal background to cope with the mass influx, the Turkish government has managed to develop its legal framework and practice how to respond to such challenges.

The diversity of states' approaches to understanding temporary protection, its elements, the categories of people to whom it may be granted, as well as the lack of its definition and the identification of its role in the international protection and asylum system, have always been the subject of scholars' interest. The evolution of the concept of temporary protection at the international level and practical application of procedures of granting temporary protection at regional and national levels, have been scrutinised by numerous scholars, e.g., Black R., Brumat L., Carrera S., Coles G. J. L., Dalkiran M., Lipman L. K, Edwards A., Esen S, Ferris

E., Ineli-Ciger M., Kortukova T., Koser K., Küçük E., Selm van J., Vosyliute L., Yemets Ye, Zoeteweij M. While some scholars draw attention to the temporary protection in its correlation with refugee protection and asylum (Fedorova A. in her paper "The main categories of displaced persons fleeing armed conflicts and their correlation in the context of russian invasion of Ukraine"[1]) as well its limits and conditions of its application (Coles G. J. L. in his paper "Temporary Refuge and the Large Scale Influx of Refugees"[2] or Edwards A. in "Temporary Protection, Derogation and 1951 Refugee Convention"[3]), others analysed the national or regional approaches to introduction of temporary protection to displaced persons in case mass influx and their compliance with international law provisions (e.g. Ineli-Ciger M.'s article "A Temporary Protection Regime in Line with International Law: Utopia or Real Possibility?[4] or Ferris E.' – "Syrian Refugees in Türkiye: Prospects for Return or Integration?"[5]).

The activation of the EU Temporary Protection Directive in March 2022, as well as the extension of temporary protected status until 2027, marked a new stage in the development of temporary protection and underscored the need to scrutinise its evolution, particularly regarding its extension beyond the national framework.

The main aim of this article is to evaluate operational challenges realised in recent applications of temporary protection, such as varying interpretations among EU member states, administrative hurdles, balancing humanitarian openness with security concerns, and managing transitions from temporary protection to long-term status or voluntary return. It further investigates comparative national policies, including the U.S. approach limited to nationals already present on its soil, Turkey's open-border and large-scale reception policy, and the nuanced EU system tied to legal residence and nationality considerations.

The research relies on papers from the UN Human Rights Commission, the UN Refugee Agency, EU directives, national law of EU member states, as well as the legislation of the United States and the Republic of Turkey. The authors

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2 Coles, G. J. L. Temporary Refuge and the Large Scale Influx of Refugees. *Australian Year Book of International Law*. 1983, vol. 7, pp. 189–212.

3 Edwards, A. Temporary Protection, Derogation and 1951 Refugee Convention. *Melbourne Journal of International Law*. 2012, vol. 13, pp. 5–6.

4 Ineli-Ciger, M. A Temporary Protection Regime in Line with International Law: Utopia or Real Possibility? *International Community Law Review*. 2016, vol. 18, no. 3-4, p. 279.

5 Ferris, E. Syrian Refugees in Türkiye: Prospects for Return or Integration? *Rice University's Baker Institute for Public Policy Briefs*. April 22, 2025. Available online at: <https://www.bakerinstitute.org/research/syrian-refugees-turkiye-prospects-return-or-integration>.

employ a historical technique to analyse temporary protection in the EU, the US, and Turkey, aiming to get a thorough comprehension of its inception, evolution, and the transformation of prevailing legal frameworks across various global locations. The techniques of legal analysis and comparison facilitated the identification of significant discrepancies and inconsistencies between EU requirements and current practices.

Ultimately, temporary protection emerges as a complex yet essential tool in modern refugee and migration law, offering a flexible, rights-based response to emergencies while navigating the persistent tension between temporary humanitarian relief and the need for sustainable, equitable solutions. This article aims to contribute a comprehensive conceptual and legal analysis, enriching scholarly and policy debates on the effective governance of forced displacement in diverse geopolitical contexts, especially in light of ongoing challenges exemplified by the mass influx of displaced Ukrainians due to Russia's full-scale aggression against Ukraine and global displacement trends.

2. Historical Context of Temporary Protection

The admission of foreign nationals for temporary protection during significant influxes of displaced persons is not a new phenomenon in the history of humanity. Throughout the centuries, this phenomenon has been the result of a variety of factors, including epidemics, climate change, and armed conflicts.

In the 20th century the need for temporary refuge was addressed on a global scale when, in 1971, the Indian government sought assistance from the United Nations to manage the influx of approximately 10 million refugees entering India from East Pakistan. India has asserted in global forums that these displaced individuals cannot remain as permanent residents, advocating for a six-month restriction on their stay and pushing the international community to develop programs to facilitate their voluntary repatriation to their country. In December of that year, the UN General Assembly adopted a resolution recognizing that voluntary repatriation was the only satisfactory solution. The resolution urged all Member States to intensify their efforts to create the necessary conditions for the speedy and voluntary return of the refugees to their homes. This was succeeded by the officially facilitated repatriation initiative, which involved the return of 10 million refugees beginning on January 1, 1972. This process was completed approximately 2.5 months later.[6]

6 Coles, G .J. L. Temporary Refuge and the Large Scale Influx of Refugees. *Australian Year Book of International* Law. 1983, vol. 7, p. 191.

A significant case emerged in Southeast Asia during the years 1975 to 1980. Almost a million Indo-Chinese people from Vietnam, Cambodia, and Laos fled their country during that time. This trend peaked in 1979, which caused serious issues for the majority of the first-refugee countries. Numerous nations were reluctant to offer sustainable solutions for even a small contingent of these refugees, apprehensive that their temporary admission would result in a significant number of refugees remaining without adequate international support in securing satisfactory durable solutions. Factors included a concern for national security and the desire to avert the challenges and risks associated with harbouring liberated members of conflicting factions from surrounding states. The entry of the bulk of Vietnamese and other Indo-Chinese refugees and displaced individuals into Southeast Asian countries has been predicated on the express understanding that such admission is temporary.[7]

The Conference of African States considered temporary asylum for the African continent in May 1979. The Conference emphasised the significance of the notion of temporary asylum in its recommendations regarding Asylum in Africa.

The United States first introduced the concept of "temporary protected status" in 1990 to defend illegal Salvadorans residing in the country from deportation. This was achieved by incorporating these provisions into the 1990 Immigration Act. The members of the United States Congress favoured the provision of temporary protection, such as respite from the prospect of deportation to individuals from specific at-risk nationalities. However, it would not grant these individuals formal refugee status.[8]

The issue of a massive influx of refugees and displaced individuals became a concern for the Turkish Republic in 2011, when Syrian refugees began to arrive in Turkey following the outbreak of the Syrian civil war. By early 2019, more than 3.6 million individuals had sought refuge in Turkey[9]. Prior to the enactment of special legislation, temporary protection was administered in accordance with Regulation No. 1994/6169, which outlined the Procedures and Principles concerning Potential Population Movements and Aliens Arriving in Turkey, whether individually or in groups, seeking asylum in Turkey or requesting

[7] Ibid, p. 193–194.

[8] Dalkiran, M., Lipman, L K. 'But we have to be realistic': examining the origins of temporary protection in the USA and European Union. *Journal of Refugee Studies*. 2025, vol. 38, no. 1, pp. 181–196.

[9] Ayhan K. The World's Leading Refugee Host, Turkey Has a Complex Migration History. *The Online Journal of the Migration Policy Institute*. November 1, 2023. Available at: <https://www.migrationpolicy.org/article/turkey-migration-history#:~:text=Turkey%20is%20the%20world's%20leading%20refugee%2Dhosting%20country%2C,of%20the%20Republic%20of%20Turkey%20in%201923.>

residence permission to pursue asylum in another country[10]. As Turkish scholar M. Ineli-Ciger indicated under this regime protection was provided to all Syrians, Palestinian refugees, and stateless individuals residing in Syria. The scope and legal foundation of the temporary protection regime were first ambiguous. In response to a parliamentary question, the Turkish Disaster Emergency Management Presidency (AFAD), an agency of the Ministry of Interior, characterised the legal foundation of the temporary protection regime as a “Guideline concerning the reception and admission of stateless and Syrian nationals.”[11]. In 2013, Turkey adopted the Law on Foreigners and International Protection (the 2013 Law)[12], which came into effect in April 2014, followed by implementing Temporary Protection Regulation (Council of Ministers Decision No: 2014/6883) in October 2014[13]. Thus, prior to the events in Ukraine in 2022, Turkey welcomed the largest number of refugees worldwide, showcasing its remarkable experience in providing temporary protection and support in everyday circumstances, especially amid the challenges posed by global events.

The history of temporary protection regulation in Europe dates back to the first half of the 20th century. M. Ineli-Ciger references the work of M. J. Gibney, noting that this history begins with England and France providing temporary refuge to Spanish individuals fleeing the Spanish Civil War in the 1930s. Additionally, Austria granted temporary refuge to Hungarian and Czech refugees in 1956 and 1968, respectively[14].

The concept of temporary protection first emerged in Europe in the early 1990s amid the turmoil in the former Yugoslavia. During this preliminary stage, European countries regarded temporary protection as a restrictive measure rather than an extensive protection system. Upon the arrival of Croatian refugees in European Community member states, they faced systems intended to impede

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10 Regulation No. 1994/6169 on the Procedures and Principles related to Possible Population Movements and Aliens Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum From Another Country. Temporary protection has gained a legal basis firstly with Law on Foreigners and International Protection. <https://www.refworld.org/legal/decreees/natlegbod/1994/en/64501>.

11 Ineli-Ciger, M. **P**rotecting Syrians in Turkey: A Legal Analysis Protecting Syrians in Turkey: A Legal Analysis. International Journal of Refugee Law. 2017, vol. 29, no 4, pp. 555–579. doi:10.1093/ijrl/eex042

12 The Republic of Turkey. Ministry of Interior. Directorate General of Migration Management. Law No. 6458 on Foreigners and International Protection of 2013. <https://www.refworld.org/legal/legislation/natlegbod/2016/en/114283.>

13 Temporary Protection Regulation (Council of Ministers Decision No: 2014/6883). <https://www.refworld.org/legal/decreees/natlegbod/2014/en/108062?prevPage=/node/108062.>

14 Ineli-Ciger M, A Temporary Protection Regime in Line with International Law: Utopia or Real Possibility? *International Community Law Review*. 2016, vol. 18, no. 3-4, p. 279.

rather than promote protection[15]. Governments perceived interim protection as a means to circumvent the provision of complete refugee status as stipulated by the 1951 Geneva Convention. Temporary protection was intentionally designed to provide a shorter duration of stay and fewer rights than traditional asylum during this period. The standards regarding rights, residence permits, and reception conditions were inconsistent across European countries, resulting in a significant variation in the approach. Essentially, temporary protection communicated the following message: “you are present, we are unable to evict you, but you are not welcome”[16]. This restricted policy reflected the hesitance of European governments to recognise war-displaced individuals as Convention refugees and their concerns about the increase in asylum applications.

As the conflict escalated in Bosnia and Herzegovina throughout the mid-1990s, temporary protection transformed into a state of “reluctant acceptance”. Croatia, for example, provided temporary protection to almost 400,000 Bosnian refugees. [17]Thus, European governments established a rather standardised methodology, albeit functioning on a national rather than a coordinated European scale. Temporary protection has assumed a subordinate status relative to Convention refugee status, which continues to be rigorously confined to explicitly delineated circumstances.

The strategy for Bosnian refugees demonstrated a fundamental inclination to limit displacement near the area of origin. European governments suggested that displaced individuals “ought to have remained in their original locations or nearer to home,” frequently in allegedly “safe areas” that subsequently revealed themselves to be perilous, or in neighbouring non-EU countries. The Security Council was engaged during this period, adopting Resolution 752 in 1992[18] concerning the situation in Bosnia and Herzegovina, which indicated international apprehension but failed to implement coordinated protection measures.

Displaced individuals were subjected to a “legal limbo” as a result of the ad-hoc nature of these measures. During the Kosovo crisis, Amnesty International documented that Macedonia’s refusal to admit refugees without third-country

[15] Selm van, J. Temporary Protection for Ukrainians: learning the lessons of the 1990s? ASILE: Global Asylum Governance and the European Union’s Role. Forum on the EU Temporary Protection Responses to the Ukraine War . 22 April 2022. Available at: <https://www.asileproject.eu/temporary-protection-for-ukrainians-learning-the-lessons-of-the-1990s/>.

[16] Ibid.

[17] Womack H., Kapic J., Benic Belavic, K. UNHCR on Regional Housing Programme in Croatia: Refugees of 1990s conflicts come home to some comfort. Croatia, Zagreb. 2019. 28 March. Available at: <https://regionalhousingprogramme.org/unhcr-on-regional-housing-programme-in-croatia-refugees-of-1990s-conflicts-come-home-to-some-comfort/>

[18] Security Council resolution 752 (1992) [Bosnia and Herzegovina] Available at: <https://www.refworld.org/legal/resolution/unsc/1992/en/82248>

relocation agreements resulted in the displacement of thousands of individuals into transit shelters. These individuals were subjected to coercive evacuations and fragmented family reunification efforts.[19] These methods prioritised containment over dignity, with host countries such as the United Kingdom and Germany providing minimal rights under transitory statuses that prohibited access to asylum procedures.[20]

The war in Kosovo revealed the inadequacies of disjointed national responses. As NATO forces established camps in Macedonia, the host nations implemented diverse temporary protection measures. Australia confined evacuated refugees to military camps without employment rights, whereas Norway issued renewable residence permits but retained the authority to enforce repatriation after four years. The UK's "exceptional leave to remain" granted one year of residency but lacked clarity regarding long-term protection.[21] The amalgamation of these experiences and the insights gained from previous methods concerning Croatian and Bosnian refugees led to an increasing acknowledgement of the necessity for a more systematic, EU-level strategy.

Enacted in 2001, Council Directive 2001/55/EC introduces minimum standards for granting temporary protection during mass influxes of displaced persons and promotes equitable distribution of responsibilities among Member States in accommodating these individuals and managing the associated repercussions, thereby establishing a unified European framework for immediate and temporary protection in such scenarios.[22]

The Temporary Protection Directive (hereinafter, TPD) signified a new era in the comprehension of temporary protection. Rather than serving as a substitute for refugee status, as it did in the 1990s, it was designed to be "an administrative prelude to the application of the 1951 Refugee Convention." This represented a significant shift in temporary protection from a restrictive model to a complimentary one that could operate alongside traditional conventional asylum systems.

However, for more than two decades, the directive went largely unnoticed in the European Union, even amid major displacement crises like the migration crisis

19 Amnesty International. FYROM: The protection of Kosovo Albanian refugees. AI Index: EUR 65/03/99. Available at: <https://www.amnesty.org/ar/wp-content/uploads/2021/06/eur650031999en.pdf>.

20 Temporary Protection Germany 2023 Update. Available at: <https://asylumineurope.org/wp-content/uploads/2024/06/AIDA-DE_Temporary-Protection_2023.pdf>.

21 Ibid.

22 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Official Journal. 2001. L 212. 7.8., pp. 12–23 Available at: <https://eur-lex.europa.eu/eli/dir/2001/55/oj/eng>.

of 2015-16. This dormancy raised concerns regarding the directive's practical efficacy and political commitment to implement it. Several factors contributed to this lengthy implementation gap. The first reason was lack of political will. Despite displacement issues, it was commonly considered that the European Commission and Council lacked the political will to implement the provisions of the Directive. Secondly, the activation mechanism is quite complex. The directive can only be activated if proposed by the European Commission and agreed by the Council with a qualified majority vote. This procedural complexity made it unsuitable for use in urgent displacement occurrences. Moreover, many member states believed that their asylum systems could handle significant numbers of people without triggering the directive, depending on existing asylum procedures and EU institutional support rather than a temporary protection regime. Lastly, although the directive includes a system for sharing the reception load among member states, the lack of precise criteria or indicators to establish each state's capacity has produced implementation doubts and difficulties in administrative collaboration.

All Member States, apart from Denmark, which has an opt-out provision, were mandated to incorporate the Directive into national legislation. Ireland initially had an opt-out but subsequently opted in; however, by 2016, it had not achieved total transposition. Germany enacted the order under Section 24 of its Residence Act, which defined the status, exclusions, distribution regulations, and rights of protection applicants[23]. The UK included temporary protection measures into its immigration regulations (part 11A)[24], defining the grounds for the deployment of such protection. Nonetheless, in the absence of EU-level activation, these regulations remained mostly theoretical.

States favoured bilateral accords or ad-hoc solutions in the following crises. During the 2015 Syrian refugee flow, Germany circumvented the Temporary Protection Directive by citing national humanitarian provisions to accept over one million asylum applicants, apprehensive that the directive's redistribution mechanism would undermine political unity.

The EU's hesitation to activate the TPD was criticised by academics and non-governmental organisations, who said that its non-use resulted in fragmented reactions. For instance, the authors of the legal essay "Temporary protection in the European Union: a legal analysis"[25] point out that the EU has not used the Directive because of ambiguous definitions of "mass influx" and political

23 Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet . 30.07.2004. <https://www.gesetze-im-internet.de/aufenthg_2004/BJNR195010004.html>.

24 Immigration Rules archive 13 February 2025 – 17 February 2025. <https://assets.publishing.service.gov.uk/media/67b5c3e6b56d8b0856c2fec5/Immigration_Rules_-_Archive_13-02-25.pdf>.

25 Kortukova, T., Yemets, Y. Temporary protection in the European Union: legal analysis. *Legal Horizons*. 2024, vol. 21, no. 2, pp. 36-45. https://doi.org/10.54477/LH.25192353.2024.2. pp. 36–45.

resistance on the part of states to use it in previous crises. They highlight the structural issues and political will that underlie the immobility. Meltem Ineli-Ciger asserted that the directive's need for unanimous Council adoption resulted in an impasse, since nations such as Hungary and Poland opposed obligatory refugee quotas[26]. And Esin Küçük discussed that temporary protection for a long time was more theoretical than operational[27].

The Temporary Protection Directive was activated for the first time upon the Russian invasion of Ukraine on February 24, 2022, which resulted in an unprecedented displacement crisis in Europe. The European Commission proposed the activation of the directive on March 2, 2022, in response to requests from EU home affairs ministers. On March 4, 2022, the Council unanimously enacted the decision, which provides temporary protection to individuals who are escaping the conflict in Ukraine. This historic activation was a direct response to the significant volume of arrivals from Ukraine, which posed a clear risk of overloading national asylum systems and humanitarian catastrophe for Europe. Standard asylum processes, as designated by the European Commission, would likely be unable to process applications within the required deadlines, potentially jeopardising the rights of those seeking protection.

3. Legal Concept of Temporary Protection

There is no universal international legal instrument specifically related to temporary protection or an internationally recognized definition of it. Furthermore, this concept has acquired various meanings depending on the context and the involved state or institution.

The concept of "temporary protection" is usually used to refer to a prompt response to large flaws of refugees, which is defined as "mass influx". But as A. Edwards indicated, "temporary protection has also been applied in situations where it is difficult to distinguish between asylum seekers and others moving in mixed flows, as well as to broader categories of persons who fall outside the 1951 Refugee Convention definition of a 'refugee'[28]".

Considering the various approaches taken by scholars, it becomes evident that there are various terms used to define the same concept: 'temporary protection',

26 Ineli-Ciger, M. Towards Temporary Prolonged Protection? EU Migration Law Blog, June 10, 2025. Available at: <https://eumigrationlawblog.eu/towards-temporary-prolonged-protection/>

27 Küçük, E. Temporary Protection Directive: Testing New Frontiers? *European Journal of Migration and Law*. 2023, vol. 25., no. 1, pp. 1–30. https://doi.org/10.1163/15718166-12340142.

28 Edwards, A. Temporary Protection, Derogation and 1951 Refugee Convention. *Melbourne Journal of International Law*. 2012, vol. 13, pp. 5–6.

'temporary refuge', or 'temporary asylum'. At the beginning of the 1980s, the senior legal advisor of the UN Refugee Agency, G. J. Cole, considered this issue and gave preference to the term 'temporary refuge' in comparison to 'temporary asylum'. He contended that it prevents confusion with the term "asylum," which he acknowledges is not universally accepted, while also incorporating the concept of protection. He characterised 'temporary refuge' as protection defined by the principle of non-refoulement, granted to an individual and lasting temporarily until a permanent solution is secured.[29]

Edwards A. also refers to another scholar, J. F Hartman, who argued that a concept of temporary refuge exists in customary international law, even though it is not formally codified in a treaty, and made a compelling connection between 'temporary refuge' and the fundamental principle of refugee law known as non-refoulement, which protects civilian war victims from forced repatriation. J. F Hartman emphasized that the length of this 'temporary refuge' often mirrors the duration of the armed conflict, which can vary significantly. Excitingly, Hartman asserts that this concept has evolved into a customary international norm, backed by consistent practices in granting sanctuary to those affected by war. This practice reflects widespread acceptance and compassion. While Hartman focuses on the vital non-refoulement obligations, it's important to note that many contemporary temporary protection arrangements also emphasize the enjoyment of various rights, fostering a hopeful environment for those in need.[30]

According to A. Edwards, the terminology of temporary protection originated in the 1990s. The shift in terminology from 'refuge' to 'protection' seems to have aligned with the evolution of the concept of 'international protection' that occurred during this period. This change in concepts marked transit from an emphasis on 'diplomatic protection' to a more expansive notion of international protection, the latter encompassing human rights or surrogate protection. Likewise, temporary protection seems to extend beyond Coles' or Hartman's non-refoulement duty to further, restricted human rights.[31]

The 1994 "Note on International Protection", a critical annual document submitted by the UN High Commissioner for Refugees to the UN Executive Committee of the High Commissioner's Programme, summarised developments in the field of refugee protection and recommended methods to address the needs of persons of concern. The document also addressed the challenges posed by situations such as mass influx, highlighting the necessity to address the requirements of refugees beyond conventional definitions and underscoring the significance

[29] Coles, G. J. L. Temporary Refuge and the Large Scale Influx of Refugees. *Australian Year Book of International Law*. 1983, vol. 7, pp. 200–202.

[30] Ibid p. 6

[31] Ibid p.6

of international solidarity and equitable burden-sharing. Paragraph 45 of the Note endeavours to define 'temporary protection' as a mechanism for offering refuge to groups or categories of individuals acknowledged to require international protection during instances of mass outflow, without initially resorting to individual refugee status determination. It encompasses respect for fundamental human rights; however, as it is designed as a temporary emergency protection measure, a narrower scope of rights and benefits is provided initially compared to those typically granted to refugees under the 1951 Convention and the 1967 Protocol. Thus, the primary concerns in 1994 were "hopefully short duration," indicating a transitory character of temporary protection, and "limited range of rights and benefits" relative to asylum status.[32]

Then, later in 2001, refocusing on the inflow, the UNHCR reaffirmed its belief that temporary protection is best understood as a workable solution to urgent protection requirements during major influx events. It has been shown to be beneficial in guaranteeing protection against deportation and human rights-compliant basic minimum treatment without placing an undue burden on the processes involved in determining an individual's status. In this definition, the UNHCR allowed the suspension of the whole spectrum of Convention rights as well as the status determination processes, recognising that temporary protection may be provided to Convention refugees in emergency situations. However, the UNHCR has never explained the legal justification for such a suspension, as opposed to the humanitarian or practical one.[33]

The Temporary Protection Directive defines 'temporary protection' as a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.[34]

Taking into account these definitions, the main features of the temporary protection can be drawn:

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32 Note on international protection / submitted by the High Commissioner for Refugees. 1994. UN Doc A/AC.96/830. < https://digitallibrary.un.org/record/161945?ln=ru&v=pdf>.

33 Global Consultations on International Protection/Third Track: Protection of Refugees in Mass Influx Situations: Overall Protection Framework. 2001. UN Doc EC/GC/01/4. < https://www.refworld.org/policy/strategy/unhcr/2001/en/21073>.

34 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Official Journal. 2001. L 212. 7.8., pp. 12–23 . <https://eur-lex.europa.eu/eli/dir/2001/55/oj/eng>.

3.1. Group coverage

In comparison to the refugee and asylum status, which is provided individually, temporary protection is granted to the representatives of a certain nationality or group. Temporary protection is a type of group protection that minimizes the burden on the national asylum systems of receiving states, reducing the need for financial resources, time, and staff efforts.

If we examine the current models of temporary protection in the USA, the EU, and Turkey, we can see how this is implemented in practice.

In the United States, the Immigration Act (amended in 1990) specifies the details of "Temporary Protected Status" in Section 244[35]. This provision allows the Secretary of US Department of Homeland Security to designate countries whose nationals are eligible for temporary protected status based on ongoing conflict, environmental disasters, epidemics, or other extraordinary temporary conditions. To qualify for temporary protected status, an individual must be a national of a designated country, have maintained continuous presence in the U.S. since a specified date, and submit their application during the designated registration periods. As of September 2025, nationals from 14 countries were designated for temporary protected status in the USA, covering 1.2 million people, with Venezuelans being the largest group.

The 2021 United States Supreme Court case *Sanchez v. Mayorkas*[36] confirmed that temporary protected status was not equivalent to lawful admission into the country and only provided legal status for the purpose of remaining in the country. Consequently, immigrants who entered the country illegally but were granted temporary protected status are ineligible to petition for permanent resident status for the simple reason that they were granted temporary protected status.

In comparison to the US model, the Republic of Turkey's "Law on Foreigners and International Protection" (No. 6458) defines temporary protection in Art. 91 as follows: "Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country they left, and have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection." [37]

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[35] Immigration and Nationality Act of June 27, 1952; Chapter 477 of the 82nd Congress; 66 STAT. 163; 8 U.S.C. 1101 et seq.1] [As Amended Through P.L. 119–21, Enacted July 4, 2025. <https://www.govinfo.gov/content/pkg/COMPS-1376/pdf/COMPS-1376.pdf>

[36] *Sanchez v. Mayorkas*, 593 U. S. (2021) <https://supreme.justia.com/cases/federal/us/593/20-315/>

[37] The Republic of Turkey. Ministry of Interior. Directorate General of Migration Management. Law No. 6458 on Foreigners and International Protection of 2013. <https://www.refworld.org/legal/legislation/natlegbod/2016/en/114283.>

The Temporary Protection Regulation (Council of Ministers Decision No: 2014/6883) widens this definition, indicating in Art. 7 that temporary protection shall be granted to foreigners who were forced to leave their countries and are unable to return to the countries they left and arrived at or crossed Turkish borders in masses to seek urgent and temporary protection, and whose international protection requests cannot be taken under individual assessment. On the other hand, temporary protection shall not cover persons who arrived in Turkey from the country or region, where events constituting a basis for the temporary protection announcement take place, prior to the effective date of the temporary protection announcement, unless the Council of Ministers decides otherwise. Temporary protection shall not be also granted to individuals and temporary protection status shall be cancelled if there are reasons to believe that these persons have committed serious crime in their country of origin or in Turkey, took part in armed conflicts in his or her country and did not permanently ceased such activities, who are identified as having committed, planned to commit or participated in acts of terrorism or those who are considered to be a threat to public due to being convicted of a serious crime and those who are considered to pose danger to national security, public order, or public security etc. (Art. 8 of the Regulation)[38]. The decision on granting the temporary protection to specific group or nationals of specific states is made by the Council of Ministers of the Republic of Turkey.

As of April/May 2025, Turkey accommodates nearly 3.1 million registered Syrian refugees, in addition to approximately 1.1 million unregistered refugees, but these figures are subject to variation. The Turkish government projected over 2.7 million Syrians under temporary protection by early May 2025[39].

Unlike the US, where temporary protection is granted only to foreign nationals already present in US and is not intended to provide legal admission, Turkey offers this status to those who have "arrived at or crossed the borders of Turkey." As of today, all Syrians, Palestinian refugees, and stateless individuals who were residing in Syria throughout the civil war are eligible for temporary protection status in the Republic of Turkey.

In the European Union, the Council Implementing Decision (EU) 2022/382[40] of 4 March 2022 establishing the existence of a mass influx of displaced persons

[38] Temporary Protection Regulation (Council of Ministers Decision No: 2014/6883). <https://www.refworld.org/legal/decreees/natlegbod/2014/en/108062?prevPage=/node/108062.>

[39] Ferris, E. Syrian Refugees in Türkiye: Prospects for Return or Integration? *Rice University's Baker Institute for Public Policy Briefs*. April 22, 2025. Available online at: <https://www.bakerinstitute.org/research/syrian-refugees-turkiye-prospects-return-or-integration>.

[40] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive

from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection indicated the list of persons eligible for temporary protection (Art. 1 (1)). That included:

a) Ukrainian nationals residing in Ukraine before 24 February 2022;
b) stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and,
c) family members of the persons referred to in points (a) and (b).

In accordance with Art. 2 (2) of the Council Decision, temporary protection as outlined in Directive 2011/55/EC or adequate protection under the national laws of Member States shall be afforded to stateless individuals and nationals of third countries, excluding Ukraine, who can substantiate legal residence in Ukraine prior to 24 February 2022 through a valid permanent residence permit issued under Ukrainian law, and who are unable to return safely and sustainably to their country of origin (Art. 2 (2)).

Despite the apparent clarity of these provisions, during the initial weeks of the full-scale aggression, as 3 million persons from Ukraine began to arrive in EU Member States, it became evident that each Member State interpreted these provisions differently, resulting in significant discrepancies in the reception of displaced persons from Ukraine.

So, the European Commission was forced to adopt in March 22, 2022 the Operational guidelines for the implementation of the Council implementing Decision 2022/382[41]. The Commission selected certain matters on which it deemed it beneficial to offer assistance to Member States, based on enquiries on the implementation of the Council Decision and the Temporary Protection Directive. The guidelines addressed these concerns, including the scope (individuals included/excluded by the Council Decision, family members).

The categories of people mentioned in Art. 2 (1) and (2) were granted temporary protection due to the provisions of the Council Decision. Under national law, there is no application procedure for either temporary or sufficient protection. Therefore, the individual in question only needed to provide proof of nationality, international protection or equivalent protection status, residence in Ukraine, or a family connection as appropriate when presenting themselves to the authorities

2001/55/EC, and having the effect of introducing temporary protection < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022D0382.>

41 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2022_126_I_0001>

to be granted the rights associated with temporary protection or adequate protection. The entitlement to short-term protection was deemed to be instantaneous. However, the Member State could choose to meet specific conditions, such as completing a registration form and providing documentation as specified in the Council Decision, in order to guarantee appropriate administration and registration of the individual in question.

One of the goals of temporary protection is to minimise paperwork in order to guarantee a quick process. According to the Council Decision's recital 12, individuals who wished to take advantage of the protection should be able to demonstrate to the appropriate authorities in the Member State in question that they were entitled to either temporary or adequate protection under national law by presenting the necessary documentation. This could encompass documented proof that helped to verify identification and domicile, or to affirm familial relationships, unity, and reliance with close relatives.

Member States were encouraged to regard expired documents as evidence of the identity or residence status of the individual concerned. If Member States had concerns regarding the authenticity of the documents, or if the individual lacked the aforementioned documents, they were allowed to reach out to Ukrainian authorities within those Member States for assistance or to verify, if feasible, the individual's Ukrainian nationality or residence status in Ukraine.

In instances where an individual could not provide the necessary documentation and Member States were unable to quickly ascertain the individual's eligibility for temporary protection or adequate protection under national law, the Commission recommended redirecting the individual to the asylum procedure. Individuals asserting an inability to safely return to their country or region of origin, coupled with an overly complex process for determining eligibility for temporary or adequate protection under national law, should have been directed to the asylum procedure.

In order to maintain family unity and prevent divergent statuses among members of the same family, the Council Decision also applies to family members of individuals referred to in Art. 2 (1) (a) and (b) who had been already residing in Ukraine prior to February 24, 2022.

In accordance with the stipulations of the Guidelines and considering the 2014 Communication from the Commission to the European Parliament and the Council regarding the application of Directive 2003/86/EC on the right to family reunification[42], the following categories of individuals are recognised as family members for the purposes of the Council Decision:

[42] Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification. Brussels, 3.4.2014 COM(2014) 210 final. < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0210>.

a) the spouse of the individual receiving temporary protection, or the unmarried partner in a stable relationship, in cases where the relevant Member State's laws or customs treat unmarried couples similarly to married couples under its national law pertaining to foreign nationals; this can be demonstrated by pertinent registry documents and certificates, or by any other document issued by Ukrainian authorities, including attestations from the nation's representation in that Member State;
b) the minor unmarried children of the aforementioned individual, covered by temporary protection, or of their spouse, regardless of whether they were born in or out of wedlock or adopted, as evidenced by birth certificates or similar documentation;
c) other close relatives who resided together as part of the family unit during the circumstances surrounding the mass arrivals of displaced persons and were wholly or mainly dependent on the individual who was covered by temporary protection. This could be demonstrated through residence documents, family registers, and proof of relevant care payments. The margin of appreciation should be utilised in the most humanitarian manner by Member States.

The Commission emphasised that, in the event of stateless individuals and nationals of third countries other than Ukraine who could demonstrate that they had been legally residing in Ukraine prior to February 24, 2022, on the basis of a valid permanent residence permit issued in accordance with Ukrainian law and were unable to return to their country or region of origin in safe and durable conditions, their family members are not entitled to temporary protection or adequate national protection under the Council Decision. Although the Council Decision does not mandate that family members of individuals referred to in Art. 2 (2) receive temporary protection as outlined in Directive 2001/55/EC or adequate protection under the national law of the Member States, the Commission urged Member States to extend the application of temporary protection or adequate protection under national law to members of their families.

The Commission also indicated the group of individuals who are not entitled to the temporary protection. These are as follows:

– Ukrainian nationals resident in Ukraine who were displaced from the country before 24 February 2022, or who were outside Ukraine before that date due to employment, studies, vacations, family visits, medical reasons, or other circumstances;
– Stateless individuals or nationals from countries other than Ukraine, who were receiving international protection status or equivalent Ukrainian refugee protection in Ukraine prior to 24 February 2022, and who were displaced from Ukraine before that date, or who were outside Ukraine due to work, study, holidays, family, medical visits, or other reasons before that date.

– Stateless individuals and nationals from third countries, excluding Ukraine, who could demonstrate legal residence in Ukraine prior to 24 February 2022, based on a valid permanent residence permit issued in accordance with Ukrainian law, and who may be able to return safely and sustainably to their country or region of origin.

Member States may exclude a displaced individual from temporary protection if there are substantial grounds to believe that the individual has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the Member State of reception prior to their admission as a person entitled to temporary protection, or if the individual is convicted of actions that contravene the objectives and principles of the United Nations.

Member States may reject a displaced individual from temporary protection if there are justifiable reasons to consider that individual is a threat to the security of the host Member State or to its community. The Commission advised Member States to consult pertinent international, EU, and national databases, particularly the alerts regarding individuals and documents in the Schengen Information System (SIS), prior to granting residence permits to beneficiaries of temporary or adequate protection under national law, thereby facilitating essential security checks.

According to Eurostat data from 31 July 2025, 4.34 million non-EU citizens who fled Ukraine due to Russia's war of aggression were granted temporary protection in the EU. By the end of July 2025, the EU nations with the largest numbers of beneficiaries of temporary protection from Ukraine included Germany (1,203,715 individuals; 27.7% of the EU total), Poland (993,665; 22.9%), and the Czech Republic (380,680; 8.8%).

As of the end of July 2025, the ratio of individuals under temporary protection to the EU population was 9.6 per 1,000 individuals. The highest ratios among EU countries were recorded in the Czech Republic (34.9 per 1,000 people), followed by Poland (27.2) and Estonia (25.3).[43]

Taking into account all the above mentioned, we can conclude that there are several approaches currently existing in the world to deciding which groups of people may obtain temporary protection status. According to the US model, temporary protection status is provided to those foreign nationals who are already present within the US borders, and it does not envisage admission to the USA for those who are beyond American frontiers. As for the Turkish and EU model, it allows for the temporary protection to be granted to those who are at their borders but also to those who are already in Turkey and EU Member States.

[43] Temporary protection for persons fleeing Ukraine – monthly statistics (Data extracted on 5 September 2025). <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Temporary_protection_for_persons_fleeing_Ukraine_-_monthly_statistics.>

The specifics of the activation of the Temporary Protection Directive lie in the fact that displaced persons from Ukraine can be admitted to temporary protection based on the timeframe and country where this person was present or resided on the date of the start of full-scale aggression against Ukraine.

3.2. Exceptional character

Temporary protection is seen as very appealing to certain governments as it establishes a legal framework for swift responses in rare circumstances that may adversely impact the safety and security of the nations.

Situations to which temporary protection could be applied were delineated in the Discussion paper of the Roundtable on Temporary Protection, which was conducted by the UNHCR on July 19–20, 2012. These include humanitarian evacuation and emergency resettlement, as well as the context of natural disasters, sudden onset environmental disasters, and human-made disasters (e.g. nuclear accidents). Additionally, severe socio-economic deprivation accompanied by political instability (e.g. the economic situation (market collapse, high inflation) in conjunction with poor political and economic governance, conflict, and drought) are among the causes of flight. The Discussion paper explicitly stated that temporary protection is generally deemed inappropriate in situations that are rooted in long-standing conflicts or events and where the short-term return to the country of origin (or transition to alternative solutions) is unlikely.[44]

According to Section 244 of the US Immigration Act, the Secretary of the U.S. Department of Homeland Security can designate a foreign state for temporary protected status for its nationals under specific conditions: (A) If there is ongoing armed conflict in the state, making it unsafe for nationals to return; or (B) If the Secretary finds that: (i) An environmental disaster has caused substantial disruptions in living conditions; (ii) The state is temporarily unable to handle the return of its nationals; and (iii) The state has officially requested such designation; or (C) If extraordinary and temporary conditions prevent safe return, as long as allowing the nationals to remain is not against US national interest. This legislation clearly defines the grounds for granting temporary protection to nationals from specific states.[45]

44 Concept Paper. Roundtable on Temporary Protection. International Institute of Humanitarian Law, Italy. San Remo. 19-20 July 2012. < https://www.unhcr.org/uk/sites/uk/files/legacy-pdf/506d8ee49.pdf>.

45 Immigration and Nationality Act of June 27, 1952; Chapter 477 of the 82nd Congress; 66 STAT. 163; 8 U.S.C. 1101 et seq.1] [As Amended Through P. L. 119–21, Enacted July 4, 2025. <https://www.govinfo.gov/content/pkg/COMPS-1376/pdf/COMPS-1376.pdf>.

In Turkey, the existing legislation does not indicate certain circumstances that may require individuals to evacuate and seek temporary protection. The legislation in force stipulates that individuals must be those "who have been compelled to leave their country and cannot return to the country they have departed". Consequently, it can be inferred from this provision that the conditions in the applicants' country of origin must be unsafe for them to remain or return. The Council of Ministers of the Republic of Turkey shall have the authority to designate individuals eligible for temporary protection in its temporary protection decision (Art.10).[46]

The EU's Temporary Protection encompasses a list of circumstances that may compel the Council of the European Union to invoke the Directive. Art. 2 stipulates the definitions of language pertinent to this legal act. "Displaced persons" refers to third-country nationals or stateless individuals compelled to leave their country or region of origin, or who have been evacuated, particularly in response to requests from international organisations. They are unable to return safely and sustainably due to the prevailing conditions in their home country and may be covered under Art. 1A of the Geneva Refugee Convention or other international or national frameworks providing international protection. This includes: (i) individuals fleeing areas of armed conflict or endemic violence; or (ii) individuals at significant risk of, or who have suffered from, systematic or widespread violations of their human rights. Ultimately, the decision about the scenario that may prompt the Council of the EU to invoke the Directive's provisions is contingent exclusively upon a proposal from the European Commission and a unanimous majority within the Council.[47]

As previously stated, despite the Directive's adoption in 2001, it remained inactive until March 2022. Proposals to activate the Directive during the 2015 Migration Crisis were not executed by the Commission and were never subjected to a vote in the Council. The Council Division enacted in 2022 faced criticism for its perceived double standards for displaced individuals from Syria, Iraq, and Afghanistan[48]. In order to substantiate the actions of the Commission and

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[46] Temporary Protection Regulation (Council of Ministers Decision No: 2014/6883). <https://www.refworld.org/legal/decreees/natlegbod/2014/en/108062?prevPage=/node/108062.>.

[47] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Official Journal. 2001. L 212. 7.8., pp. 12–23 . <https://eur-lex.europa.eu/eli/dir/2001/55/oj/eng>.

[48] CARRERA, S., INELI CIGER, M., VOSYLIUTE L., BRUMAT, L. The EU grants temporary protection for people fleeing war in Ukraine. Time to rethink unequal solidarity in EU asylum policy. *asileproject.eu*, March 2022. Available at: <https://www.asileproject.eu/suleyman-demirel-university-3/>

the Council's decision, it is important to recall that the EU Member States in the western region of Ukraine were the closest safe havens for Ukrainian displaced persons to evacuate when the full-scale war in Ukraine finally broke out. On the other hand, the Russian Federation and Belarus, which instigated this aggression against Ukraine, are located on the eastern and northern borders of Ukraine. The majority of Ukrainian exiled individuals were unwilling to voluntarily travel to the countries that had sparked hostilities against their homeland.

3.3. Mass influx of displaced persons

The definitions of the terms "mass influx" and "imminent mass influx" were addressed by the international community starting from the 1980s.

But firstly, the issue of "massive exoduses" was considered as the concept interconnected with the mass influx. In 1981 the UN Commission on Human Rights prepared the Study on Human Rights and Massive Exoduses[49] where the Special Rapporteur of the Commission Sadruddin Aga Khan indicated that the choice of terminology can lead to misunderstanding, and nomenclatural issues have hindered comprehension of the mass migration phenomena. In order to produce the appropriate definition in the meaning of its study, he applied several criteria:

i. "In *quantitative terms*, if the number of persons leaving is very high in relation to the country of origin or the country of asylum. It is difficult to establish a percentage vis-à-vis the national populations, since the size of the two (or more, in the case of there being more than one country of asylum) is bound to be different, just as the loss of manpower of the one or absorptive capacity of the other is bound to be at variance. … it will be seen that some of the situations selected have involved a loss of population amounting to more than a quarter of the national population. However, a flow of even one per cent or less in a country with, say, 40 or 50 million people could well constitute a mass influx for a receiving country.
ii. In *qualitative terms*, a situation may be considered one of mass exodus despite the number of people leaving being relatively low, if they should belong to a particular minority, such as a religious or ethnic group. If events or circumstances prevailing in a given country and affecting in particular a certain minority or group leads to the departure of a high proportion of them, this could be qualified as a mass exodus."[50].

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49 Commission on Human Rights. Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories: Study on Human Rights and Massive Exoduses. E/OT.4/150. 1981. 69 P. <https://docs.un.org/en/E/CN.4/1503.>

50 Ibid, p. 17.

This approach was applied in 1983 by the UN Economic and Social Committee in its Report to the UN Secretary General “Human Rights and Mass Exoduses”[51] where the term “mass influx” was also applied regarding the receiving states. This resulted in the UN General Assembly adopting its resolutions on December 4, 1986 (44/148)[52] and December 15, 1989 (44/164)[53] “Human Rights and Mass Exoduces” where it urged the Commision on Human Rights to continue to consider the issues of mass influxes and exoduses and their consequences for the human rights protection.

However, in 2004 Executive Committee of the High Commissioner’s Programme as the governing body of the UNHCR (ExCom) noted in its Conclusion No. 100 (LV): International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations “that mass influx is a phenomenon that has not been defined, but … mass influx situations may, inter alia, have some or all of the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.”[54].

Moreover, the UNHCR emphasised in the 2000 Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx that the notion of a “mass or large-scale influx” cannot be absolute; it must be contextualised according to the resources of the host nation. The term denotes a substantial influx of individuals from the same nation into a country within a brief timeframe, who have been displaced under conditions suggesting that they are eligible for international protection, and for whom, due to their volume, individual refugee status determination is procedurally unfeasible[55].

It is evident that the primary criterion for defining a *“mass influx”* should be the recipient state’s ability to accommodate the number of displaced persons and asylum seekers. This is why it is unnecessary to establish specific figures, as this

[51] UN Economic and Social Committee. Report to the UN Secretary General. “Human Rights and Mass Exoduses”. A/38/538. 1983. 21 p. < https://digitallibrary.un.org/record/57285/files/A_38_538-EN.pdf.>

[52] Resolution 44/148 “Human Rights and Mass Exoduses”, 9th plenary meeting, 4 December 1986. <http://www.worldlii.org/int/other/UNGA/1986/196.pdf.>

[53] Resolution 44/148 “Human Rights and Mass Exoduses”, 82nd plenary meeting, 15 December 1989. <https://docs.un.org/en/A/RES/44/164.>

[54] Conclusion No. 100 (LV): International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations – Adopted by the Executive Committee (2004). <https://www.refworld.org/policy/exconc/excom/2004/en/42049.>

[55] UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx (2000). <https://www.refworld.org/legal/intlegcomments/unhcr/2000/en/35448.>

could potentially impede the states from activating the temporary protection if the circumstance is not representative of a mass influx. The UNHCR also determined that "in large-scale situations on a group basis," it is still feasible to implement asylum procedures in accordance with the 1951 Convention, provided that the states can accommodate the volume of refugee claimants who arrive at their frontiers[56].

The EU Temporary Protection Directive defines "*mass influx*" as "arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example, through an evacuation programme".[57]

In 2022, when Russia launched a massive invasion of Ukraine, the Council of the EU, in its Implementing decision, concluded that more than 650,000 displaced persons had entered the Union from Ukraine via Poland, Slovakia, Hungary, and Romania as of March 1, 2022. It was anticipated that those figures would rise. The Council assumed that the Union would be confronted with a significant number of displaced persons, potentially between 2.5 million and 6.5 million, as a result of the armed conflict, depending on the course of the conflict. It was anticipated that between 1.2 million and 3.2 million of these individuals would have sought international protection. At that time, UNHCR estimated that, in the worst-case scenario, up to four million individuals could have fled Ukraine. The data indicated that the Union was confronting a scenario marked by a substantial influx of displaced individuals from Ukraine, who were unable to return to their homeland due to the Russian military assault. The magnitude of the influx would likely pose a significant risk that the asylum systems of the Member States would be unable to process the arrivals without detrimental effects on their operational efficiency and the interests of both the individuals involved and others seeking protection. The Council concluded that "the existence of a mass influx into the Union of displaced persons who have had to leave Ukraine as a consequence of an armed conflict is hereby established" (Art. 1)[58] and activated the Temporary Protection Directive based on the aforementioned. The choice to implement

[56] Global Consultations on International Protection/Third Track: Protection of Refugees in Mass Influx Situations: Overall Protection Framework. EC/GC/01/4. (2001). <https://www.refworld.org/policy/strategy/unhcr/2001/en/21073.>

[57] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Official Journal. 2001. L 212. 7.8., pp. 12–23 . <https://eur-lex.europa.eu/eli/dir/2001/55/oj/eng>.

[58] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection // https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022D0382.

proved prescient, as about 4.4 million Ukrainian migrants entered the European Union and neighbouring European countries during the opening three months of the full-scale war against Ukraine (from late February to late May 2022).

This significant displacement became one of the most extensive and rapid refugee migrations in the history of contemporary Europe.

3.4. Limited time

The term "temporary protection" suggests that it is not permanent and should be restricted in time. The UNHCR framework emphasises that temporary protection must be both flexible and time-limited in order to immediately address crises, providing fundamental rights and protection during an emergency phase, and "it is considered generally inappropriate in situations that have their roots in long-standing conflicts or events and where return to the country of origin (or transition to other solutions) is not likely in the short-term[59].

The Discussion Paper of the Roundtable on Temporary Protection conducted by the UNHCR in 2012 provided that "temporary protection is return-oriented and not seen as a long-term commitment" and indicated that various methods exist for determining the parameters of temporary protection. The initial step might involve establishing a preliminary timescale, subject to extension if necessary. An alternative approach is to refrain from stipulating a minimum length of stay, allowing States to exercise discretion based on the prevailing circumstances (for instance, the Libya crisis did not inherently necessitate a one-year stay, as numerous individuals were swiftly evacuated or returned shortly after hostilities ceased). However, maximum restrictions should be established to facilitate individuals' transition to other alternatives. The duration of these constraints varies from three to five years.[60]

There are two options when temporary protection ends: termination or expiration. Termination would tie the end of temporary protection to the achievement of objective requirements in the country of origin, whereas expiration would connect the end of temporary protection to the expiration of the specified period of stay. Regarding the latter, a "maximalist approach" would be to utilise the same criteria as those envisioned in the 1951 Convention's "ceased circumstances" sections (Article 1C). A "minimalist approach" can just call for a shift to alternative arrangements and solutions (see VII) or a change in circumstances that permit a return to safety and dignity. When termination is scheduled before

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[59] UNHCR, Expert Meeting on International Cooperation to Share Burden and Responsibilities, 27-28 June 2011, Amman, Jordan: Summary Conclusions, Annex 1, paragh. 5, p. 8. <https://www.refworld.org/en/download/83174.>

[60] Concept Paper. Roundtable on Temporary Protection. International Institute of Humanitarian Law, Italy. San Remo. 19–20 July 2012. < https://www.unhcr.org/uk/sites/uk/files/legacy-pdf/506d8ee49.pdf>.

the agreed period of stay expires, the latter may need to enlist an independent decision-making body or arrangement to make this conclusion. Beneficiaries of temporary protection should be permitted to request judicial review of the decision in question if the termination decision is an administrative decision.[61]

The drafters of the Discussion paper assert that, despite the widespread belief that temporary protection is of brief duration, it is a violation of international law for an individual to be returned to an unsafe location or to pursue a return if it is not feasible or respectful (e.g., if the individual would be required to traverse perilous territory). These factors may not be applicable to the group as a whole, and a fixed end of transitory protection is unable to account for them. Objective criteria, on the other hand, may be more suitable for this purpose. It is also not advisable to have an open-ended status, as one of the primary benefits of granting temporary protection is that it is time-limited. This prevents States from perceiving it as a pathway to permanent migration or asylum, thereby diminishing its appeal. Concurrently, there will be circumstances that necessitate transitioning to alternative statuses. A dual approach was recommended, in which maximal limits are established, but any early termination would necessitate justification based on objective criteria, subject to independent review. However, the attainment of utmost limits does not necessarily indicate a return; it may also indicate a transition to alternative solutions or statuses. The prohibition on refoulement must always be adhered to.[62]

The 2014 UNHCR Guidelines on Temporary Protection or Stay Arrangements (TPSAs) specifically provide that TPSA's are time-limited. Accordingly, "temporary protection/stay ends when:

a. it is determined – on the basis of an objective assessment based on clear indications, that the situation causing the displacement has ended, and voluntary return is reasonable and can be carried out in safety and dignity;
b. the TPSA has been replaced by another form of protection, including transition to refugee status, as appropriate;
c. an individual has transitioned to an alternative status (including, for example, residency status, work visa, or another migration status); or
d. an individual has been admitted to a third State on a humanitarian basis or through resettlement.

The decision to end the applicability of a TPSA overall would need to be taken, preferably collectively, by all relevant States, to prevent onward movements caused by the premature ending of stay in one country"[63].

[61] Ibid.
[62] Ibid.
[63] UNHCR Guidelines on Temporary Protection or Stay Arrangements (2014) <https://emergency.unhcr.org/sites/default/files/Guidelines%20on%20Temporary%20Protection%20or%20Stay%20Arrangements%2C%20February%202014.pdf.>

Pursuant to the provisions of the Art. 4 of the EU Temporary Protection Directive the temporary protection shall last for 1 year. It may automatically be renewed by six monthly periods for a maximum of one year unless discontinued early. The Council may extend temporary protection by up to one year upon a proposal from the Commission, which shall also evaluate any request from a Member State to submit a proposal to the Council, if the reasons for temporary protection persist. This decision will be made by qualified majority.[64]

According to Art. 6 of the Directive temporary protection ends when the maximum duration has been reached; or at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council. The Council Decision will be predicated on the determination that conditions in the country of origin allow for the secure and sustainable repatriation of individuals granted temporary protection, while upholding human rights, fundamental freedoms, and Member States' non-refoulement obligations. The European Parliament shall be notified of the Council Decision.[65]

As mentioned above, on March 4, 2022, Council Implementing Decision (EU) 2022/382[66] formally activated the Temporary Protection Directive. It was initially in effect for a year, ending on March 4, 2023, and was then automatically extended for another year, ending on March 4, 2024. Temporary protection was extended until March 4, 2025, by Council Implementing Decision (EU) 2023/2409[67]. Finally, temporary protection was extended for an additional year, until March 4, 2026, by Council Implementing Decision (EU) 2024/1836[68]. On July 15, 2025, the Council of the European Union adopted its new decision[69]

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64 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Official Journal. 2001. L 212. 7.8., pp. 12–23 . <https://eur-lex.europa.eu/eli/dir/2001/55/oj/eng>.

65 Ibid.

66 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection. <https://eur-lex.europa.eu/eli/dec_impl/2022/382/oj/eng.>

67 Council Implementing Decision (EU) 2023/2409 of 19 October 2023 extending temporary protection as introduced by Implementing Decision (EU) 2022/382. <https://eur-lex.europa.eu/eli/dec_impl/2023/2409/oj/eng.>

68 Council Implementing Decision (EU) 2024/1836 of 25 June 2024 extending temporary protection as introduced by Implementing Decision (EU) 2022/382. <https://eur-lex.europa.eu/eli/dec_impl/2024/1836/oj/eng.>

69 Council Implementing Decision (EU) 2025/1460 of 15 July 2025 extending the temporary protection introduced by Implementing Decision (EU) 2022/382. < https://eur-lex.europa.eu/eli/dec_impl/2025/1460/oj/eng.>

extending the regulation on temporary protection for Ukrainians in the European Union until March 4, 2027.

The temporary protected status is now scheduled to end in 2027, despite the Directive's original design as a short- to medium-term emergency solution.

The Commission stated that the proposal to extend protection until March 2027 was completely compliant with the EU asylum law, as the Temporary Protection Directive is an important pillar of the Common European Asylum System. The extension was justified by the Commission on four grounds: the need to protect those who continue to require protection, the risk of overwhelming asylum systems if temporary protection is abruptly terminated, the persistence of the original conditions that triggered the Directive's activation in 2022, and the ongoing hostilities in Ukraine. Nevertheless, academics like M. Ineli Ciger and S. Peers heavily criticize this Decision. For instance, M. Ineli Ciger argued that Art. 4 (2) does not provide the Commission and the Council with the legal basis to extend the temporary protection to displaced persons for more that 3 years[70] what may undermine the legality of the temporary protection status of displaced persons from Ukraine and sets dangerous and undesirable precedent of "temporary" becoming long-term or permanent without appropriate legal background and is contrary to the obligations of all EU Member States according to the 1951 Refugee Convention[71].

But the case of Syrian refugees in Turkey is proof that temporary protection can be granted on a long-term basis. As mentioned above, according to the Turkish Government, over 2.7 million Syrians still have an active temporary protection status. However, the process has become more restrictive, with a decrease in the number of new registrations and apprehensions regarding the arbitrary deactivation of statuses. With a few exceptions (family reunion, therapeutic access, work permit, vulnerable groups), no new temporary protection registrations have been granted since 2022[72]. Therefore, the circumstances in Turkey demonstrate that "temporary protection" may be extended for a long period – for more than 15 years.

[70] Ineli-Ciger, M. Towards Temporary Prolonged Protection? Eumigrationlawblog, June 10, 2025. Available at: https://eumigrationlawblog.eu/towards-temporary-prolonged-protection/.

[71] Ineli-Ciger, M. Legal landmine: the risky proposition of extending the application of the EU Temporary Protection Directive beyond March 2025. *Eulawanalysis*. May 31, 2024) Available at: <https://eulawanalysis.blogspot.com/2024/05/legal-landmine-risky-proposition-of.html.>.

[72] Overview of main changes since the previous report update – Türkiye. (29/07/2025). <https://asylumineurope.org/reports/country/turkiye/overview-main-changes-previous-report-update/.>

3.5. 'Open borders' policy

The open border policy is the general rule for temporary protection, which applies to the decisions of the recipient states to permit the admission of displaced persons to their territory while simultaneously eliminating the majority of restrictions during border control. This may encompass simplified visa and entry procedures for individuals who require protection.

The approaches to open border policy currently existing globally are very different.

For instance, the US, while providing temporary protection status, is not a country with an open border policy; however, it offers procedures for credible fear interviews and asylum applications to assist asylum seekers and other individuals who are escaping peril[73].

Conversely, Turkey, despite often not awarding refugee status to asylum seekers from outside Europe, has implemented an open-door policy for refugees entering from Syria since 2011. Initially, all Syrian nationals, stateless persons, and refugees who entered Turkey, whether individually or as part of a large inflow due to armed conflict in Syria, were granted entrance without visas or further authorisations. However, subsequent to 2016, Turkey began requiring visas from Syrians entering the country by air or sea from a third nation[74]. Discriminatory methods were developed wherein persons arriving straight from Syria by land are permitted admission without authorization, but those arriving from third countries are entirely prohibited from temporary refuge[75]. Over the past decade, Turkey has been compelled many times to block its border with Syria to manage the substantial influx of displaced individuals from Syria.

As for the European Union, the Council implementation decision which activated the Directive 2001/55 mentions that Ukraine is listed in the Annex II of the Regulation 2018/1806 as s third country whose citizens are exempt from visa requirements[76].

Ukrainian nationals possessing biometric passports are exempt from the short-stay visa requirement for entry into the Union and are entitled to unrestricted

[73] American Immigration Council. Asylum in the United States. Fact Sheet. May 2025. <https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/05/asylum_in_the_united_states_may_2025.pdf.>.

[74] Ineli-Ciger, M. A Temporary Protection Regime in Line with International Law: Utopia or Real Possibility? *International Community Law Review*. 2016, vol. 18, no. 3–4, pp. 278–316.

[75] European Council on Refugees and Exile. Country Report: Turkey. July 2025. <https://asylumineurope.org/reports/country/turkiye/>

[76] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 303, 28.11.2018, p. 39).

movement within the Schengen area for a duration of 90 days within a 180-day timeframe following their admission into the territory. Consequently, individuals could go to the Member State where they chose to use the rights associated with temporary protection and reunite with their family and friends within the extensive Ukrainian diaspora networks already present throughout the Union.

According to the European Commission Guidelines at the beginning of war Ukrainian national could enter the EU territory holding one of the following documents even if the period of validity expired: passports of any kind (national passports, diplomatic passports, service passports, collective passports and surrogate passports including children's passports); national identity cards (including temporary and provisional); military service books and military service cards; citizenship certificates; and other official documents that mention or indicate citizenship. As for the individuals who were entitled to temporary protection or adequate protection under national law and were not visa exempt (e.g., due to the absence of a biometric passport) and did not possess a short-stay visa, long-stay visa, or residence permit issued by a Member State, that in accordance with Article 8(3) of Directive 2001/55/EC, Member States were required to provide all necessary facilities for the acquisition of visas, including transit visas, in order to be admitted to their territories. Due to the urgency of the circumstance, formalities had to be minimised. If an individual wished to exercise their rights in a Member State other than the initial entry point, the Commission advised that the initial Member State had to issue a visa at the border crossing or an inland location to mitigate congestion, valid for 15 days, in accordance with Article 35(3) of the Visa Code. This would have enabled the individual in question to traverse the Schengen region. Visas granted at the border or near border crossing points pursuant to Art. 35 of the Visa Code, valid for 15 days, could be subsequently extended if necessary (Art. 33 of the Visa Code). Information pertaining to the application and issue of the visa should have been recorded in the Visa Information System (VIS) in accordance with relevant regulations. The Commission advised that visas should be complimentary, or their fees minimised[77].

Stateless individuals and nationals from countries other than Ukraine, who can demonstrate legal residency in Ukraine prior to 24 February 2022 through a valid permanent residence permit (e.g., family members), were also permitted to cross EU borders and receive temporary protection.

[77] Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2022_126_I_0001>

The Commission advised that Member States refrain from imposing financial penalties on carriers transporting individuals eligible for temporary protection or sufficient national protection from another Member State, who lacked the necessary documentation for entry into the destination Member State. This also concerned airlines. In instances where the individual lacked a valid travel document, the Commission advised the adoption of the model transfer form. This form allowed the Member State of first entry to specify the Member State to which the individual intended to travel in order to access the rights associated with temporary protection.

Upon the issuance of a residence permit by a Member State in line with Art. 8 of Directive 2001/55/EC, the individual granted temporary protection is entitled to travel to other Member States for a duration of 90 days within a 180-day timeframe.

Such derogations from the general provisions for Ukrainians entering the territory of the EU Member States were cancelled when the mass influx of individuals on the borders returned to the pre-war numbers. As of 2025, all Ukrainian nationals must possess a valid biometric travel passport in order to travel visa-free in the EU or apply for an appropriate type of visa.

3.6. Policy of non-refoulment

The concept of non-refoulement is a key tenet incorporated in several global international treaties and legal practices. This principle prohibits States from repatriating displaced individuals to their countries of origin or other nations where they may encounter threats to their life, torture, or severe human rights abuses, such as harsh, inhuman, or degrading treatment or persecution, or where there is a risk of it[78]. Human rights jurisprudence elucidates that the principle of non-refoulement necessitates states to evaluate the impact of return procedures on the medical condition[79] and overall health situation of individuals[80], including mental health[81], in addition to prohibiting ill-treatment and torture[82].

[78] United Nations Network on Migration. The principle of non-refoulement under international human rights law. <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

[79] ECtHR Grand Chamber judgement. Case of Paposhvili v. Belgium. Application no. 41738/10. <https://hudoc.echr.coe.int/fre?i=001-169662.>

[80] Judgment of the Court (Grand Chamber), 18 December 2014. Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida. Case C562/13. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0562.>

[81] ECtHR Grand Chamber judgement. Case of Savran v. Denmark. Application no. 57467/15. <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-214330%22]}.>

[82] ECtHR Grand Chamber judgement. Case of Saadi v. Italy. Application no. 37201/06. 28.02.2008. <https://hudoc.echr.coe.int/fre?i=001-85276.>

In addition, the principle of non-refoulement prohibits states from deporting individuals when there is a risk of human rights violations, such as protracted solitary confinement[83], degrading living conditions[84], and severe forms of gender-based violence[85].

This policy applies universally to all persons, irrespective of their migratory or refugee status, and is an unequivocal, non-derogable responsibility under international human rights, refugee, and humanitarian law.

The concept of non-refoulement is articulated, among other provisions, in Art. 33 (1) of the 1951 Convention pertaining to the Status of Refugees and its 1967 Protocol. Reservations to Art. 33 of the 1951 Convention or any other non-refoulement provisions under international law are not allowed. Moreover, States are prohibited from suspending the application of the principle of non-refoulement during periods of war or national emergency. Article 33(2) of the 1951 Convention permits two specific exceptions to the norm of non-refoulement: when there are reasonable grounds to consider the refugee a danger to the national security of the host country and if the individual was convicted by a final judgement of a particularly serious crime and constitutes a danger to the community of the country of origin. Nonetheless, non-refoulement responsibilities under international human rights law remain applicable without exception.[86]

The United States acknowledges and incorporates the concept of non-refoulement into its domestic immigration and refugee legislation, chiefly via the 1967 Protocol Relating to the Status of Refugees, approved by the US in 1968. This inclusion signifies that the US is compelled to refrain from repatriating persons to nations where they encounter dangers to their life or liberty due to persecution, as delineated by international refugee law.

Although the US Immigration and Nationality Act does not explicitly incorporate the non-refoulement principle for temporary protected status, Section 244(a)(1)(A) clearly states that “the Secretary of the Department of Homeland Security, in accordance with this section – (A) may grant the alien temporary protected status in the United States and shall not remove the alien from the United

[83] UN Human Rights Committee (HRC). CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment). <https://www.refworld.org/legal/general/hrc/1992/en/11086.>

[84] ECtHR Grand Chamber judgement. Case of M.S.S. v. Belgium and Greece. Application no. 30696/09. 21. 1. 2011. <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-103050%22]}.>

[85] UN Committee on the Elimination of Discrimination against Women. General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women. 5.11.2014. <https://www.refworld.org/legal/general/cedaw/2014/en/102146>

[86] UNGCR Emergency Handbook. Access to territory and non-refoulement. <https://emergency.unhcr.org/protection/legal-framework/access-territory-and-non-refoulement.>

States during the period in which such status is in effect."[87] Thus, individuals having temporary protected status must not be removed or deported from the United States where their return would pose a danger to their safety.

In practice, non-refoulement protections are implemented via the delay of removal processes. Asylum applicants and individuals with temporary protection must establish a credible fear of persecution to be eligible for protection from deportation. The delaying of removal requires a more stringent level of evidence but guarantees protection from deportation. Nevertheless, recent US policies, particularly during the first and second Trump presidential terms, imposed constraints that hindered the execution of non-refoulement. [88] Policies prohibiting asylum claims for individuals traversing between ports of entry, mandating that asylum seekers remain in Mexico during the adjudication process (the Migrant Protection Protocols), and imposing limitations on third-country asylum claims have incited legal challenges centred on adherence to non-refoulement obligations.[89] Judicial bodies have examined these policies for conformity with international law, occasionally recognising the nation's obligations and at other times granting injunctions against enforcement actions considered inadequate in safeguarding against refoulement.[90]

In Turkey the Law on Foreigners and International Protection in Art. 4 explicitly recognizes the principle of non-refoulement: "No one … shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion"[91]. Prof. Elin Esen discusses that, differently from the 1951 Convention, under Article 4, the principle of non-refoulement not only covers refugees but also others who enjoy international protection, and other

87 Immigration and Nationality Act of June 27, 1952; Chapter 477 of the 82nd Congress; 66 STAT. 163; 8 U.S.C. 1101 et seq.1] [As Amended Through P. L. 119–21, Enacted July 4, 2025 <https://www.govinfo.gov/content/pkg/COMPS-1376/pdf/COMPS-1376.pdf>

88 Ramji-Nogales J. Non-Refoulement under the Trump Administration.. / American Society of International Law Insights. 2019. Volume 23. Issue 1**1**. 3. 12. 2019. <https://www.asil.org/insights/volume/23/issue/11/non-refoulement-under-trump-administration.>

89 Luquerna, A. Biden's Proposed Asylum Policy does not Fulfill U.S. Treaty Obligations. *Opinio Juris*. March 22, 2023. Available at: <https://opiniojuris.org/2023/03/22/bidens-proposed-asylum-policy-does-not-fulfill-u-s-treaty-obligations/.>

90 Baker, K. Revival of Measures to Expel Asylum-Seekers from the United States: Implications for Non-Refoulement Obligations. *Oxford Human Rights Hub*. August 25, 2025. Available at: <https://ohrh.law.ox.ac.uk/revival-of-measures-to-expel-asylum-seekers-from-the-united-states-implications-for-non-refoulement-obligations/.>

91 The Republic of Turkey. Ministry of Interior. Directorate General of Migration Management. Law No. 6458 on Foreigners and International Protection of 2013. // https://www.refworld.org/legal/legislation/natlegbod/2016/en/114283.

aliens who entered into Turkey legally or illegally. Yet, in contrast to the 1951 Convention, Art. 4 does not stipulate any exception clause. Accordingly, this provision is consistent with the standards set by the European Court of Human Rights. She stipulates that the Turkish legislation establishes certain rules regarding the exclusion of expatriates from deportation and the deportation process. Art. 55 specifies the categories of foreigners who will not be deported. These categories include those who are at risk of being subjected to the death penalty, torture, cruel or degrading treatment or punishment in the country to which they will be deported, who are unable to continue treatment for a life-threatening health problem in the country to which they will be deported, who are victims of human trafficking and are receiving victim support, or who are currently being treated as victims of psychological, physical, or sexual violence. [92]

Persons who have been granted temporary protection in Turkey are guaranteed protection against refoulement under Art. 6 of the Temporary Protection Regulation.

An exemption was established by Emergency decree in 2016[93] and formalised by Law No. 7070 in 2018, permitting the deportation of temporarily protected individuals if they threaten public order, public health, or have affiliations with terrorist organisations[94]. Certain exceptions essentially authorise the deportation of asylum seekers, recipients of international protection, and beneficiaries of temporary protection, provided they meet certain criteria. The Decree significantly eliminates the automatic suspensive impact of appeals concerning deportation judgments, allowing removal to occur even while appeals are unresolved. Judicial redress generally involves filing petitions with the Constitutional Court, which frequently issues temporary measures to suspend deportations and enforce non-refoulement protections in practice.[95]

In the European Union the principle of non-refoulement is enshrined in Art. 78 (1) TFEU which stipulates: "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must

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92 Esen, S. The Principle of Non-Refoulement as a Constitutional Right of Asylum Seekers in Turkey, *VerfBlog,* 2016/7/26, <https://verfassungsblog.de/the-principle-of-non-refoulement-as-a-constitutional-eight-of-asylum-seekers-in-turkey/>, DOI: 10.17176/20160802-094330.

93 Emergency Decree 676 of 29 October 2016. // https://www.resmigazete.gov.tr/eskiler/2016/10/20161029-5.htm.

94 Zoeteweij, M. The State of Emergency, Non-Refoulement and the Turkish Constitutional Court, *VerfBlog*, 2018/5/09. <https://verfassungsblog.de/the-state-of-emergency-non-refoulement-and-the-turkish-constitutional-court/, DOI: 10.17176/20180509-084012.>

95 Turkey: Constitutional Court Pilot Judgment on Protection from Refoulement.. // ECRE Weekly Bulletin. 26. 10. 2018. <https://mailchi.mp/ecre/ecre-weekly-bulletin-26102018.>

be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.” [96] Art. 19 (2) of the Charter of Fundamental Rights of the European Union provides that “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”[97]

In Art. 3 (2) of the 2001 Temporary Protection Directive, it is mandated that Member States must implement temporary protection in a manner that is consistent with their obligations regarding non-refoulement and human rights and fundamental freedoms. It also provides that termination of the temporary protection by Council Decision “based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of those granted temporary protection with due respect for human rights and fundamental freedoms and Member States’ obligations regarding non-refoulement”.[98]

The concept of returning to the country or region of origin in safe and durable conditions is not specified in Directive 2001/55/EC or in the Council Decision. The Commission regarded it as a unique concept in the Directive.

Furthermore, Art. 6 (2) of Directive 2001/55/EC stipulates that the cessation of temporary protection is contingent upon conditions in the beneficiaries’ country of origin that allow for a safe and sustainable return, while ensuring adherence to human rights, fundamental freedoms, and the obligations of Member States concerning non-refoulement.

The inability to ‘return in safe conditions’ may arise from significant risks to the individual’s safety, including armed conflict, endemic violence, documented threats of persecution, or other forms of inhuman or degrading treatment or punishment.

For the return to be considered ‘durable’, the individual must be able to exercise active rights in their country or region of origin, ensuring that basic needs can be met and facilitating reintegration into society.

Member States should assess the return’s safety and durability based on the overall conditions in the country or region of origin. However, the individual must demonstrate prima facie evidence at the personal level indicating an

[96] Consolidated text: Consolidated version of the Treaty on European Union. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016M%2FTXT-20200301.>

[97] Charter of Fundamental Rights of the European Union. <https://eur-lex.europa.eu/eli/treaty/char_2012/oj/eng.>

[98] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Official Journal. 2001. L 212. 7.8., pp. 12–23 . <https://eur-lex.europa.eu/eli/dir/2001/55/oj/eng>.

inability to return safely and sustainably to their country or region of origin. In this context, Member States should consider whether the individual maintains a significant connection to their country of origin, taking into account factors such as the duration of residence in Ukraine or familial ties in their country of origin. Attention must be directed towards the specific needs of vulnerable individuals and children, particularly unaccompanied minors and orphans, in accordance with the principle of prioritising the best interests of the child.[99]

Therefore, the termination of temporary protection (which is scheduled for March 2027, as previously mentioned) does not necessitate the immediate return of Ukrainian citizens and other individuals who received temporary protection as a result of the full-scale aggression in Ukraine to their country of origin. For the past three years, academics and practitioners have deliberated on the necessity of transferring temporary protected persons to other statuses within the EU. Several alternatives were proposed, including the application for asylum, the return to Ukraine, and the transfer to permanent residence in the EU Member States.[100] The final alternative is the most advantageous for the following reasons: the majority of temporary protected persons from Ukraine will have been residing in the EU Member States for five years, which qualifies them for permanent residence as of March 2027. Additionally, many of them are already employed and integrating into the receiving Member States.

In September 2025, on the proposal of the European Commission, the Council of the EU adopted a Recommendation on a coordinated approach to the transition out of temporary protection for displaced persons from Ukraine[101]. The Recommendation urges the Member states to provide displaced Ukrainians with national residency permits, granted on the basis of job, training, education, or familial connections, contingent upon the fulfilment of specific criteria. Individuals benefiting from temporary protection should be permitted to apply for statuses under EU legislation, such as those pertaining to highly qualified work. Simultaneous possession of statuses under EU law while benefiting from temporary protection is not permissible.

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[99] Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2022_126_I_0001>

[100] İneli-Ciger M. Beyond Temporariness: Policy Options for Ukrainians Under EU Temporary Protection in 2025. *College of Europe Policy Brief*. 2025. # 2 (June). Available at: <https://www.coleurope.eu/sites/default/files/research-paper/%C4%B0neli-Ciger_CEPOB_2-2025.pdf.>

[101] Council Recommendation on a coordinated approach to the transition out of temporary protection for displaced persons from Ukraine. 12015/25. Brussels, 8 September 2025. <https://data.consilium.europa.eu/doc/document/ST-12015-2025-INIT/en/pdf.>

Additionally, member states should establish voluntary return programs that are applicable for a specified duration and coordinate the terms of these programs with the Ukrainian authorities and other member states. Moreover, they should extend the provisional protection rights (e.g., those related to shelter, medical care, and education) to individuals who are in voluntary return programs. Member states can assist displaced individuals from Ukraine in returning and reintegrating into Ukrainian society by permitting them to conduct exploratory visits to Ukraine. The parameters for these exploratory trips must be harmonised throughout the EU nations.

Displaced Ukrainians should also be informed by member states about the opportunities to apply for a different legal status, the impact on their rights and advantages, and the support available for their return to Ukraine. EU countries should establish information systems and campaigns regarding voluntary return programs. Additionally, they have the option of establishing Unity Hubs, which can be funded through EU programs. Unity Hubs can aid displaced Ukrainians in a member state by serving as points of contact, providing employment advice in the host country and Ukraine, and assisting with documents.

4. Conclusions

Temporary protection has been implemented for decades as a humanitarian, exceptional, and adaptable measure in international and national law to address urgent displacement situations. When the situations of mass exodus and mass influx of displaced persons were to be addressed, it was considered as an alternative to the lengthy and bureaucratic asylum procedures.

In the 1980s, this concept was regarded as a temporary refuge. However, it was later transformed into temporary protection as a result of the growing recognition that displaced persons who arrive in large numbers should be provided with a minimum standard of rights and benefits to facilitate the acquisition of employment and decent living conditions.

At present, there are numerous methodologies in place at both the national and international levels to establish the definition of transitory protection and the rights and benefits that should be granted to temporary protected persons. These include the approaches to define the groups covered, situations of mass-influx, conditions of entry, terms of temporality of protection, and the principle of non-refoulement.

The United States' strategy is somewhat restricted. It limits the transitory protection status to individuals who are already present within the United States' frontiers. Additionally, the most recent ruling of the United States Supreme Court clarified that temporary protection status does not grant the right to enter the

United States, but rather the right to remain and not be returned to the country of origin. This is since the situation that prompted the introduction of temporary protection status for nationals of specific states continues to exist.

Beginning in 2011, the civil unrest in Syria forced millions to seek asylum in Turkey, leading to a significant influx of displaced refugees into the country. This necessitated the enactment of specific legislation and regulations governing the material and procedural dimensions of providing temporary protection to all displaced individuals who arrived at Turkish borders or were already inside its territory. As of 2025, Turkey remains the nation with the highest number of temporary protected persons globally.

The EU legislative framework for granting temporary protection emerged as a result of the 1990s war in the former Yugoslavia, during which over 500 000 Bosnians sought refuge in EU Member States. Discrepancies in country legislation and practices resulted in varying levels of protection being provided to such persons, harming their basic needs and human dignity. The EU responded by adopting the Temporary Protection Directive in 2001 and establishing standard procedural guidelines for its implementation in cases of mass influxes of displaced individuals. Nonetheless, the Directive was not activated even during the Migration Crisis in the mid-2010s due to the requirement for a proposal from the European Commission and a unanimous majority in the Council.

The Directive was activated by the EU only after the beginning of the full-scale Russian aggression against Ukraine in 2022, which illustrated the effectiveness of collective action that was supported by binding standards. Nonetheless, the directive's activation marks a watershed, proving that temporary protection can balance immediate humanitarian needs with long-term integration prospects when grounded in solidarity and shared responsibility. Displaced individuals of Ukrainian descent who were displaced at the outset of the conflict were permitted to traverse the frontier with EU Member States through simplified procedures that utilised various forms of documentation. It was permissible for their family members who were citizens of other third countries and those who were under international protection to enter the EU territory as well. The procedures for granting temporary protection were also simplified, and it only took a few hours to several days to obtain temporary protection status and begin utilising all of the rights and benefits that this status provides.

A highly contentious topic in scholarly discourse is the duration of temporary protection within the EU. The Temporary Protection Directive empowers the Council of the EU to prolong temporary protection for a maximum of three years. In July 2025, on the European Commission's proposal, the Council extended this time until March 2027, referring to its powers provided in the Directive allowing displaced individuals from Ukraine who arrived in 2022 to transfer for permanent residence status in EU Member States in 2027. This signifies the shift in the EU's strategy from providing temporary protection for Ukrainians to implementing more sustainable solutions that are preferable for all stakeholders concerned.

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Europe's New Constitutional Democracies as Constitutional "Postmodernity"? (or even the Modernization of Classic Constitutional Models?)

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Abstract: Revolutionary political changes in the former socialist states of Central and Eastern Europe, including the Balkans, have taken place since the early 1990s. 20th century and fundamental changes in constitutional systems. The creation of democratic constitutionalism brought several original solutions in the parliamentary form of government, the institutional structure of the constitutional division of power, and territorial self-government. Thus, the protection of constitutionally guaranteed human rights and the protection of constitutionality through a specialized constitutional judiciary has significantly expanded in Europe. The purpose of the article is to demonstrate that the creative constitutionalism of these new democracies brought many new constitutional solutions. At the same time, the construction of democratic constitutionalism made significant use of classical constitutional models of democratic constitutionalism such as the French, English and US. In this way, the article builds on the hypothesis whether it is a modernization of classic constitutional models.

Keywords: democratic constitutionalism, socialist states, parliamentary form of government, territorial self-government, classical constitutional models, protection of human rights and freedoms, specialized constitutional judiciary.

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1. Introduction. The domino effect of the fall of the former so-called socialist states and the originality of the new constitutional reality and creativity.

The revolutionary political changes of the 1990s triggered processes leading to the installation of new constitutional democracies in the countries of Central and Eastern Europe.[1] This was joined by the gradual destruction of 3 socialist federations, and thus the creation of more than 20 new nation states.[2] The adoption of new constitutions was thus linked both to the use of established models of classical Western democracies and to the constitutional creativity of new democratically elected parties. The constitutional changes thus focused mainly on the installation of a system of competitive democracy, the separation of powers in the form of a parliamentary form of government, the development of the concept of territorial self-government, the installation of so-called independent constitutional bodies, the constitutional anchoring of the classic catalog of fundamental rights and freedoms, and the constitutional establishment of constitutional review through constitutional courts. The purpose of the article is to argue that the constitutional character of the new democracies from a comparative point of view clearly proves their modernization benefits and the enrichment of the experience of classical constitutionalism.

Constitutional law has a special position both in the legal systems of democratic states and in the international university context. Developments in the world, especially in modern times, i.e. basically from the end of the 18th century, gradually meant a certain internationalization of constitutional (constitutional) ideas, and especially after the II. World wars and their globalization. There is a certain global pool of constitutional law ideas, concepts and models, and these are transferred into national arrangements, creating distinctive versions. A comparative analysis of the history of constitutional law shows that inspiration from homogeneous constitutional documents is quite common and undoubtedly has its own logic and effect[3]. This constitutional, legal, institutional and model transfer historically takes place both gradually and individually over time, as well as

[1] For this, cf. author in the chapter "Constitutional situation after the collapse of the Soviet Union (USSR)", in: KLÍMA, K. Ústavní právo srovnávací. Metropolitan University Prague Press, Wolters Kluwer CR, 2020, ISBN 978-80-7598-883-6, p. 158 et seq.

[2] For comprehensive information on the constitutional system of the Czech Republic, see the author in: KLÍMA, K. *Constitutional Law of the Czech Republic*. Pilsen, Aleš Čeněk, 2008, ISBN 978-80-7380-089-5.

[3] In the literature, 3 degrees of intensity of foreign inspiration are distinguished: a) inspiration, b) takeover, and c) transplantation (whether during the creation, change or interpretation of the constitution). For this, cf. K. Léko in the article "Foreign inspiration during constitutional

in historical "waves", which in this way also have a specific historical-genetic logic and justification.

The 1980s meant the growth of internal political tension in states preserving the regime of the dominion of a single political party based on communist ideology, and thus also the personal ruling sets connected with it. The influence of Gorbachev's perestroika consisting in a certain effort to liberalize the directiveness of the regime meant the gradual destruction of the totalitarian system of the sui generis model. The revolutionary changes of the former so-called socialist states in their succession in 1986 and beyond (starting with the political-inversion experience of Poland which led to the introduction of the institutions of the rule of law already in the 1980s) had a clear influence on the necessity of fundamental and systemic constitutional changes. Regime political changes consisting in the removal of the previously unchangeable (and totalitarian) leading role of the Marxist-Leninist type of party caused a "domino" effect in the disintegration of the three so-called socialist federations at the time, and thus in the creation of many new states.[4] It is therefore completely logical that the adoption of new constitutions and the anchoring of the institutions of classical constitutionalism in them, i.e. in the form of certain established, traditional models of the so-called Western constitutionalism, became a certain target solution for the new political sets in the so far independent and even "new" states.[5] The criterion portfolio of the science of comparative constitutional law is thus able to analyze and deduce the degree of similarity, applicability and use of these models, as well as their

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changes", in: WINTR, J., ANTOŠ, M. (eds.) Ústavní právo v mezinárodním kontextu. Prague: Charles University, Faculty of Law, 2013, p.13 et seq.

4 In this regard, L. Mezzetti states "the collapse of the internal and external domain of the Soviet empire", cf. in: MEZZETTI, L. *Le democracy incerte. Constitutional transitions and consolidation of democracy in Eastern Europe, Africa, Latin America, Asia*. Torino: C. Giappichelli Editore, Torino, 2000, ISBN 88-348-0273 X, pp. 15ff.

5 The author comprehensively deals with this for the first time in the chapter „Obnova ústavní demokracie v postsocialistických zemích-výběr", in: KLÍMA, K. *O právu* ústavním. pp. 238 to 254. Prague: Wolters Kluwer, Czech Republic, 2012. Then elaborated more comprehensively in: KLÍMA, K. Ústavní právo srovnávací. Prague: Metropolitan University Prague Press, Wolters Kluwer, CR, 2020, pp. 154 to 164. A very important inspirational model for this was the work of Professor de Vergottini, cf. in: VERGOTTINI, G. de. *Diritto constitutionale comparato*. Qutra editione. Milano, 1993, ISBN 88-13-17737-2. The publication: VERGOTTINI, de G. (ed.) *Giustizia constituzionale e sviluppo democratico nei paesi dell'Europa centro-orientale, is completely comprehensive and specific to individual new democratic constitutional systems*. Torino, Giappichelli editore, 2000, ISBN 88-348-0439-2, containing informative contributions on the constitutional systems of: Armenia, the Czech Republic, Croatia, Hungary, the Republic of Poland, Romania, the Russian Federation, Slovenia, Ukraine, as well as on the situation of the former Yugoslavia, Macedonia, Bosnia-Herzegovina, to which the commenting introduction is the work of prof. de Vergottini and the closing remarks of Prof. S. Bartole.

creative development.[6] It is also necessary to take into account the varying degrees of historical experience from the functioning of democratic constitutionalism, even short-term.[7]

In the emergence and development of new constitutional systems after 1990, basically two parallel trends were evident, namely, on the one hand, a clear motivation to set up models of constitutionalism according to existing "Western" models, especially European-continental versions of "written" constitutions. The influence of the German constitutional doctrine of the constitution as a "fundamental law" was particularly evident, namely the constitutional style set by the doctrine of the Austrian professor H. Kelsen.[8] A certain partial institutional influence is also evident in the presence of several elements of the American constitutionalism,[9] respectively, the ideological and institutional influence of French constitutionalism is significant.[10] At the same time, however, it is quite evident that none of the modern democratic systems mechanically "described" and the creative modern originality of the solution is quite evident.

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6 Classical concepts of understanding constitutionality and, in particular, the separation of powers also reflected in the consolidated concepts of the scientific-pedagogical interpretation of constitutional law, cf. for example, the teaching structures of textbooks: CONSTANTINESCO, V., PIERRÉ-CAPS, S. Drept constitutional. Universul Juridic, Bucuresti, 2022, further for example in: GRAD, F., KAUĆIĆ, I., ZAGORC, S. *Ustavno pravo*. Second spreekena in dopolvena idzaja. Ljubljana, Faculty of Law University of Ljubljana, 2018, ISBN 978-961-64-47-75-1, or in: GIBA, M. et al. Ústavné právo. Bratislava, Wolters Kluwer, 2019, ISBN 978-80-571-0086-7, respectively in: Kolektiv. *Konstitucija i narodnyj soverenitet Ukraina*. Problems of theory and practice of implementation. Kyiv, 2008, ISBN 978-966-8688.

7 It is also necessary to consider the varying degrees of historical experience from the functioning of democratic constitutionalism, even short-term.

8 The Czech constitutional system in the Kelsen tradition is based on the supremacy of all constitutional laws over "ordinary" laws, with the fact that constitutional laws have a higher "legal force", and all other laws must be in accordance with them. Article 87, paragraph 1, letter a), according to which, if the Constitutional Court finds that the law does not comply with the constitutional law, it will annul the law or its individual provisions.

9 This is currently significantly manifested in the predominance of direct presidential elections, but also references to the creation of a kind of functional balance of the checks and balances type, which, according to V. Sládeček, means that "the Constitutional Court should primarily function as an effective part of the system of checks and balances, within division of state power ....," and " ... preventions against attempts at unauthorized appropriation of a part of public power by one of the state powers ...", cf. in: SLÁDEČEK, V. MIKULE, V:, SYLLOVÁ, J. Ústava České republiky. *Komentář*. Comment. I. edition. Prague: C.H. Beck, 2007, p. 666, point no. 9. The European-continental constitutional systems (of the former so-called socialist countries) are the French model, which is embedded in the traditions of European republican parliamentarism, closer to the French model, in: CHAGNOLLAUD de SABOURET, D. *Droit constitutionnel contenporain 2, La Constitution de la Véme République.* 8e édition, Paris, DALLOZ, 2017, ISBN 978-2-247-16995-5, pp. 99 ff.

10 For this especially in: CUBERTI, G. *Grands systemes de droit contemporaines. Introduction on droit comparé*. 3rd edition. Paris, LDGJ, 2016, ISBN 978-2-275-03857-5.

Thus, the purpose of the article is to provide a certain constitutional-comparative, i.e., external audit, which would be able to divide, distinguish, and possibly define a degree of generality as well as conceptually special. In this way, the author does not claim from experience to find out or determine what is optimal, more effective, etc. Constitutionalism has its traditional criteria of regulation, and thus it is primarily a question of whether any solution is functional.[11]

2. Historical parallels of constitutional democratization after World War II.

A very clear wave of constitutional expansion in the form of restitution, reconstruction and the setting up of new constitutional democracies, i.e. as a group renewal of constitutional democracy, can be seen in "Western" and "Southern" Europe itself after World War II. Liberation from fascist totalitarian systems meant a clear solution – the adoption of new constitutions (or even a return to the "pre-war" constitutions).

Thus, Austria returned to its constitution from 1920, and therefore to the original federation, when the constitution is fundamentally based on the equality of the federation and the federal states. The constitutional basis is based on the parliamentary form of government in the Confederation, in the countries there are regional assemblies.[12] In Italy, the monarchy was abolished by a referendum in 1946, and a republic was declared simultaneously with the establishment of the Constituent Assembly, i.e. the Constituent Assembly. The Constitution of the Italian Republic was then adopted in 1947, establishing a parliamentary form of government with consistent democratization.[13] The French Republic is historically exceptional for its phenomenal constitutional history. After liberation in 1945, it set up the system of the so-called 4th

[11] B. Banaszak's observation about the context of the expansion and extension of new democracies is certainly apt, as ".... a part of globalization, the aim of which is to unify the principles of socio-economic life of the world...", to this in: BANASZAK, B. *Porównavcze prawo konstytucyjne wspólczesnych państw demokratycznych*. 2nd edition. Warszawa: Wolters Kluwer, Poland, 2007, ISBN 978-83-7526-082-3, p. 31.

[12] See in: WALTER, R., MAYER, H. *Grundriβ des Österreichischen Bundesverfassungsrecht.* Wien: Maunz Verlag, 1996, p. 71.

[13] The constitutional history of Italy goes back to the middle of the 19th century, when the so-called Albertine Statute was adopted in Sardinia as the so-called tripled constitution of Italy introducing the so-called Salicylic-type monarchy. For the development of Italian constitutionalism, see, for example, A. Pizzorusso in the chapter "Modificazioni anizite di una constituzione rigida" in: SAGADO, F., F. *The Spanish Constitution in the European constitutional context*. Madrid, Dykinson, 2003, ISBN ISBN84-9772-094-6, pp. 805ff.

Republic, confirmed by the Constitution of 1946 regulating the classical parliamentary form of government.[14]

Not even Germany had before II. The World War long tradition of constitutionally based democracy, when the concept of the recognized so-called Weimar Constitution from the "twenties" remains a distinctive constitutional attempt. Based on of the Potsdam agreements, Germany's constitutional development was clearly directed towards democratization and decentralization and was implemented in 1949 with the version of the constitution of the Federal Republic of Germany as the so-called Basic Law (Grundgesetz). The constitutional law experience of the Federal Republic of Germany is for constitutional law a comparative stage of constitutional democracy after II. Exceptional during the Second World War, it inspires especially with the concept of so-called chancellor democracy as a stable version of the parliamentary form of government, as well as with the concept of a federal state with a strong position on the constitutionality of the individual federal states. Since the 1970s, the jurisdictional activity of the German Federal Constitutional Court has become an inspiring concept for the protection of basic human rights and freedoms for many countries of the so-called new democracies.[15] The post-war development of Japan must also be followed in this historically conditioned constitutional parallel. Japan with the beginning of II. The World Wars allied Germany and Italy with the fascist states of the so-called "Berlin-Rome-Tokyo" axis. As a country defeated in the war, Japan was subordinated to the directives of the Potsdam Agreements, while the principle of democratization declared in them meant installing a democratic, i.e. constitutionally based, system in Japan. The new constitution of 1947 thus establishes a parliamentary monarchical form of government, while respecting that the emperor does not have executive power.[16] The version of the constitutional

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[14] The constitutional solution of French forms of government can be considered an original model as a traditional segment of comparative constitutional law, especially in: FAVOREU, L. et al. *Constitutional law*. 25th edition. Paris, DALLOZ, 2023, ISBN 978-2-247-21682-6, p. 635 et seq., or further drawn from: DUHAMEL, O., MÉNY, Y. *Dictionaire constitutionnel*. Presses Universitaires de France, 1992, ISBN 2-13044-256-256-0, resp. GINESTE-SIMONJAN, H. *Le Droit constitutionnel en schémas*. 6e édition. Paris, 2016, ISBN 978-2340-013421, respectively in: CHAGNOLLAUD, de S.D. *Droit constitutionnel contemporain*. 8th edition. Paris, DALLOZ, ISBN 978-224716995-5.

[15] To the peculiarities and importance of the Federal Constitutional Court of the Federal Republic of Germany drawn from: FAVOREU, L., MASTOR, W. *Les cours constitutionnelles*, 2éme édition, Paris, DALLOZ, 2016, ISBN 978-2-247-16188-1, p. 40 et seq. respectively p. 51, respectively p. 58, p. 65, respectively p. 82 et seq.

[16] At the same time, *Shintoism*, as the original Japanese state religion, remains a cultural-religious system of binding social values. Closer to the development of Japanese post-war constitutionalism in: DUHAMEL, 0., MÉNY, Y. *Dictionnaire constitutionnel*. Presses universitaires France 1992, ISBN 2-13044-256-0, pp. 536 ff.

monarchy thus became an original combination of the dynastic-monarchical tradition with a modern parliamentary form of government for Japan. A very special stage of constitutional democratization in post-war Europe is the gradual fall of the fascist regimes of Spain (1975), Greece (1975) and finally Portugal (1976), i.e. only in the 1970s. Above all, the constitutional monarchy of the Kingdom of Spain is a modern constitutional state established by a constitution approved by a referendum in 1978.[17]

3. Comparative directions of constitutional changes of former so-called socialist states.

Hypothetically, it is primarily possible to deduce certain common features of the constitutionally based democracy of the so-called post-socialist states of the turn of the nineties and the return of the previous totalitarian states of Western Europe after the Second World War. World War gradually to constitutional democracy. The new wave of this "group" democratization is, however, in some facts completely original in the so-called post-socialist states. From a political point of view, the fact that the fall of the socialist system of the totalitarian type simultaneously had a multiple character played a crucial role. Moreover, it was accompanied by the creation of new states after the collapse of three federations, it was logical (and almost conceptually "programmatic") to use the experience of already stabilized constitutional democracies of the "Western" type.[18]

The kind of "collective" programming was thus also clearly oriented towards the historical sources of constitutionalism and their developmental connotations.[19] The development of modern constitutionalism is thus quite clearly linked to the

[17] The history of Portuguese statehood is also one of the oldest in the world (since 1139), including the large-scale medieval colonial expansion of the Portuguese state, especially into South America. However, after the fall of dictator Salazar in 1976, a completely new constitutionalism was established by the 1982 constitution, including a parliamentary form of government and a constitutional court.

[18] On the process of establishing the new Portuguese constitutionalism treatise in: CHAGNOLLAUD, D. *Droit constitutionnel contemporaine. Tome 1, Théorie générale Les régimes étrangéres*. Paris, DALLOZ, 2009, ISBN978-2-247-08451-7, p. 357 et seq.

[19] t is not out of place for the author to recall that from his knowledge of university academic cooperation within the framework of the former so-called socialist states, it is demonstrable that their law faculties had perfect knowledge of classical constitutional history, as well as the reality of selected "Western" constitutional systems (i.e. USA, Germany, Great Britain, France, Germany and Italy), and as such these systems were taught in the subject "state law of capitalist countries", for this see the textbook KLOKOČKA, V. Ústavní právo kapitalistických zemí. (Constitutional and political institutions of the USA, Great Britain, Germany, France, Italy). Prague, ORBIS, 1967, 11-05-67.

constitutionally initiating English, anti-feudal and, in a way, "nationally" liberating, American revolutions with the creative effect of written constitutionalism, as well as the extremely anti-feudal and anti-totalitarian French revolution.[20] The latter was probably most aimed at fulfilling the legacy of the philosophers in the concept of the so-called social contract. Thus, in a consolidated manner, the author permanently lists the directions of the newly installed constitutional solution common to all so-called new democracies. It is therefore an argument in the direction of what the constitutional systems had to incorporate into the new constitutionality to depict the new democratic system, representative democracy and the rule of law.

In the sense of the above, it is thus possible to choose primarily the method of institutional induction. On its basis, in a synthesis, which, based on the previous inductive "entry" into the constitutional systems of the new democracies considered here, it is possible to conclude and arrive at a certain systemic summary of what was the purpose and goal of the constitutional changes:

1. constitutionally establish a system of parliamentary form of government, based on a multi-party-political system and free competition of political parties,
2. to establish an electoral system that would enable the implementation of free selection of candidates for representative bodies of all levels, based on the exercised right to vote and be elected, with a secret ballot,[21]
3. to replace the original planned economy with a system of equality of all types of ownership, with an emphasis on the development of conditions for the restoration and protection of ownership of private and free enterprise,[22]
4. to build a system of territorial self-government of a multi-level type, in relation to the size of the country, historical context and experience, the demographic and locational situation of the population, including the constitutional-judicial protection of territorial self-government (see below),
5. to establish (apply) various mechanisms of direct democracy in the system of democratic governance, in the form of decision-making, consultative or initiative forms such as referendum (central, regional and local), consultation

[20] Same in notes above and 9, 10, and 11, on the typology of constitutional "models", see the author in the chapter "Constitutional models of the division of power and their modalities", in: Comparative Constitutional Law ..., ibid., p.47 et seq.

[21] The work of G. Sartori, in the original as: SARTORI, G. Comparative Constitutional Engineering, became a significant inspiration in the reconstruction of electoral systems. An Inquiry into Structures, Incentives and Outcomes. Basingstoke and London, Mac Millan Press, Ltd., 1997.

[22] It is possible to consider the so-called restitution processes (return of property) as a certain peculiarity in the development of decommunization, which (very prominently) in Czechoslovakia, for example, related to the return of property that was nationalized, confiscated or otherwise illegally seized by the regime after 1948.

with voters, parliamentary petition right, collective proposal to solve the responsibility of top officials' constitutional functionaries, etc.)[23]

6. to insert into the constitutional foundations an internationally contractually set, and even binding directly in the Council of Europe system, catalog of rights of people and citizens conceived as a group: basic human rights, political freedoms and economic, social and cultural rights.
7. establish the concept of the rule of law as an institutionally functioning mechanism implementing the right to a fair trial and the protection of human rights and freedoms, with an emphasis on the installation and development of constitutional control and administrative justice,
8. to install in the system of the constitutional so-called horizontal division of power some so-called independent constitutional institutions with a similar systemic effect aimed at deepening the constitutionally horizontal division of power, which effect primarily concerns both the control of the executive power and guarantees of the protection of fundamental rights and freedoms of people. (see below),
9. to implement the constitutional basis of the relationship between national law and international law, and in the form of state loyalty to international contractual obligations, including the direct binding of certain types of contracts, which gained conceptual and jurisdictional precedent acceleration especially in the process of accession of new democracies to the European Union system, (see below)
10. to carry out the implementation of political change consisting in participation in military-defence pacts, including the establishment of a solution to war and civil crisis situations through the concept of a so-called crisis constitution.[24]

For a certain completeness of our argument about the distinctiveness (and usefulness) of the phenomenon of the constitutions of new democracies, one important feature common to these constitutions must still be added. Namely, the process of getting rid of the political attachment to the so-called Soviet bloc, and especially to the political hegemony of the USSR, and eventually the disintegration of the three federations, meant a free role for states in deciding their national interests. In this sense, the fundamental role of the new constitution as

23 The scope of the use of the means of direct democracy is not only diverse in terms of number, but also in terms of the forms of solutions, a marked absence, for example, in the Czech Republic, and, in contrast, a wider use in Slovenia, cf. to that in: GRAD, F., KAUČIČ, I., ZAGORC, S. *Ustavno pravo*. Ljubljana: Faculty of Law, University of Ljubljana, 2018, ISBN 978-961-64-47-75-1. p. 243 et seq.

24 More on this in the author's contribution "La gestion administratives des risques en République Tchéque", in: La gestion administratives des risques, Annuaire éuropéenne d'administration publiques, XXIX,2006, Presses universitaires d'Aix-Marseille, 2007, p. 156 et seq.

the basis of national sovereignty and constitutional identity was exercised. It also meant an extensive and multiple expression of the political emancipation of such free peoples, often associated with a gesture and declaration of the political sovereignty of the state. This was primarily manifested not only in fundamental constitutional declarations, but also in the first articles of the constitutions. In that context, the constitutions also greatly emphasized their connection with the sovereignty of the respective nation, which thereby "became independent" and thus also became a state-creating factor.[25] This "group" characteristic feature not only represents a new "wave" of creative national constitutionalism, but also confirms the significant role of the constitution in protecting national legitimacy and thus the territorial inviolability of the state, and thus also the position of state-forming nations in the overall development of globalization and its diverse effects.

4. Representative democracy in the concept of variants of the so-called parliamentary form of government in new constitutional democracies.

Establishing the classical type of parliamentarism as historically established and developed by European "Western" democracies, both in the form of constitutional monarchies and French republicanism, became a key political and constitutional creed. However, the key question was certainly not what the optimal solution is, whether a unicameral or a bicameral parliament. Establishing a classical democratic so-called form of government was apparently the main and first goal of democratic regime changes, but it was the result of efforts to fundamentally change the totalitarian system of the previous "leading role of one party" (communist type). This system was based on the permanence and immutability of the political regime. The historical opposite is thus a system of competitive party democracy based on a plurality of political parties and free elections.

In principle, these changes succeeded when diverse party systems were formed and developed from a political point of view in various forms. Although communist-type parties ended relatively early in them, even in the last decade the differences between the so-called left-wing and right-wing groups are disappearing. These relatively typical instabilities of party systems influence the legislative activity of parliaments, and therefore also on the effective representation of

[25] Compare Also in: KAMPA, V. M., SAVČIN, M., B. (eds.) *Ustava i narodnyj soverenitet v Ukraine: problemi teorii i praktiki realizationiji*. Kyiv: Dodrukarska pidgotovka ta druh, 2008, 978-966-8668-42-5.

citizens' interests, which in turn also affects a potential crisis of a governmental nature. Even the new democracies have already come to the experience that the constitutional responsibility of governments is governed practically by English "leadership". If the government retains the political support of party coalitions, then no one can realistically "depose" it, i.e. with the result of its departure from the ruling position. This fact significantly modifies the original intention of the "new" democratic constitutionalists, which was to establish the controllability of the executive power by the parliament as a representative body representing citizens.[26] In this way, the constitutional division of power in the form of the so-called tripartite is significantly modified, as the executive power is politically more or less dependent on the political majority in the parliament.

And how did the so-called third power, i.e. the judicial power, develop? Certainly, a distinct phenomenon of the process of installing the concept of the rule of law was the generally common development of constitutional control in the form of the installation of constitutional courts.[27] This fact, consisting of the intention to insert into the constitutional system the institution of checking the constitutional conformity of the laws produced by the parliament over the years, thus created the constitutional courts as a real competitor to the parliament. In fact, the duality of the constitutional separation of powers was thus created, where the constitutional court, in its derogative function towards the attacked laws of the parliament, is not only a body that can annul that law, but also influence the future law through a precedential opinion.[28] It is not so illogical that a hypothesis can be set up in the sense that such a real constitutional division of power creates a certain system of "constitutional balance" (checks and balances style a la USA). Even when acknowledging a certain logic of these statements, one cannot

[26] Professional literature draws attention to some dilemmas connected with the parliamentary form of government. Thus, J. Drgonec states that "... the parliamentary form of government is marked by the burden of partocracy present behind the scenes of parliaments and pushing democracy out of the exercise of public power, which cannot be separated from the parliamentary form of government...". For this, cf. in: DRGONEC, J. Constitutional substantive law. 1st edition. Bratislava: C. H. Beck, 2018, p. 224.

[27] In this way, in the new constitutional democracies, we can talk about "group expansion of constitutional courts", for this clearly in: FAVOREU, L., PASTOR, V. *Les Cours constitutionnels*. 2nd edition. Paris, DALLOZ, 2016, ISBN 978-2-247-16188-1, respectively FROMONT, M. *La justice constitutionnelle dans le monde*. Paris, DALLOZ, 1996, ISBN 2-247-02203-0, respectively ROUSSEAU, D. *La justice constitutionnelle en Europe*. Paris. Montchréstien, 1992, ISBN 2-7076-0524-7.

[28] This was typically shown in the Czech Republic in January 2021, when the Constitutional Court of the Czech Republic annulled the provisions of the electoral law governing the closing quotas of coalitions in percentage terms required for entry into the House of Representatives, and the subsequent and "quick" amendment of the electoral law created a favourable situation for the ambitions of especially so-called small parties for the subsequent autumn elections.

undoubtedly abandon the fundamental idea on which the parliamentary form of government and representative democracy is based, namely – the dominance of the parliament in this system.

Comparatively inspiring is the issue of the approach of new constitutional democracies to the structure of parliaments, i.e. to the application of so-called unicameral parliaments, or in the bicameral version of parliaments. From the historical beginnings of the formation of parliament-type bodies, parliaments could be divided in this way. Their development in terms of the concepts of unicameralism and bicameralism is thus also an inspiration for new constitutional democracies, as each parliament is embedded in a system of separation of powers, which for new constitutional democracies meant the application of these two concepts in the system of a parliamentary form of government.

In relation to the development of parliamentary bicameralism, it should be remembered that its modern installation is rather based on the different electoral legitimacy of the so-called second chamber, which in the American version is the concept of the Senate (USA) as the representation of the states (USA), in the French version as the representation of the regions in their Senate, then as the Federation Council in the version of the Constitution of the Russian Federation. The new constitutional democracies thus had no reason to be inspired by the bicameralism just mentioned, due to the overwhelming unitarity of (especially) the new states. The exceptions are Poland, where the French and Italian experience was applied rather symbolically, the Czech Republic tried to restore the idea of the Senate from the First Czechoslovak Republic,[29] and Slovenia, by structuring the parliament, partially built on the experience of its own previous coexistence within the former "Yugoslav" constitutional self-government.[30]

29 The relatively late establishment of the Senate of the Parliament of the Czech Republic (elected from 1997 initially with a mandate of 2, 4 and 6 years, i.e. with gradual re-election every two years for 6 years), as well as its "weak" function in the legislative process, raised permanent doubts about the meaning of its existence. The author of these doubts, especially given the stabilizing role of this chamber in the constitutional system of the Czech Republic, does not share these concerns in principle, see KLÍMA, K. Ústavní právo. 5th ed. Pilsen: Aleš Čeněk, 2016, ISBN 978-80-7380-606-4, p. 504.

30 The Slovenian so-called Državni svet (40 deputies) is established by groups: employees, employers, trade unions, farmers and other business activities, to which lies in: *Ustavno pravo* ..., ibid., p. 446 et seq.

5. Variability of new party-political systems and new "electoral engineering".

In the constitutional mechanism of democratic power, the establishment of representative bodies by citizens, especially parliaments, is of fundamental constitutive importance. The science of constitutional law thus follows the various mechanisms of this electoral democracy, in our understanding the so-called electoral technology.[31] New democracies also set new electoral systems as a priority political change, which was enshrined in the constitutions and concretized in the laws specifying these, which have the character of so-called organic norms.[32] Even in the so-called new democracies, certain political, constitutional and legislative organizational principles were accepted, such as universality, equality, directness of the electoral system and the provision of secret ballots. The nomination of candidates (mostly collectively) by political parties was accepted, except for so-called independent candidates. The representative character of parliaments is basically based on how the method of calculation mechanism is organizationally constructed in constitutional systems as a reflection between the voters' votes received for the candidate entities and the "seats" thus obtained in the parliament. This technology of representation is thus manifested in the legal way of allocating mandates to political parties and individual candidates based on election results.

In this direction, even the new constitutional democracies have joined the traditional variability of model mandate allocation systems, with the predominance of the application of so-called proportional representation systems. The latter is also applied in several possible versions, especially the so-called D'Hondt's is applied in Europe (for example: the Czech Republic, Germany, Portugal, Wales, Scotland, etc.). Precisely in connection with the application of the system of proportional representation, several new democracies also inserted a so-called closing clause (of the German type) into the system, as an organizational reduction of the access of some political parties to parliament in a situation where their election result did not exceed the number set by law (in percentages).[33] Even

31 It is also necessary to recall the established and recognized term for these processes, such as so-called electoral engineering, according to Sartori: "Although the electoral system does not have to be formally included in the constitutional text, it remains in fact a fundamental part of the operation of the political system", cf. to that in: SARTORI, G. *Srovnávací ústavní inženýrství.* Prague: SLON, 2011, p. 9.

32 For this, the author refers to the chapter "Les normes reglementaires ordinaires", in. FAVOREU, L. et al. *Droit constitutionnel* ..., ibid. p. 1019 et seq.

33 On the particularities of the German electoral system specifically drawn from: HOCHMANN, T. et al. *Droit constitutionnels francais et allemand. Perspectives comparée*. Paris, LDGJ, 2019, ISBN 978-2-275-05386-8, pp. 179 ff.

in connection with the political effort to set up a democratic electoral system, the new constitutional democracies did not avoid such contexts of this search, when individual (new) political subjects (political parties) looked for variants advantageous to them in the classic variants of allocating mandates to political parties.

New constitutional democracies based new political systems on the experience of classical constitutionalism, according to which political parties as a political phenomenon are recognized as a state-forming element of democracy. In this sense, their foundations are confirmed by constitutions, and we can thus speak of the constitutional institutionalization of political parties, and therefore also the basis of democratic competition for representation in parliaments. The new constitutional democracies generally implemented legislative concretization of the position of political parties in constitutional systems, including their possible exclusivity as exclusive electoral subjects.[34] Classical "Western democracies" are also inspiring in that the subject of legal regulation is the regulation of the financing of political parties, as well as the mandatory transparency of the activities and sources of income of political parties, including election expenses.

Thus, even in new democracies, political parties are a consolidated part of the constitutional environment as a key factor in de facto constitutionality. In them, the system of political parties completes the so-called de facto constitution, which to a certain extent connects with the principles of the constitution set out in the constitution for the system of the form of government, electoral systems, the structure of the parliament, as well as the control of constitutionality.

The constitutional system of representative democracy also includes the corporative right to territorial self-government as political competition against the central constitutional "supremacy". Targeted and programmatic political development certainly resulted in a significant elevation of the constitutional concept of the right to territorial self-government. The constitutional anchoring of territorial self-government can be considered a significantly innovative element of constitutionalism after the Second World War. World War, to which the constitutions of the new democracies undoubtedly contributed.[35] The constitutional installation of the concept of at least two-tier territorial self-government thus

[34] Even "older" constitutions were amended in this way, cf. for example, first Germany and Italy in the sixties, then Greece, Spain, Portugal, etc. Taken here from: SPIROPOULOS, P., C., FORTSAKIS, T. *Constitutional Law in Greece. Athens*, Wolters Kluwer, 2009, ISBN 978-904-11-2878-2.

[35] In this sense, it is necessary to emphasize the fact that the membership of the new democracies in the Council of Europe system was also influenced by the fact that the corporate right to territorial self-government is the basis of the relevant Charter of local self-government, within the framework of the Council of Europe's contractual system. This charter was mostly ratified by the new constitutional democracies considered here, including the Czech Republic. To this, the author in: *Constitutional Law of the Czech Republic* ..., ibid. p. 361 et seq.

became a program goal, which basically meant the decentralization of power, i.e. the separation of some functions of public administration (functions of "organization of services of public interest") and their entrustment to municipal and regional units of territorial self-government. The scope of these functions as executive activities entrusted to municipalities, districts and regions (mostly regions) is thus comparatively diverse, and therefore it is not possible to assess the degree of decentralization under some unifying criterion.

What, however, is a certain fundamental and comparatively significant conditionality of the territorial self-government system in the new democracies? Here we comparatively assess the states that have fundamentally changed their political regime since the end of the 1980s. Thus, these constitutional systems generally geographically belonged to the part of Europe that started with Central European Czechoslovakia, then meant the further democratic development of the eastern part of continental Europe, and significantly also to its continental "Southeast" and especially the Balkan states. Some of these states had exceptional experience of the original Austro-Hungarian administrative decentralization, such as Czechoslovakia, Hungary, Slovenia,[36] some followed certain self-governing elements of the former Yugoslav federation (Slovenia, Croatia, Serbian Federation, Montenegro, etc.), certain Polish experiences of decentralization were still built in the system of the PSDS leading role from the seventies.[37] However, all European-continental systems have decentralized public administration from the original centralized systems of "absolute monarchy", and what they have in common – and shared by contemporary European-continental constitutional democracies – is that the central constitutional power retains the function of legislatively defining the scope of "public self-government" and also the executive power in the form of governmental and ministerial power is not only superior in its supervisory function, but also directly manages some administrative functions through offices incorporated into local, district or regional authorities, but in parallel it also manages a number of public administration functions in places through its decentralized or deconcentrated bodies. It is therefore a question to what extent the bodies of territorial self-government are "self-governing", and to what extent they are not rather the executive apparatus of the executive centre of the state, and whether the right to territorial self-government is not rather a mostly constitutional fiction.

[36] As a reminder, the legislative concept of the so-called independent and the so-called transfer of powers was already established by the Austrian law from 1862, the solution was adopted by the First Czechoslovak Republic, while it is permanently present in the current system of territorial self-government of the Czech Republic. For this, cf. author in: *Constitutional Law of the Czech Republic* ..., ibid., p. 364 et seq.

[37] More on this in: DABEK, D. *Prawo miejscowe*. Warszawa: Wolters Kluwer, Poland, 2007, ISBN 978-83-7526087-8.

6. Innovative contribution of the new constitutional democracies to the concept of the constitutional and legal state.

The concentration of political power during the period of so-called real socialism significantly suppressed the protection of human rights and freedoms, and especially political ones such as freedom of expression, freedom of assembly, freedom of political corporate association, etc. Thus, since the 1990s, institutions of the rule of law have become the targeted direction of the development of constitutional changes. such as constitutional courts, ombudsmen, so-called supreme councils of the judiciary, administrative judiciary, independent control authorities, etc. It is also related to the historical fact and motivating circumstances when new democratic states also became member states of the Council of Europe and the idea of the right to a fair trial "it's The Convention on Human Rights and Fundamental Freedoms became legally binding on their judicial systems.[38] It was therefore a key and literally programmatic issue to establish a classic catalog of human rights and freedoms in the basic constitutional texts. This happened mainly in the binding reflection on the pivotal document of the Council of Europe, which is the Convention on Human Rights and Fundamental Freedoms. After that, the almost universal installation of constitutional courts in new constitutional democracies became a matter of course. In this sense, the original conceptual source of the constitutional judiciary of the Federal Republic of Germany, and thus the experience of the Constitutional Court of the Federal Republic of Germany in Karlsruhe, undoubtedly manifested itself. It is also essential that the concept of specialized constitutional justice has its essence in the constitutional catalog of decision-making powers entrusted to constitutional courts, where the basic idea of the so-called abstract review of constitutionality based on an incident review of the conformity of laws with constitutional norms is developed by a concrete incident review in subject-specific issues of constitutionality.[39] It is a question of which constitutional values are further protected in addition to judicial supervision of the constitutionality of the legislative output of parliaments. The special expansion of the new democracies was then aimed particularly at enshrining the authority of constitutional courts to decide on so-called

[38] To this in: GRONOWSKA, B. *Europejski trybunal ochrony praw człowieka w poszukiwaniu efektywniej ochrony praw jednostk*i, Toruń, 2011, ISBN 978-83-7285615-9, p. 179 et seq.

[39] Here, the inspiration from the constitutional judiciary of the Federal Republic of Germany in the form of their so-called *Verfassungsbeschwerden* is very evident. For this in the subsection „Die individuale Verfassungsbeschwerde" in: WIESER, B. *Vergleichendes Verfassungsrecht.* Springer Wien New York, 2005, ISBN 13987-3-211-27753-9, pp. 141ff.

constitutional complaints.[40] In real quantitative competition, the superiority of the idea jurisprudence of these submissions against decision-making in the other jurisdictions of the constitutional courts may turn the constitutional courts into some other (quasi), albeit extraordinary judicial instance of review.

It was during the review of the observance of human rights and freedoms that the judicial administrative judiciary experienced a completely fundamental evolutionary significance in the development of the independent judiciary. The review of the legality and, in many cases, the correctness of the decisions of state and other public administration bodies created controllability of administrative-legal decision-making. Within its framework, the public administration bodies, in a position of legislative supremacy, decide both on so-called public subjective rights and in administrative punishment. Administrative justice thus guarantees the key principle of the concept of the rule of law, consisting in demands for the strict legality of decision-making by the "supreme" public administration. In this sense, it is the administrative judiciary that is essential as a constitutional power distinct from the executive power and its role in the incident control above all the legality of the procedure and decisions of public administration bodies.[41]

In the area of the development of controllability of guarantees of human rights and freedoms, a significant expansion of institutions such as the Swedish ombudsman can be noted.[42] The initial experiences of the Polish *Rzecznik praw obywatelskich* from the second half of the 1980s, i.e. an attempt to bring under some control the constitutionally uncontrollable (and politically untouchable) government and executive power linked to the political leaders of a single leading and dictating political party, are historically completely precedential. The enshrining of this type of body has acquired a constitutional character (for example, in Poland),[43] as well as regulation (only) by ordinary law (for example

40 The author's contribution to this in: VERGOTTINI, G. de (ed.) *Giustizia constituzionale e sviluppo democratico* ..., ibid., p. 273 et seq.

41 For the installation of a completely new concept of the administrative justice system in the Czech Republic only in 2002, see the author in the chapter "Constitutional Principles of Administrative Justice", in: *Constitutional Law of the Czech Republic* ..., p. 355 et seq. The setting of the administrative justice system in the Czech Republic was significantly influenced by the perspective of the republic's early admission to the European Union.

42 The gradual "expansion" (initiative spread) of the institution of the ombudsman is already evident in the continuity of new constitutional democracies to the constitutional development of states democratized already after II. World War II, when it was introduced: in Finland (as early as 1919), then in Norway (1952), in Denmark (1954), in Germany (1957), in the United Kingdom (1967), in Northern Ireland (1969), in France (1973), Italy (1974), Portugal (1975), Austria (1977), Spain (1971), Poland (1987), Romania (1981), etc.

43 In the Constitution of Romania, in articles 58 to 60, there is an institution of the ombudsman under the name "Avocatul popolurui", see in: DRAGUE, L. *Drept constitutional si instituti politice*,

in the Czech Republic. Many years of practice, however, shows that the actual status and effectiveness of the activities of such independent control bodies is diverse and depends on the overall atmosphere of respect of the general and current policy towards this body.

In connection with the implementation of the concept of the rule of law from the point of view of its implementation in the constitutional context, it should be recalled that in all contemporary constitutional democracies, in the system of their membership in the Council of Europe, the judicial power is clearly subordinated to the observance of precedent law created by the European Court of Human Rights. Related to this are the possibilities for private entities from any member state to initiate a review of the decisions of their judicial authorities with a complaint to this court, in relation to the observance of Article 6 of the Convention in the jurisprudence criterion "right to a fair trial".[44] In the case of the Convention, it is thus undoubtedly a quasi-constitutional document of substantive law and, by extension, procedural law as well.[45] When applying for complaints by natural or legal persons addressed to the European Court of Human Rights, the complainant's burden of proof rests on proving a violation of the "procedural" Article 6 of the Convention and, as a rule, serious interference by the state authorities of a member state in the basic human rights of the complainant or a gross violation of some of the political freedoms.

7. Europeanization of constitutional law or even constitutionalising of European law.

The sovereignty of modern (classical) state power in its internal and external manifestation is declaratively confirmed by constitutional texts. The new constitutional democracies considered here added to this, especially when the new constitution followed the creation of a new state and the declaration of its

I. Universul Juridic, Bucuresti, 2022, ISBN 978-606-39- 1008-1, pp. 129 et seq.

44 For this, cf. in: KMEC, J. et al. *European Convention on Human Rights. Comment*. 1st edition. Prague: C. H. Beck, 2012, p. 565 et seq. Also drawn mainly from: BERGER, V. *Jurisprudence de la Cour Européenne des droits de l'homme.*11e edition. Paris, SIRREY, 2009, ISBN 978-2-247-08275-9.

45 In this way, the author permanently cultivates a hypothetical concept of the existence and justifiability of the so-called European constitutional law, cf. in: Ústavní právo srovnávací ..., ibid., p. 283 et seq. Also see the author's article "The constitutional nature of the European Union. The theoretical Premises of European Constitutionality", in: ŠIŠKOVÁ, N. (ed) *The Process of Constitutionalisation of the EU and Related Issues*. Amsterdam, Europa Law Publishing, 2008, ISBN 978-90-76871-87-5, pp. 75 et seq.

sovereignty.[46] After 1990, however, these new and democratically founded states were gradually admitted to the Council of Europe and subsequently (in 2004) to the European Union. These international associations of a new type deviate from some requirements of international public law, in particular by a certain convergence with elements of constitutional confederalism or even federalism.[47] At the same time, this process also has a number of other obvious constitutional aspects, in the case of the European Union, these are elements of the internal division of power, both horizontal and vertical, and the role of the judiciary in a "quasi-federation". In the case of the Council of Europe, it is about enforcing the right to a fair trial. However, it is necessary to consider the development of the world after World War II. The World Wars, when, in connection with the internationalization of international relations and their entry into the constitutional systems of primarily European states, elements of consistency or cooperation with transnational systems begin to penetrate them. One of the reasons for this correlation between state sovereignties and supranational systems is the development of constitutional democracies and democratic constitutionalism, and gradually the democratization of almost all of Europe. At the same time, these new European association units, through their own law, move into a position of contractual supremacy over all state entities of the member states that have voluntarily (and contractually) accepted this supranational obligation. For new constitutional democracies, this aspect occurs immediately after admission to the Council of Europe system, i.e. after the establishment of the constitutional version of democracy and the system of protection of human rights and freedoms.[48]

46 A typical example: Slovakia in August 1992 when the traditional anniversary of the so-called Slovak National Uprising, the new Constitution was then announced on September 1, 1992. Day 1.1. 1993, i.e. the date of entry into force of the Constitution of the Slovak Republic, is considered the date of creation of "II. Slovak Republic", also in: SVÁK, J., CIBULKA, L. Ústavné právo Slovenskej republiky. Bratislava: BVŠP, 2008, p. 19.

47 For example, an assessment of the nature of the European Court of Human Rights and the Court of Justice of the European Union, both courts basically "defined themselves" as "federal", quasi-federal, or "supreme" courts, cf. in: MASQULET, J., C. TURPIN, D. *Libertées publiques et droits fundamentals*. Paris: Vauves Éditions Foucher, 1997, ISBN 978-2-216-11065-0, pp. 26ff. Further to this, for example, in: RENNUCI, J.-F. *Droit éuropéenne droit de l'hommes.* Paris, L.G.D.J., 2001, ISBN 2-275-01930-8, respectively SHAW, J. *Law of the European Union.* New York PALGRAVE, ISBN 0-333-92491-2.

48 In that context, the adoption of the Charter of Fundamental Rights and Freedoms in Czechoslovakia in January 1991 was aptly considered to be "a ticket to the Council of Europe", to which the author in: Constitutional Law of the Czech Republic..., ibid., p. 113 et seq. For example, the articles: Banaszak, B. Verfassungsrecht und die Processe der Unifikation der Europe und der Globalisierung, p. 27 et seq., respectively Claret, F. L´influence de l´integration éuropéenne sur des institutions territoriales des états members, p. 97 et seq., resp. Chronowski, N. Constitutional Consequences of Hungarian EU Membership, pp. 53 et seq., et al. In: ILLÉSSY, I. (ed) *Constitutional consequences of the EU Membership*. Pécs, 2005, ISBN 963-642-039-4.

An assessment of only some aspects of the constitutional relationship of the new constitutional democracies to both supranational power systems allow us to draw some conclusions. Both systems, in terms of their contractual, structural and content structure, resemble a constitutional mechanism, i.e. in the case of the European Union, a power system of the type of separation of powers, with significant elements of a “parliamentary form of government (sui generis, of course). In the case of the Council of Europe system, the judicial activity of the European Court of Human Rights based on the European Convention on Human Rights and Fundamental Freedoms creates European case law binding on the constitutional and legal systems of the member states. In both cases, it is a kind of “European constitutional law”. Each member state of these systems is then the addressee, user and binding party. However, the source of a possible concept of European constitutionalism is the common constitutional values of the member states, the constitutional culture of constitutionalism. And this certain constitutional European polycentrism, into which the new constitutional democracies have undoubtedly creatively entered, is not only the Europeanization of constitutional law, but also the constitutionalising of European law.[49]

8. Possible dilemma of constitutional (in)stability of new constitutional democracies.

As part of our discussion, some problems and possible critical evaluations of the constitutional systems of the new democracies must be identified, especially from the point of view of their stability. These are possible questions such as: why the constitutional situation in the states monitored here cannot often be considered fully stabilized after thirty years. Or why political parties are unable to respect constitutional rules. Or what criterion is decisive for stating that a constitutional institution has not proven itself and needs to be changed. In a way, the question arises as to whether the political instability caused by the political clashes of rival parties and coalitions does not put constitutional rules behind so much that it is also possible to state certain latent dangers of the degradation of constitutionality. And what would be even worse – such a humiliation of constitutionality, when the political sphere is able to (perhaps even intentionally) eliminate it as an (allegedly) ineffective system. Another danger arises when election winners

[49] Similarly, in the chapter “Unfluenta europeana asupra contitunului constitutilor nationale”, in: *Drept constitutional* ..., ibid., p. 278 et seq. Also see R. Arnold’s article “European Constitutional Law”, in: ŠIŠKOVÁ, N. (ed) *The Process of Constitutionalisation of the EU* ……, ibid., p.41 et seq.

(and post-election hegemons) begin to adapt the constitutional rule to their goals.[50] Thus, it must be stated that to preserve the formal legal barrier set by the rigidity of constitutional norms, as the difficulty of approving constitutional changes, the political culture struggles with the intentions of arbitrariness and expediency in the conquest of political power.

At the same time, however, a positive developmental construct of new constitutional democracies capable of stabilizing the situation is the development of constitutionally based controllability of constitutional institutions. A special result of this development is the inspiration of Western democracies in the sense that so-called independent constitutional bodies were inserted into the constitutional systems of these states, which formally and effectively strengthened multiple functional control in constitutional systems, namely of a horizontal constitutional type. And it is possible to speak of a kind of "fourth" power, as a control power, if we refer to this to the control function of ombudsmen. Another of the classical constitutional systems transferred by the application of so-called independent bodies are the bodies of the type of accounting courts (in the Czech Republic such as the Supreme Audit Office) and the constitutional anchoring of central banks. In both cases, the purpose is to strengthen the constitutional independence of the executive power, the constitutional setting of government control, respectively the independence of the monetary and exchange rate function and, of course, the protection of the rights and freedoms of private entities.

However, special attention should be paid to the so-called supreme councils of the judiciary. However much bodies of this type can be discussed in connection with the installation of the concept of the so-called rule of law, we prefer to include bodies of this nature in the discussion of bodies strengthening constitutional independence, in this case as a conditio sine qua non. The creative diversity of the installation of bodies of this type, including the variability of their composition, the way they are established, and above all their functions in relation to judicial systems, is very inspiring.[51]

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50 This was very clearly demonstrated, for example, in the political turbulence in Poland in 2017 and the following years, with constitutional implications. The ruling Law and Justice party (PiS) controlled the situation to such an extent that, through constitutional changes, it politicized the establishment of judges of the Constitutional Court of the Republic of Poland, as well as the composition and functioning of the Regional Judicial Council. Overall, together with other interventions, it significantly modified the constitutional principle of the independence of the judiciary.

51 The author thus refers to his analytical comparative study published in The Lawyer Quaterly, TLQ 3(2022) "Supreme Judicial Councils as a guarantee of the Independence of judicial Power and their Role in the Appointment and Career Advancement of Judges", and dedicated to an international grant The Metropolitan University in Prague, together with the University of Vilnius, dealing with the issue of "Selection of Judges" from 2020 to 2024, cf. in: www.ilas.cas.

9. Finally

So, is it possible to consider the new constitutional democracies as a kind of post-modernism, as a unique innovation, and even a potential constitutional benefit of this "wave" of a kind of constitutional globalization? The author is aware that the article can only be an approach to solving the question. Despite this, his answer to this question is unambiguous, and therefore certainly positive and affirmative.

The evaluation of more than thirty years of installation, development and functioning of "new" constitutional democracies primarily testifies to the fundamental (overall) humility of these systems in relation to classical constitutionalism. This primarily concerns the fundamental inspiration of the English, French, American (USA) and German (after World War II from 1949) models of constitutionalism. At the same time, the conceptual variability of these (new democratic) systems completely enriched the comparative textual basis for the evaluation of precisely those peculiarities that potentially enrich constitutionality. It can also be stated that constitutions and constitutional law have become functional and functioning legal instruments in these countries, namely with an emphasis on the fact that the constitution is a "fundamental law" (German inspiration here). The Constitution in that sense, its constitutional principles, as well as the text of the constitutional norms themselves, are the main source of law, which must be implemented and especially concretized by "ordinary" laws. Constitutional norms and constitutional safeguards then become the basis for their use in specific constitutionally judicial conflict situations, and therefore also the subject of interpretation by constitutional courts. To this must be added the fact that the "quantitative" increase in the number of constitutional courts in Europe, as bodies of specialized judicial review of constitutionality, means not only a comparative but also an effective contribution to this modern constitutional phenomenon.

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Expanding the Territorial Reach of European Union Law: Current Realities and Trends

Liudmyla Falalieieva & Bohdan Strilets*

Summary: The article explores practice of expanding territorial scope of EU law, emphasizing the extraterritorial application regarding third countries through international agreements and acts of the EU institutions. This expansion is influenced by the universality of human rights and the need for economic integration, which involves complex legal relationships with third countries, notably Ukraine. It discusses the inconsistency in case law, affecting legal certainty in extraterritorial contexts. Additionally, the impact of EU law on the legal systems of third countries is studied, especially in economic relations, for example, in the area of free trade and free capital movement. The article highlights the EU's commitment to integrating human rights considerations across all external policies, ensuring that its activities comply with international standards in human rights area, backed by EU common values and principles of EU law.

Keywords: EU law, common values, Court of Justice of the European Union, extraterritorial application of the EU law, extraterritoriality of human rights, territorial reach of the EU law, fundamental rights, EU internal market, free trade, free movement of capital, the EU trade and investment policy.

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1. Introduction

In the legal framework for the implementation of the extraterritorial application of the European Union (hereinafter referred to as the EU) law in the internal legal orders of third countries, there is a tendency toward an increase the importance of international agreements and *mutatis mutandis* acts of the EU institutions as legal instruments for expanding the territorial reach of EU law, aimed at causing legal consequences in the internal legal orders of third countries, having legal impact on them, as well as on individuals or legal entities under jurisdiction of third countries. The universality of human rights is obviously important, but it is not enough to justify extraterritorial application of EU law. In addition, it is noteworthy that the universal approach to human rights requires a broad concept of extraterritorial jurisdiction, rather than the proposed contradictory arguments in favor of alternative interpretive theories,[1] which are not properly argued, mostly limited to the reference to "impose fundamental rights standards enshrined in an international treaty on States that are not party to that treaty".[2] As noted by Enzo Cannizzaro, Professor of International Law and European Union Law at the University of Rome "La Sapienza", fundamental rights do not imply selective protection of individuals, *ratione loci,* but rather a reduction of the unlimited discretion of state authorities. Restricting them to a certain geographical area or defining conditions of application undermines the logic and the very *raison d'être* of the sphere of fundamental rights.[3] The issue of extraterritoriality in the EU's activities arises not only when it comes to human rights protection, it may also emerge in such areas as EU competition, foreign direct investment[4] resulting from free capital movement, consumer and environmental law. One else example related to environmental, administrative and criminal law: third-country vessels are not subject to EU jurisdiction on the high seas, however, once they call at an EU port, they can be held liable for

[1] See: MILLER, S. Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention. *European Journal of International Law*. 2009, vol. 20, no. 4. p. 1223. [online]. Available at: https://academic.oup.com/ejil/article/20/4/1223/530744.

[2] HUMMELBRUNNER, S. Beyond Extraterritoriality: Towards an EU Obligation to Ensure Human Rights Abroad? Reflections in Light of the *Front Polisario Saga*. *CLEER Papers*. 2019, no. 2. p. 28. [online]. Available at: https://www.asser.nl/media/679407/cleer_19-02_web.pdf.

[3] CANNIZZARO, E. The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels. *The European Journal of International Law*. 2014, vol. 25, no. 4. p. 1094. [online]. Available at: https://ciaotest.cc.columbia.edu/journals/ejil/v25i4/f_0033361_27136.pdf.

[4] See: RODRIGUES, N. C. (Editor). *Extraterritoriality of EU Economic Law: The Application of EU Economic Law Outside the Territory of the EU*. Cham, Switzerland, Springer, 2021, 385 pp.

illegal high-seas fishing;[5] for such types of violations administrative sanctions and even criminal penalties are possible.[6]

Conceptual approaches to the application of extraterritorial legal measures by the EU, analysis of the areas of legal regulation covered by the extraterritorial effect of EU law and case law on these issues by judicial bodies, and doctrinal constructions of extraterritoriality of human rights are relevant and under-researched issues of great theoretical, methodological and practical importance for the modern science of international law and EU law.

In Ukraine, not only monographic works, but also publications focused on or related to this complex and controversial topic are rare, but it is dynamically developing in case law of judicial and quasi-judicial international bodies, and has been thoroughly covered in foreign legal literature[7] over the past two decades

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[5] KRISCH N. Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance. *European Journal of International Law*. 2022, vol. 33, no. 2, p. 491. [online]. Available at: https://academic.oup.com/ejil/article/33/2/481/6647799.

[6] See: BEKE, M., BLOMEYER, R. *Illegal, unreported and unregulated fishing: sanctions in the EU. European Parliament Directorate General for Internal Policies, Policy Department B: Structural and Cohesion Policies*. Brussels, European Parliament, 2014. [online]. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2014/529069/IPOL_STU(2014)529069_EN.pdf.

[7] HUMMELBRUNNER, S. Beyond Extraterritoriality: Towards an EU Obligation to Ensure Human Rights Abroad? Reflections in Light of the *Front Polisario Saga*. *CLEER Papers*. 2019, no. 2. 50 p. [online]. Available at: https://www.asser.nl/media/679407/cleer_19-02_web.pdf; VELLUTI, S., TZEVELEKOS, V. P. Extraterritoriality of EU law and human rights after Lisbon: the case of trade and public procurement. *Europe and the World: A law review*. 2018, vol. 2, no 1. pp. 1–9. [online]. Available at: https://livrepository.liverpool.ac.uk/3027467/1/EWLR-2-2.pdf; BERKES, A. The extraterritorial human rights obligations of the EU in its external trade and investment policies. *Europe and the World: A law review*. 2018, vol. 2, no. 1. pp. 1–21. [online]. Available at: https://bura.brunel.ac.uk/bitstream/2438/19661/1/FullText.pdf; RYNGAERT, C. EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations. *International Community Law Review*. 2018, vol. 20, no. 3-4. pp. 374–393. [online]. Available at: https://www.researchgate.net/publication/326335056_EU_Trade_Agreements_and_Human_Rights_From_Extraterritorial_to_Territorial_Obligations/fulltext/5bb7a22e92851c7fde2f1d7d/EU-Trade-Agreements-and-Human-Rights-From-Extraterritorial-to-Territorial-Obligations.pdf; BEHRENS, P. The extraterritorial reach of EU competition law revisited – The «effects doctrine» before the ECJ. *Discussion Paper*. 2016, no 3. pp. 3-15. [online]. Available at: https://www.econstor.eu/bitstream/10419/148068/1/87238506X.pdf; ŠIŠKOVÁ, N. The EU Concept of the Rule of Law and the Procedures *de lege lata* and *de lege ferenda* for its Protection. *International and Comparative Law Review.* 2019, vol. 19, no. 2, pp. 116–130. [online]. Available at: https://sciendo.com/de/article/10.2478/iclr-2019-0017; HAMUĽÁK, O., VARDANYAN, L., KOCHARYAN, H. The Global Reach of the Right to be Forgotten through the Lenses of the Court of Justice of the European Union. *Czech Yearbook of Public and Private International Law.* 2021, vol. 12, pp. 196–211. [online] Available at: https://rozkotova.cld.bz/CYIL-vol-12-2021/196/; Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law / ed. by Malcolm Langford, Wouter Vandenhole, Martin

taking into account geographical coverage of the EU's human rights obligations and the impact of EU international agreements on the implementation of human rights in third countries,[8] extraterritorial case law of the Court of Justice of the European Union (hereinafter referred to as the CJEU), inconsistency of the European Court of Human Rights (hereinafter referred to as the ECtHR) case law,[9] and thus its unpredictability, which does not contribute to the level of legal certainty on such complex issues that require, *inter alia,* clarity and comprehensibility.

The results of the work of scientists, including A. Berkes, C. Gammage, O. Hamuľák, S. Hummelbrunner, N. Krisch, S. Miller, N. Rodrigues, C. Ryngaert, N. Šišková, V. Tzevelekos, S. Velluti will contribute to deepening partnership with the EU on a parity basis and taking into account the peculiarities of the extraterritorial effect of EU law and modern mechanisms for its implementation. Thus, we are talking about extremely important and quite real problems that, on the one hand, raise fundamental issues that remain unresolved and controversial, and, on the other hand, have legal and political consequences. In this context, the ongoing academic discourse offers valuable insights for shaping future legal regulation and fostering mutual understanding between the EU and third countries. The interplay between national sovereignty and extraterritorial reach of EU law remains a dynamic area of study, with practical implications for legal consistency and the protection of fundamental rights.

2. Extraterritoriality of EU Law as a Multidimensional Problem

The relevance of the issue of extraterritorial action / application of EU law (interchangeable terms) in the context of ensuring respect for human rights lies in the fact that, on the one hand, its mechanisms should be taken into account in the process of European integration and fulfillment of the obligations assumed, and, on the other hand, the effective functioning of the EU legal

Scheinin, Willem van Genugten. Cambridge: Cambridge University Press, 2013. 477 p.; KRISCH N. Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance. *European Journal of International Law*. 2022, vol. 33, no. 2. pp. 481–514. [online]. Available at: https://academic.oup.com/ejil/article/33/2/481/6647799.

8 RYNGAERT, C. EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations. *International Community Law Review*. 2018, vol. 20, no. 3–4. pp. 375-393. [online]. Available at: https://www.researchgate.net/publication/326335056_EU_Trade_Agreements_and_Human_Rights_From_Extraterritorial_to_Territorial_Obligations/fulltext/5bb7a22e92851c7fde2f1d7d/EU-Trade-Agreements-and-Human-Rights-From-Extraterritorial-to-Territorial-Obligations.pdf.

9 MILLER S. Op. cit. pp. 1223-1246.

order, extraterritorial application of EU law, is impossible if the extraterritorial jurisdiction of the Member States is excluded from the scope of EU law.[10] In this case, the extraterritorial jurisdiction of a state means "the exercise..., under certain conditions and in compliance with the relevant international legal standards, of jurisdiction over acts, property, persons or facts that take place wholly or partially outside its territory",[11] but have a certain connection with it. The definition of extraterritorial jurisdiction proposed by Serhiy Peremot enriched the Ukrainian science of international law, which for a long time developed without paying due attention to the peculiarities of theory and practice in this area. It is noteworthy that the concept of extraterritoriality, having extensive semantic connotations, is part of the basic terminology of the general theory of law and is revealed in the context of the topic "effect of legal acts in time, space and by the circle of persons".[12] The extraterritorial effect of EU law in the internal legal orders of third countries reflects the evolution and priorities of the EU legal policy, which is based *stricto sensu* on common values, in particular on respect for human rights, as well as on EU standards, which is a complex and under-researched issue.

The current EU-Ukraine treaty practice emphasizes the importance of researched topic, and understanding of these issues will contribute to: ensuring respect for human rights; predictability of the mechanisms for implementing the political association and economic integration of Ukraine with the EU; strengthening economic relations between the parties; gradual integration of Ukraine into the EU internal market and adaptation of Ukrainian legislation and its application to EU law. In addition, it is necessary to take into account the following: national interests; current EU standards, policies and practices; peculiarities of the functioning of its institutional and legal system; modern approaches to the extraterritorial effect of EU law; and the evolution of the CJEU's application of jurisdictional models. It is equally important to be familiar with the legal intricacies of the relevant EU legal acts, as well as to introduce the practice of compliance with the regulatory methods underlying the functioning of the integration association, the basis of the human rights protection system formed

[10] FALALIEIEVA, L. Ekstraterytorialna diia norm prava YeS: osoblyvosti teorii ta praktyky zastosuvannia. *Pamiati profesora Pavla Petrovycha Zavorotka. Aktualni problemy pravovoi nauky*: zb. nauk. statei / za zah. red. N. P. Shyshkovoi; Kyivskyi nats. un-t imeni Tarasa Shevchenka. Kyiv: Pretsedent, 2014, pp. 154–161. (in Ukrainian).

[11] PEREMOT, S. V. Ekstraterytorialna yurysdyktsiia. Entsyklopediia mizhnarodnoho prava: u 3 t. / redkol.: Yu. S. Shemshuchenko, V. N. Denysov (spivholovy) ta in.; In-t derzhavy i prava im. V. M. Koretskoho NAN Ukrainy. Kyiv: Akademperiodyka, 2017. T. 2: E–L. s. 49 (in Ukrainian).

[12] See: KHRYSTOVA, H. Pozytyvni zobov'iazannia derzhavy u sferi prav liudyny: suchasni vyklyky: monohr. Kharkiv: Pravo, 2018, 680 p. (in Ukrainian).

within its framework.[13] It is also noteworthy that, as Lorand Bartels states, the EU is not formally bound by any international human rights treaties, including the Convention for the Protection of Human Rights and Fundamental Freedoms (better known as the European Convention on Human Rights; hereinafter referred to as ECHR).[14] This is mainly due to the lack of relevant competence in the EU. However, since 2011, the EU has been a party to one multilateral international human rights treaty, approved by the European Parliament[15] on December 23, 2010, the UN Convention on the Rights of Persons with Disabilities, which is the first UN international treaty on these issues that contains minimum standards without creating new rights for persons with disabilities.

The EU's accession to the ECHR, without setting clear deadlines for its implementation, is provided for in Article 6(2) of the Treaty on European Union (hereinafter referred to as the TEU) as amended by the Lisbon Treaty of 2007. At the same time, the study of the ECtHR's extraterritorial case law leads to the conclusion that it is not consistent, and therefore does not contribute to overcoming uncertainty in some issues, and to increasing the level of legal certainty in others.[16] As Sarah Miller emphasizes, this uncertainty creates a double risk that states will either underestimate the jurisdictional scope of ECHR and violate human rights that might otherwise be protected, or, conversely, they will overestimate the reach of the ECHR and refrain from taking actions that are strategically important. In any case, the ECtHR's dual doctrine does not allow states parties to clearly consider the legal responsibilities associated with specific extraterritorial actions to the detriment of both human rights and security.[17]

The above is important, in particular, in the sense of Article 52(3) of the Charter of Fundamental Rights of the European Union (hereinafter referred to as the EU Charter), which textually confirms that if the EU Charter contains rights that coincide with the rights guaranteed by the ECHR, the *meaning* and *effect* of these rights are the same as those granted by the latter. This provision does not

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[13] FALALIEIEVA, L. Prava liudyny ta ekstraterytorialna diia prava YeS: evoliutsiia praktyky zastosuvannia yurysdyktsiinykh modelei. *Visnyk Kyivskoho natsionalnoho universytetu imeni Tarasa Shevchenka.* Mizhnar. vidnosyny. 2017, vo. 46, no. 1, p. 91. (in Ukrainian).

[14] BARTELS, L. The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects. *The European Journal of International Law*. 2014, vol. 25, no. 4, p. 1079. [online]. Available at: http://www.ejil.org/pdfs/25/4/2546.pdf.

[15] The Evolution of Fundamental Rights Charters and Case Law. Study. Brussels, European Parliament, 2011. [online]. Available at: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/432755/IPOL-AFCO_ET(2011)432755_EN.pdf.

[16] FALALIEIEVA, L. Zakhyst osnovopolozhnykh prav u intehratsiinomu pravoporiadku Yevropeiskoho Soiuzu: monohrafiia. Kyiv, 2020, pp. 197–198. (in Ukrainian).

[17] MILLER, S. op. cit. p. 1230.

prevent the EU law from being granted broader protection[18] in comparison with the ECHR, but, according to the second paragraph of Article 6(1) TEU as amended by the Lisbon Treaty 2007, it does not in any way expand the competence of the EU as defined in the founding treaties. In addition, Article 52(3) of the EU Charter creates synergy with the ECHR, so the interpretation of the latter by the ECtHR and its case law (which is not consistent with respect to extraterritoriality, and therefore difficult to apply) is usually taken into account by the CJEU. The integration association is not currently a party to the ECHR, but this possibility is not excluded in the future. Professor Cedric Ryngaert emphasizes that, given the EU's competence, cases on extraterritoriality arising under the EU Charter may differ significantly from those arising under the ECHR, as the ECtHR cases so far have mainly concerned extraterritorial military operations carried out by States Parties to the ECHR.[19] Moreover, as Clair Gammage emphasizes, from the standpoint of international law, human rights have so far been conceptualized as the granting of rights, duties and obligations through a state-centered relational model.[20] Of course, the EU's phenomenality is also clearly manifested in its conceptualization of fundamental rights, which constitute the so-called *hard core* of human rights, recognized, confirmed and guaranteed by a supranational association with an autonomous legal order.

An inclusive approach to legal regulation is evident in the EU Charter, which is characterized by the broadest possible concept of fundamental rights, generalized and systematically combined *mutatis mutandis* within one comprehensive document, emphasizing their unity and indivisibility. Within the competence of the EU granted to it under the founding treaties and in compliance with the principle of subsidiarity, the provisions of the EU Charter are addressed to the institutions, bodies, agencies, and services of the integration association. Observance of fundamental rights is a condition for the validity and legitimacy of EU acts, but the situation with regard to national legislation of the Member States

[18] Charter of Fundamental Rights of the European Union. *Official Journal of the European Union*. C 202/02. Vol. 59. 7 June 2016. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN.

[19] RYNGAERT, C. EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations. *International Community Law Review*. 2018, vol. 20, no. 3–4. pp. 381–382. [online]. Available at: https://www.researchgate.net/publication/326335056_EU_Trade_Agreements_and_Human_Rights_From_Extraterritorial_to_Territorial_Obligations/fulltext/5bb7a22e92851c7fde2f1d7d/EU-Trade-Agreements-and-Human-Rights-From-Extraterritorial-to-Territorial-Obligations.pdf.

[20] GAMMAGE, C. A critique of the extraterritorial obligations of the EU in relation to human rights clauses and social norms in EU free trade agreements. *Europe and the World: A law review*. 2018, vol. 2, no. 1. p. 3. [online]. Available at: https://www.scienceopen.com/document/read?vid=eb01108a-0187-4216-a45c-5fea4601d4d6.

remains ambiguous. They are obliged to respect the fundamental rights guaranteed by the EU only if their activities are carried out within the scope of EU law, but it is not always clear when and whether Member States act within the scope of EU law in a particular situation. It is important to keep in mind that Member States are obliged to respect fundamental rights not only when implementing EU legal acts, but also when interpreting or applying domestic law that falls within the scope of EU law.

The conceptualisation of the extraterritoriality of human rights is a multifaceted and complex issue, characterised by ambiguity of vision and perception both in international law and in the EU legal order. The legal analysis of the conceptual approaches to understanding the extraterritoriality of human rights, the case law of CJEU, and the extraterritorial application of EU law in the internal legal orders of third countries available in the specialised literature gives rise to the following conclusion: the legal significance of extraterritorial effect as a separate manifestation of the application of EU law is the possibility of extending their effect in the areas within the competence of the EU beyond its borders, i.e., the Member States, to the territory of third countries, to individuals or legal entities under their jurisdiction, whose relations (behaviour/practices) have the necessary connection with the EU: were carried out within its borders or have/may have a significant actual impact on it, in particular on the EU internal market,[21] fundamental rights (consumer protection, personal data protection, etc.) recognised, confirmed and guaranteed by the EU. This raises complex and still open-ended questions: is the EU obliged to protect the fundamental rights of the EU Charter beyond its own borders? And if so, when does this duty arise, and how far does it extend? The above only confirms the correctness of the conclusion of Samantha Velluti and Vasilis P. Tzevelekos that "'extraterritoriality' is a complex and multidimensional legal problem" and "a growing number of EU rules aim to produce legislative effects in third countries",[22] which highlights the importance of its study in various aspects and manifestations, taking into account the latest approaches to understanding fundamental rights and the development of the human rights protection system in the EU.

[21] FALALIEIEVA ,L. Modern Approaches to the Extraterritorial Application of the EU Law. *European Studies – The Review of European Law, Economics and Politics*. 2014, vol. 1, p. 103.

[22] VELLUTI, S., TZEVELEKOS, V. P. Extraterritoriality of EU law and human rights after Lisbon: the case of trade and public procurement. *Europe and the World: A law review*. 2018, vol. 2, no. 1, p. 9. [online]. Available at: https://livrepository.liverpool.ac.uk/3027467/1/EWLR-2-2.pdf.

3. Expansion of the EU Law Territorial Scope in Current Realities

In the context of the above, attention should be paid not only to the activities of the EU institutions, primarily the European Commission, in this area and its ability to take measures aimed at exercising extraterritorial jurisdiction, but also to the result of these activities, its significance and role as a deterrent to possible future violations. The extraterritorial effect of EU law is characterized, as Professor Victor Muravyov notes, "by a situation where the same behavior falls under two competing jurisdictions: on the one hand, this behavior is regulated by EU law, and on the other, by the domestic law of a third country. The extraterritorial effect of EU law in such cases may result in a negative impact on the functioning of economic relations in third countries and on relations between the EU and the latter".[23] In addition, naturally, such an effect may be perceived negatively: "…EU unilateral climate measures with significant extraterritorial impacts generally pursue goals broadly shared by the international community, such measures have nonetheless often been vehemently opposed by third countries, lamenting a violation of their sovereignty".[24] Therefore, with the development of economic relations between the EU and third countries, EU law may in certain cases apply to third countries, individuals or legal entities under their jurisdiction, since the activities of the latter affect or may affect, including negatively, the EU internal market[25], which affects the efficiency of the functioning of its legal order. The connection between the behavior that, *inter alia*, affects fundamental rights within the EU legal order and the extraterritoriality of EU law also needs to be understood, since the integration association explicitly guarantees a clearly defined scope of fundamental rights that constitute "*hard core*" of human rights.[26]

[23] MURAVIOV, V. I. Pravovi zasady rehuliuvannia ekonomichnykh vidnosyn Yevropeiskoho Soiuzu z tretimy krainamy (teoriia i praktyka): monohr. Kyiv: Akadem-Pres, 2002. p. 262. (in Ukrainian).

[24] ANTONIAZZI, C. T. Extraterritorial Human Rights Obligations in the Area of Climate Change: Why the European Union Should Take Them Seriously. *European Papers.* 2024, vol. 9, no. 2. p. 483. [online]. Available at: https://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2024_2_Chiara_Tea_Antoniazzi_00768.pdf.

[25] FALALIEIEVA, L. Ekstraterytorialna diia norm prava YeS: osoblyvosti teorii ta praktyky zastosuvannia. *Pamiati profesora Pavla Petrovycha Zavorotka. Aktualni problemy pravovoi nauky:* zb. nauk. statei / za zah. red. N. P. Shyshkovoi; Kyivskyi nats. un-t imeni Tarasa Shevchenka. Kyiv: Pretsedent, 2014. p. 154. (in Ukrainian).

[26] See: HAMUL'ÁK, O. Is Charter of the Fundamental Rights of the EU Taking Social Rights Seriously? *European Studies – The Review of European Law, Economics and Politics.* 2015, vol. 2, pp. 18–19.

It is important to distinguish between *fundamental rights that impose positive obligations*, i.e., require ensuring observance of this category of rights, including preventing their violation by third parties, and *fundamental rights that impose negative obligations*, i.e., require addressees to refrain from unjustified violations of these rights.[27] The above is all the more significant because there is still no complete certainty about the possibility of extraterritorial application of the EU Charter, which does not distinguish between negative and positive obligations in terms of the scope of application. On the one hand, given the numerous substantive features of the EU Charter, the practice of its application may differ from the established approaches to the application of international human rights treaties, and on the other hand, by analogy with the extraterritorial application of international human rights treaties, it seems acceptable and justified to assert that, unlike positive obligations, negative obligations can be considered territorially unlimited.[28] A convincing example in this context is the EU's practice of imposing targeted sanctions against specific individuals outside its borders,[29] which demonstrates that the EU and its Member States have negative obligations under the EU Charter, including in the extraterritorial dimension. As for the positive obligations that are not singled out as such in the EU Charter, the enforcement of fundamental rights in terms of territorial coverage is carried out on a case-by-case basis.[30] It should also be noted that when it comes to sanction policy, one of manifestations of restrictions on free capital movement, which has extended in recent years with regard to Russia and countries providing military support to it,[31] the EU has an approach stating that it couldn't force third countries to do the same, so in this regard sanctions are not extraterritorial.[32] However, the 14th

27 FALALIEIEVA, L. Zakhyst osnovopolozhnykh prav u intehratsiinomu pravoporiadku Yevropeiskoho Soiuzu: monohrafiia. Kyiv, 2020. p. 201 (in Ukrainian).

28 See: MILANOVIC, M. *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*. Oxford: Oxford University Press, 2011, pp. 209–222.

29 See: Council Decision (CFSP) 2024/3182 of 16 December 2024 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. OJ L, 2024/3182, 16. 12. 2024. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202403182.

30 FALALIEIEVA, L. Zakhyst osnovopolozhnykh prav u intehratsiinomu pravoporiadku Yevropeiskoho Soiuzu: monohrafiia. Kyiv, 2020. p. 201 (in Ukrainian).

31 FALALIEIEVA, L., STRILETS, B. Capital Movement Restrictions in EU Law: Retrospective and Modern Approaches, Development Trends. *European Studies – The Review of European Law, Economics and Politics*. 2023, vol. 10, no. 1, p. 80. [online]. Available at: https://sciendo.com/de/article/10.2478/eustu-2023-0003.

32 Press and information team of the Delegation to UKRAINE. Some clarifications on the circumvention of EU sanctions against Russia. 22.05.2023 [online]. Available at: https://www.eeas.europa.eu/delegations/ukraine/some-clarifications-circumvention-eu-sanctions-against-russia_en?s=232.

package of sanctions against Russia associated with its unprovoked full-scale military aggression against Ukraine seems to show a lessened non-extraterritoriality approach. For example, EU-based companies will have to undertake "best efforts" to ensure that their subsidiaries in third countries don't take part in any activities undermining EU sanctions.[33] Such rules as well as so-called "secondary sanctions", which may imply, for example, freezing assets of third country-based companies, are "in contrast with the principles of EU sanctions design".[34] Presumably, this might be a sign of some "indirect extraterritoriality", when foreign subjects are influenced by EU law regulations through actions carried out by EU-based companies.

Undoubtedly, "in today's globalized world, the legal systems of states are subject to constant mutual influence."[35] The extraterritorial effect of EU law in the context of globalization of the world economy is particularly important, on the one hand, being an important factor in its development, and, on the other hand, causing many problems in practical application. Globalization processes are accompanied by the intensification of economic factors and interconnections, the mutual influence of legal systems of states, and the emergence of new conceptual structures, but at the same time, conflicts of jurisdiction arise with third countries, especially in the field of economic relations, where each state is trying to assert the greatest possible influence. For example, the United States uses the extraterritorial application of national competition law, corporate relations, etc. as a tool to spread its influence on global economic processes, sometimes without limiting the excessive spread and unjustified exercise of extraterritorial jurisdiction.[36] As Serhiy Peremot appropriately emphasizes, the most expansive models of the exercise of extraterritorial jurisdiction do indeed allow to achieve the maximum level of protection of the national interests of the regulatory state due to the relatively wide spread of its jurisdiction, almost inevitably causing jurisdictional conflicts between the regulatory state and the state with territorial

33 Questions and Answers on the 14th package of restrictive measures against Russia. Brussels. Jun 24, 2024. [online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_24_3425.

34 LONARDO, L. Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy. *Cambridge Yearbook of European Legal Studies.* 2023, p. 14. [online]. Available at: https://www.researchgate.net/publication/376704817_Challenging_EU_Sanctions_against_Russia_The_Role_of_the_Court_Judicial_Protection_and_Common_Foreign_and_Security_Policy.

35 PTUKHA, S. S. Ekstraterytorialna diia prava Yevropeiskoho Soiuzu. Entsyklopediia mizhnarodnoho prava: u 3 t. / redkol.: Yu. S. Shemshuchenko, V. N. Denysov (spivholovy) ta in.; In-t derzhavy i prava im. V. M. Koretskoho NAN Ukrainy. Kyiv: Akademperiodyka, 2017. T. 2: E–L. p. 47. (in Ukrainian)

36 FALALIEIEVA, L. Zakhyst osnovopolozhnykh prav u intehratsiinomu pravoporiadku Yevropeiskoho Soiuzu: monohrafiia. Kyiv, 2020. p. 202 (in Ukrainian).

jurisdiction over the relevant case.[37] These dynamics highlight the urgent need for improved coordination and dialogue at the international level. The legitimacy of extraterritorial jurisdiction shall be continuously assessed against the principles of proportionality, respect for state sovereignty, and sovereign equality of states.

4. External Dimension of EU Activities and Human Rights Impact Assessment

The widespread practice of unilateral and overly broad exercise of extraterritorial jurisdiction encouraged the Council of the EU to adopting Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.[38] In this way, the EU protected itself from these practices. The preamble to this regulation states that it refers to cases where a third country has enacted certain laws, regulations, and other legislative instruments which purport to regulate activities of natural and legal persons under the jurisdiction of the Member State (para. 6) and emphasises that, if applied extraterritorially, such legal acts violate international law and impede the achievement of the objectives set out in this Regulation (para. 7). In addition, it is stated that such laws, regulations and other legal instruments, as well as actions based on them or arising from them, affect or may affect the established legal order and have adverse effects on the interests of the EU and the interests of natural persons/legal entities exercising the rights (para. 8)[39] guaranteed by the EU. On 21 December 2021, the CJEU issued a significant ruling in the *Bank Melli Iran* case (C-124/20), clarifying the scope and application of the Regulation (EC) No 2271/96. In particular, it was ruled that the prohibition for EU residents to comply with any foreign requirement or prohibition as established by this regulation applies "…even in the absence of an order directing compliance issued by the administrative or judicial authorities of the third countries which adopted those laws".[40]

[37] PEREMOT, S. Ekstraterytorialne zastosuvannia konkurentnoho prava YeS: vynyknennia ta rozvytok yurysdyktsiinoi modeli. *Ukrainskyi shchorichnyk mizhnarodnoho prava*. 2009. Kyiv: Vyd-vo «Feniks», 2014. p. 352 (in Ukrainian).

[38] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom. *Official Journal of the European Communities*. L 309. Vol. 39. 29 November 1996. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1996:309:FULL&from=EN.

[39] Ibid.

[40] Case C-124/20. Judgment of the Court (Grand Chamber) of 21 December 2021. *Bank Melli Iran v Telekom Deutschland GmbH*. [online]. Available at: https://curia.europa.eu/juris/document/do

Judicial authorities of states that have association relations with the EU have the possibility to apply to the CJEU for a preliminary ruling to obtain an interpretation of the provisions of primary and/or secondary EU law (in this case the author is referring to the Article 107 of Agreement on the European Economic Area), which means that the CJEU's jurisdiction is extended to relations outside the EU,[41] thus expanding the territorial scope of EU law. We should note that this possibility is not usually resorted to. As early as the end of the last century it was initiated to incorporate the "human dimension" into the EU's external relations, its treaty practice. Since then, the European Commission has decided to introduce a standard provision in the EU's treaty practice: the inclusion of a requirement to respect and observe democratic principles and human rights in EU international agreements with third countries, which are identified as essential elements, necessary provisions for concluding international agreements. Criticizing the EU's extraterritorial obligations regarding human rights and social standards in its free trade agreements, Clair Gammage recognizes that the essential elements clause is more robust than the "soft incentive-based" approach.[42] As a rule, such provisions are accompanied by a rule that in case of violation, either of the contracting parties may take appropriate measures, including suspension or termination of the agreements.

With the entry into force of the Lisbon Treaty on December 1, 2009, such safeguards became fundamental in the external dimension of the EU's activities, encouraging the Council of the EU to adopt on May 19, 2014, the Conclusions on a human rights-based approach to development cooperation that encompasses all human rights. At the same time, the European Commission is obliged to conduct a preliminary human rights impact assessment of an international agreement during the negotiation process. "The most certain way of doing so efficiently is to carry out a human rights impact assessment in the preparation phase..."[43] of the international agreement, *before* it is concluded, not after it enters into force (§24 of European Ombudsman's Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement).

The European Ombudsman rightly recognizes that "…the human rights impact assessment is not a collection of data or a response to public opposition,

cument.jsf?text=&docid=251507&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1240123.

41 MURAVIOV, V. I. Ekstraterytorialna diia prava Yevropeiskoho Soiuzu u pravoporiadkakh tretikh krain i uhody pro asotsiatsiiu. *Aktualni problemy mizhnarodnykh vidnosyn*. Zb. nauk. prats. 2013. Vyp. 117 (Chastyna I). p. 65. (in Ukrainian).

42 GAMMAGE, C. Op. cit. p. 19.

43 European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement. 26 February 2016. [online]. Available at: https://www.ombudsman.europa.eu/en/decision/en/64308.

but rather an analytical tool for demonstrating that all necessary factors and circumstances have been taken into account in framing a policy. The human rights impact assessment tool identifies the sources of risks and the human rights impacts...”[44] in areas related to the relevant international agreement at each stage of its implementation. The role of this instrument is primarily preventive, since, having identified negative impacts, it is necessary either to amend the agreed provisions or to take a decision on mitigating measures before concluding an international agreement (§ 25).[45] From a practical point of view, Professor Cedric Ryngaert believes that the EU should carry out a preliminary human rights impact assessment, i.e. during the preparation of an international agreement, and preferably also *ex-post*, at the stage of its implementation.[46] Obviously, “*ex-post* human rights impact assessment” (§ 18)[47] is also inherent in the practice of the European Commission, ensuring the positive impact of the relevant international agreement on human rights and allowing to eliminate/mitigate negative impacts. However, of course, *ex-post* impact assessment cannot replace the tool of preliminary human rights impact assessment, since the latter has both predictive value and is aimed at preventing/eliminating negative human rights consequences.

The obligation to carry out a human rights impact assessment correlates with the obligation to exercise due diligence, which is the need to study, in some cases, to comprehensively review, taking into account the human rights situation in the territory of the contracting state and fully and impartially establishing the potential impact of a particular international agreement on human rights in the territory of that state to ensure that the EU's actions, in particular the conclusion of this agreement, will not lead to human rights violations outside the EU and will not have a negative impact on the benefits of the EU. The peculiarity, as compared to the obligation to carry out a human rights impact assessment, is that the concept/standard of due diligence is linked to the existence of specific concerns about the human rights situation in the territory of the contracting state, i.e. there must be appropriate grounds for such a review. Obviously, this is a procedural obligation of the EU, the failure to comply with which can be qualified as a *clear error of judgment*, which could potentially lead to the annulment of the relevant international agreement. Emphasizing the

44 European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement. 26 February 2016. [online]. Available at: https://www.ombudsman.europa.eu/en/decision/en/64308.

45 Ibid.

46 RYNGAERT, C. Op. cit. pp. 392–393.

47 European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement. 26 February 2016. [online]. Available at: https://www.ombudsman.europa.eu/en/decision/en/64308.

overly abstract level of this approach, Sandra Hummelbrunner concludes: "as a consequence, the Union would still be 'unilaterally' impose its human rights standards on the other State",[48] although the author recognizes that there are good reasons justifying due diligence,[49] the idea of which is to encourage third countries to comply with their human rights obligations, and the EU's desire to ensure compliance[50] by the state concerned.

Monitoring a partner country's compliance with human rights provisions enshrined in an EU international agreement is one of the manifestations of the EU's conditionality policy. The latter is one of the tools introduced under the European Neighborhood Policy as one of the areas of external activity of the integration association aimed at creating conditions for security, stability and prosperity in the neighborhood based on common values, principles of in-depth cooperation and long-term nature of relations. It is about the interconnectedness of political conditions, legal requirements, economic incentives, as well as the importance of their attractiveness, flexibility of approaches, effectiveness of coercive instruments and optimisation of existing incentives to ensure efficiency.

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part 2014 (hereinafter referred to as the EU-Ukraine Association Agreement 2014) is no exception in this sense, as it also contains a clause that provides for the possibility of applying appropriate measures, if the other party fails to fulfill its obligations under it. In this regard, the essential elements of the EU-Ukraine Association Agreement 2014 are noteworthy, which include respect for democratic principles, human rights and fundamental freedoms, respect for the rule of law, which should form the basis of the internal and external policies of the Contracting Parties (Article 2).[51] Thus, the scope of application of these provisions may potentially fall under the extraterritorial effect of EU law.

48 HUMMELBRUNNER, S. Op. cit. p. 45.

49 Ibid. p. 47.

50 Ibid. p. 46.

51 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. *Official Journal of the European Union*. L 161. Vol. 57. 29 May 2014. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529(01)&qid=1580481775906&from=EN.

5. EU External Action Priorities and the Concept of Extraterritorial Obligations

Human rights have been consistently asserted as the basis of the EU's relations with other subjects of international law, with third countries, including EU candidate countries. Reflecting on the extraterritorial application of human rights and the limits of the EU's competence, scholars, including Lorand Bartels and Clair Gammage, share the general conclusion that human rights do not fall within the area of exclusive EU competence,[52] of course, this is confirmed by practice. At the same time, Samantha Velluti and Vasilis P. Tzevelekos note that "the EU does not have a general competence in the field of human rights, that is, conferred competence within the meaning of Article 5(1) and (2) TEU"[53] as amended by the Lisbon Treaty 2007, but it has the relevant obligations to protect fundamental rights, freedoms and, in certain cases, the principles set out in the EU Charter. It is noteworthy that in the EU founding treaties, shared competence is designated by this term, which is used in Article 4 of the Treaty on the Functioning of the European Union[54] (hereinafter referred to as TFEU), which reveals the content of the EU's common competence with the Member States,[55] in accordance with the principle of conferred competence, which the Member States have implemented in the founding treaties to achieve the goals they set.

According to Article 21(2)(b) TEU as amended by the Lisbon Treaty of 2007, one of the objectives of the EU's external action is to "consolidate and support democracy, the rule of law, human rights and the principles of international law",[56] and Article 3(5) of this Treaty states that in its international relations the EU shall promote "... the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international

52 BARTELS, L. Op. cit p. 1079; GAMMAGE, C. Op. cit. p. 19.

53 VELLUTI, S., TZEVELEKOS, V. P. Extraterritoriality of EU law and human rights after Lisbon: the case of trade and public procurement. *Europe and the World: A law review*. 2018. vol. 2, no. 1. p. 5. [online]. Available at: https://livrepository.liverpool.ac.uk/3027467/1/EWLR-2-2.pdf.

54 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union*. C 202/01. Vol. 59. 7 June 2016. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN.

55 See: Division of competences within the European Union. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020.

56 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union*. C 202/01. Vol. 59. 7 June 2016. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN.

law, including respect for the principles of the United Nations Charter".[57] In general, the EU's external action is guided by the values and principles underlying its foundation, development and enlargement, which it seeks to promote: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law (Article 21(1) TEU). In this context, it is worth noting the doctrinal view that, given the linguistic construction, Article 3(5) and Article 21(1) TEU serve to limit the EU's external activities towards third countries, and Article 21(3) TEU is "normatively stronger" than Article 3(5), since the former also refers to "the external aspects of its *(EU's – authors' note)* other policies".[58] Thus, Article 21 and Article 3(5) TEU refer to human rights as belonging to the principles of the integration association's external action, which gave grounds to see it as a global fighter for human rights, which was strengthened by *the EU Strategic Frameworks and action plans on human rights and democracy*,[59] adopted to implement the Strategic Framework in order to ensure a flexible response to changing realities and new challenges.

The Strategic Framework encourages a universal approach to human rights, as well as respect for human rights, democracy and the rule of law,[60] which are the basis for all aspects of the EU's internal and external policies. It is also emphasised that a democratic society is based on human rights and the rule of law,[61] i.e., attention is focused on the interconnectedness of the above-mentioned EU's fundamental values and principles. The Council of the EU also stressed the role of the Joint Communication of the European Commission and EU High Representative for Foreign Affairs and Security Policy "Human Rights and democracy at the heart of EU external action – Towards a more effective approach", which assesses the impact of the policy today and proposes further steps towards the realization of these goals through external action.[62] Equally

[57] Ibid.

[58] See: GAMMAGE, C. Op. cit. p. 4.

[59] EU Action Plan on Human Rights and Democracy 2020-2027. 2020 (extended in 2024). [online]. Available at: https://www.eeas.europa.eu/sites/default/files/documents/2024/Action-Plan-EN_2020-2027.pdf.

[60] See: ŠIŠKOVÁ, N. European Union's Legal Instruments to Strengthen the Rule of Law, their Actual Reflections and Future Prospects. *The European Union – What is Next? A Legal Analysis and the Political Visions on the Future of the Union:* Collective monograph / ed. by Naděžda Šišková. Köln: Wolters Kluwer Deutschland, 2018. pp. 136-162.

[61] Council of the European Union, Document 11855/12, 25 June 2012. Human Rights and Democracy: EU Strategic Framework and EU Action Plan. p. 3. [online]. Available at: https://data.consilium.europa.eu/doc/document/ST-11855-2012-INIT/en/pdf.

[62] Ibid. p. 4.

important is the provision that stipulates the joint responsibility of the EU and its Member States for promoting human rights and democracy beyond their borders,[63] integrating the promotion of human rights and trade, investment, technology, telecommunications, the Internet, energy, environment, corporate social responsibility, development policy, the Common Security and Defense Policy, external dimensions of employment, social policy, the area of freedom, security and justice, including anti-terrorism policy.[64] To this end, the EU is stepping up its efforts in all areas of external action, improving its capacities and mechanisms for early prevention of crises that could lead to human rights violations. In its development cooperation, the *human rights-based approach* will be used to ensure that the EU's efforts to assist partner countries are intensified, thus contributing to the implementation of their international human rights obligations.[65] The above emphasizes the importance of strengthening the EU's cooperation with partner countries, including candidate countries, as well as civil society, international organizations, including the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE), the African Union, the Association of Southeast Asian Nations (ASEAN), the Organization of American States, the League of Arab States, the Organization of Islamic Cooperation, and the Pacific Islands Forum, in order to encourage the consolidation of regional human rights mechanisms.[66] It should also be borne in mind that the EU systematically develops partnerships with the United Nations, guided in its activities, *inter alia,* by the document called Taking the UN-EU Strategic Partnership on Peace Operations and Crisis Management to the Next Level: Priorities 2022-2024.[67] It is noteworthy that the EU Delegation to New York has an extended observer status at the UN, representing the common positions of the Member States.

The doctrine also actively develops flexible approaches related to the EU's vision of the role of a global champion of human rights.[68] After all, human rights are not only an important component of achieving balance, but a fundamental

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[63] Ibid.

[64] Ibid. p. 5.

[65] Ibid.

[66] Ibid. p. 8.

[67] Taking the UN-EU Strategic Partnership on Peace Operations and Crisis Management to the Next Level: Priorities 2022–2024. Council of the European Union. 2021. [online]. Available at: https://www.coe-civ.eu/kh/taking-the-un-eu-strategic-partnership-on-peace-operations-and-crisis-management-to-the-next-level-priorities-2022–2024.

[68] HUMMELBRUNNER, S. Op. cit. P. 8; SZEPELAK K. Judicial Extraterritorial Application of the EU Charter of Fundamental Rights and EU Trade Relations – Where Do We Stand Today? *EU Trade Agreements and the Duty to Respect Human Rights Abroad* / Eva Kassoti and Ramses A. Wessel (eds.). *CLEER Papers*. 2020. No. 1. p. 37. [online]. Available at: https://www.asser.nl/media/679745/cleer020-01_web_final.pdf.

basis, the core of coherence of the EU's external activities, ensuring compliance with common values and fundamental principles, among which respect for human rights occupies a prominent place. Obviously, Professor Enzo Cannizzaro notes, the EU's aspirations as a global champion of human rights are limited by the narrow scope of the principle of conferred powers.[69] The founding treaties emphasize that the EU "shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties" (Article 3(6) TEU), and that "the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers" (Article 7 TFEU)".[70] Thus, compliance with the principle of coherence in the EU's external action is important if the question of whether its human rights obligations can/have extraterritorial application is to be answered in the affirmative. As Professor Cedric Ryngaert argues, a simple competence-based standard prevails: in exercising its powers, the EU has human rights obligations to persons affected by bad governance, regardless of their location.[71] At the same time, the European Ombudsman points out that "...good administration means, in the first place, observance of and respect for fundamental rights. In fact, where fundamental rights are not respected, there cannot be good administration. Accordingly, EU institutions and bodies must always consider the compliance of their actions with fundamental rights and the possible impact of their actions on fundamental rights. This applies also with respect to administrative activities in the context of international treaty negotiations. The EU Administration should not only ensure that the envisaged agreements comply with existing human rights obligations, and do not lower the existing standards of human rights protection, but should also aim at furthering the cause of human rights in the partner countries." (§ 10).[72] Finally, in the external dimension, in its external activities, the EU is obliged to respect human rights as provided for in the above-mentioned provisions of the founding treaties, generally recognized principles and norms of international law, *inter alia,* customary international law.

Obviously, the EU's extraterritorial human rights obligations are primarily derived from the EU Charter as the up-to-date catalog containing a systematic list of confirmed fundamental rights guaranteed by the Union. The EU Charter

[69] CANNIZZARO, E. Op. cit. p. 1099.

[70] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union*. C 202/01. Vol. 59. 7 June 2016. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN.

[71] RYNGAERT, C. Op. cit. p. 380.

[72] European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement. 26 February 2016. [online]. Available at: https://www.ombudsman.europa.eu/en/decision/en/64308.

is explicitly silent on territorial application and jurisdiction, which may create opportunities for expanding its geographical coverage.[73] In fact, Professor Cedric Ryngaert recognizes that Article 51 of the EU Charter explicitly deals with the scope of application, but it is covered in a functional rather than territorial manner,[74] since the provisions of the Charter "are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law" (Article 51(1)).[75] Of course, a competent determination of the geographical scope of the EU Charter is extremely important,[76] but the CJEU in its case law has not yet given an unambiguous answer regarding its possible extraterritorial application. Thus, when it comes to issues like this one, "timing and a sense of realism" do matter here.[77]

In the *Front Polisario* case, the General Court applied the provisions of the EU Charter to the Sahrawi people of Western Sahara in the context of the Council of the EU decision on the liberalization agreement, without explicitly stating that the EU Charter gives rise to extraterritorial obligations. It recognized violations of the fundamental rights guaranteed by the EU Charter, in particular: human dignity (Article 1), right to life (Art. 2), right to the integrity of the person (Article 3), prohibition of slavery and forced labor (Art. 5), freedom to choose an occupation and right to engage in work (Article 15), freedom to conduct a business (Article 16), right to property (Art. 17), fair and just working conditions (Art. 31), prohibition of child labour and protection of young people at work (Art. 32) (§ 228).[78] In addition, the General Court held that when concluding an agreement with a third country, the Council of the EU must take into account the impact of

73 RYNGAERT, C. Op. cit. p. 379.

74 Ibid.

75 Charter of Fundamental Rights of the European Union. *Official Journal of the European Union*. C 202/02. Vol. 59. 7 June 2016. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN.

76 For the CJEU's legal positions on these issues, see: Case C-104/16 P Council of the European Union v. Front populaire pour la libèration de la saguia-et-hamra et du rio de oro (Front Polisario) (Judgment of the Court (Grand Chamber) of 21 December 2016). ECLI:EU:C:2016:973. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CJ0104_SUM.

77 SCHNEEMELCHER, P., HAAS, J. Rules enforcement in the EU: "conditionality" to the rescue? *Bertelsmann Stiftung Policy Paper*. 28.05.2019. p. 11. [online]. Available at: https://www.delorscentre.eu/fileadmin/user_upload/20190528_Konditionalitaet-und-MFR_Schneemelcher_Haas1-2.pdf.

78 Case T-512/12 Front populaire pour la libèration de la saguia-et-hamra et du rio de oro (Front Polisario) v. Council of the European Union (Judgment of the General Court (Eighth Chamber) of 10 December 2015). ECLI:EU:T:2015:953. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:T:2015:953.

the agreement on the implementation of fundamental rights in that state (§228).[79] In other words, the Council in particular and the EU institutions in general have extraterritorial obligations under the EU Charter, which apply on a purely causal basis.[80] The decision of the General Court was set aside by the Court of Justice, which limits its precedential value.[81] Sharing this conclusion, Sandra Hummelbrunner emphasizes that the precedential nature of the General Court's decision is somewhat limited, however, since the Court has never considered such cases on the merits, but only reversed the decision of the General Court, many questions regarding the application of the EU Charter or the provisions of EU law in general in its external activities, in situations of its negative consequences for human rights in third countries, still remain open,[82] attracting the attention of scholars and practitioners.

Exploring the EU's extraterritorial human rights obligations in its foreign trade and investment policy, Dr. Antal Berkes points out that "…the EU has an obligation under its own 'constitutional law', customary international law and its human rights treaty obligations to assess and prevent foreseeable human rights violations in third countries as a consequence of its domestic policies. Therefore the EU has to integrate risk assessment in its trade and investment policies..."[83] Professor Enzo Cannizzaro, recognizing the principle of territoriality as having stood the test of time, notes that in the field of human rights, there is a paradigm shift from the concept of territoriality to the functional concept. In addition, according to the scholar, one should not limit oneself to the geographical or functional sphere, but rather restrictive extraterritoriality is an ideal paradigm for the vexed question of extraterritorial application of human rights.[84] The scholar summarizes: separation of the concept of jurisdiction from its original understanding based on the principle of territoriality is especially appropriate in the field of human rights. If the scope of the state's powers is not determined by the territorial test, then the same test should determine the scope of its obligations to respect human rights.[85] This view is shared by Professor Cedric Ryngaert, who emphasizes that the distinction between people based only on the status of a particular territory is contrary to the universal application of human rights.[86] At

79 Ibid.

80 RYNGAERT, C. Op. cit. p. 381.

81 Ibid.

82 HUMMELBRUNNER, S. Op. cit. pp. 10–11.

83 BERKES, A. The extraterritorial human rights obligations of the EU in its external trade and investment policies. *Europe and the World: A law review*. 2018, vol. 2, no. 1. p. 16. [online]. Available at: https://bura.brunel.ac.uk/bitstream/2438/19661/1/FullText.pdf.

84 CANNIZZARO, E. Op. cit. pp. 1093–1094.

85 Ibid. p. 1095.

86 RYNGAERT, C. Op. cit. p. 392.

the same time, the latter form the basis of the EU's functioning in the internal and external dimensions of its activities. Ensuring synergy between different areas of the EU's external activities will prevent fragmentation in ensuring the observance and protection of human rights.

6. Conclusions

The above crystallises the need for harmonisation of legal regulation and convergence of its application in the field of human rights. In this regard, the following is of great importance: compliance with universally recognised basic principles and norms of international law, primarily *jus cogens* norms of general international law, the content of which corresponds to *erga omnes* obligations, as well as common values and fundamental principles of the EU law; taking into account the peculiarities of the human rights protection system in the EU, the role of institutions in the development of jurisdictional practice of extraterritorial application of EU law in the context of expanding international cooperation and deepening international economic integration; evolution of the approaches used to protect human rights, especially their *hard core* – fundamental rights recognised by the Lisbon Treaty of 2007, confirmed by the EU Charter, and thus guaranteed at the level of primary EU law.

Human rights are consistently affirmed as a *hard core* of the EU's relations with other subjects of international law, with all third countries, including the EU candidate countries. At the same time, human rights are not only an important component of achieving balance, but also a fundamental basis for the coherence of the EU's external activities, adherence to common values and fundamental principles, among which respect for human rights is at the forefront. Ensuring the synergy of different areas of the EU's external activities will obviously prevent fragmentation in ensuring the observance and protection of human rights.

The legal analysis of the available in the special literature conceptual approaches to understanding the extraterritoriality of human rights, extraterritorial application of EU law in the internal legal order of third countries, and the CJEU's case law, gives grounds to conclude that the legal significance of extraterritorial action as a separate manifestation of the application of EU law rules is the possibility of extending their effect in areas within the competence of the EU beyond its borders, i.e., the Member States, to the territory of third countries, to individuals or legal entities under their jurisdiction, whose relations (behaviour/practices) have the necessary connection with the EU: have been carried out within its borders or have/may have a significant actual impact on it, in particular on the EU internal market, fundamental rights (regarding consumer protection, personal data protection, etc.) are recognised, confirmed and guaranteed by the EU. The foregoing demonstrates the multifaceted nature of the outlined issues, the complexity of conceptualizing the extraterritoriality of human rights, and the ambiguity of the vision and perception of the latter both in international law and in the EU legal order.

The understanding of respect for human rights as a *hard core* of common values and human rights standards has provided grounds for distinguishing *internal (at different levels of the EU)* and *external (in relation to third countries) dimensions* of ensuring its observance in EU practice. The external dimension is aimed primarily at involving third countries in European integration processes on the basis of common values and civilizational achievements, which are thus directly or indirectly disseminated by the EU within various forms and models of regional cooperation, including the renewed European Neighborhood Policy. The respect for human rights is a sustainable fundamental part of the modern concept of human rights, an important component of the concept of fundamental rights and common values that form the core of EU human rights standards, and ensuring respect for them is one of the essential elements of international EU agreements, including the EU-Ukraine Association Agreement 2014.

As a global champion of justice, the EU seems to be changing its approach to the extraterritorial nature of sanctions policy. While earlier the integration association objected to the extraterritorial character of financial sanctions, the latest packages against Russia showed the opposite trend, because primary and direct measures were not enough to achieve the desired effect, so there is an opinion that the EU referred to the so-called secondary sanctions with a more explicit extraterritoriality. Despite the fact that sanctions are one of the manifestations of restrictions on the movement of capital, their existence is necessary in the current conditions of violation of the international legal order by the aggressor state.

The conclusion of the EU-Ukraine Association Agreement 2014 initiated the newest generation of basic agreements with the countries of the Eastern Partnership, a new institutional and legal mechanism of bilateral special relations based on common values that permeate all components of the EU-Ukraine Association Agreement 2014, constituting its most essential element, and also ensured the improvement of the existing and introduction of new dimensions of integration interaction, certifying the increase in the degree of legal integration and determining the mechanisms for its achievement. The effectiveness of the fulfillment of the EU-Ukraine Association Agreement 2014 and ensuring respect for human rights will obviously depend on how effectively Ukraine, as a candidate country for accession to the EU, will carry out systemic internal transformations and use all available instruments, all mechanisms of cooperation with the EU that influence the development of European integration processes. The above has a practical value for deepening the political association and strengthening the economic integration, increasing the efficiency and speeding up the result-oriented practical cooperation of Ukraine with the EU on the basis of the essential elements of the Ukraine-EU Association Agreement 2014 on ensuring respect for the common values and fundamental principles that should form the basis of the domestic and foreign policy of Ukraine and the EU. Such practices of integrative cooperation are particularly important for the state that acquired candidate status during the legal regime of martial law, while opposing the Russian Federation as an aggressor state.

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Mediation and the Right to Effective Judicial Protection in the Case-law of the Court of Justice of the European Union.

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Summary: The article focuses on the case law of the Court of Justice of the European Union in relation to mandatory mediation and its compatibility with the right to effective judicial protection. It analyses the general principles formulated in the Unibet and Impact judgments, in which the Court of Justice defined the limits of procedural autonomy of Member EU Member States through the principles of equivalence and effectiveness of EU law. On that basis, it subsequently develops a framework for assessing the compatibility of mandatory mediation with EU law. The key decision in Alassini constitutes the Court of Justice's first direct ruling on mandatory mediation, in which it recognised its admissibility under certain conditions. The subsequent Menini and Rampanelli judgment further refined the proportionality test established in Alassini and applied it for the first time to specific national legislation. The aim of this article is to critically evaluate how the Court of Justice has shaped the relationship between the right to effective judicial protection and mandatory mediation through its case law.

Keywords: mandatory mediation, EU law, effective judicial protection, right of access to a court, proportionality, CJEU case law, ECtHR case law

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1. Introduction

The case law of the Court of Justice of the European Union (CJEU) has long had a fundamental influence on the development of many areas of law, including alternative dispute resolution (ADR). Alternative dispute resolution is often presented in EU discourse as a more effective, faster and less costly alternative to court proceedings, but statistics show that its use in EU Member States remains limited. One of the instruments intended to support its development was the adoption of Directive 2008/52/EC on mediation.[1] This directive granted Member States broad discretion in its implementation, which raised a number of fundamental questions concerning the form, scope and limits of mediation in EU law.

It was in this context that a question of fundamental importance was referred for a preliminary ruling to the Court of Justice of the European Union, namely whether mediation, in particular in its mandatory form, is compatible with the right to effective judicial protection, as protected by Article 47 of the Charter of Fundamental Rights of the EU (the Charter) and Article 6 of the European Convention on Human Rights (the Convention). The obligation to attend an initial meeting with a mediator as a condition for the admissibility of a claim raises questions as to whether such a procedural requirement constitutes an unacceptable restriction on access to justice. Although the Court of Justice was initially cautious in its approach to alternative dispute resolution mechanisms, it has gradually played a key role in defining the balance between the efficiency of the judicial system and the protection of fundamental procedural rights of individuals.

Since procedural law is not comprehensively harmonised at EU level, the decisions of the Court of Justice, which defined the principles of equivalence and effectiveness and the principle of effective judicial protection (Unibet and Impact decisions, see below Chapter 1), play a key role in national procedural practice in the application of EU law. These principles then served as the basis for determining the criteria for assessing mandatory mediation. This is reflected in the Rosalba Alassini and Menini Rampanelli judgments (Chapters 2 and 3), in which the Court of Justice formulated the proportionality test for the first time and provided practical guidance on the conditions under which mandatory mediation can be considered compatible with the right to effective judicial protection. This line of case law thus establishes a comprehensive legal framework for assessing the compatibility of mandatory mediation with EU law.

[1] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. (Hereinafter: Mediation Directive.)

Against this background, the main issue of interest of this paper is whether mandatory mediation is permissible under European Union law and, if so, under what conditions. Below we will endeavor to give answer thereto.

2. Basic framework for the application of national procedural rules

The case law of the CJEU has long been based on the premise that, in the absence of harmonised procedural rules at EU level, the regulation of procedural remedies for the protection of rights arising from EU law falls within the procedural autonomy of the Member States.[2] However, this autonomy is not unlimited and is subject to review by the Court of Justice. National procedural rules are limited by two principles defined by the Court of Justice in the 1970s. These are the principle of equivalence and the principle of effectiveness, which were formulated in the Rewe-Zentralfinanz case.[3] The principle of equivalence means that actions based on EU law must not be subject to less favourable procedural rules than similar domestic actions. The principle of effectiveness, which was specified in the Peterbroeck judgment,[4] prohibits procedural requirements from making it impossible or excessively difficult in practice to exercise rights conferred by EU law.

In relatively extensive follow-up case law, the CJEU clarified these principles, particularly in the Unibet and Impact judgments. These laid the foundations for the subsequent interpretation of the compatibility of procedural mechanisms with the right to effective judicial protection.

In the Unibet judgment[5], the Court of Justice emphasised that the right to effective judicial protection does not require Member States to introduce special procedural measures to protect rights arising from EU law if the existing national

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[2] This means that each EU Member State determines the procedural rules at its discretion (e.g. actions, time limits, remedies, etc.).

[3] Judgment of the Court of Justice of 16 December 1976, Rewe-Zentralfinanz, Case C-33/76. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61976CJ0033.

[4] The principle of effectiveness was clarified by the Court of Justice in its judgment in Peterbroeck (C-312/93) in which it held that even procedural rules that appear to be neutral may be contrary to EU law if, in a specific case, they render the exercise of rights conferred by EU law practically impossible. Judgment of the Court of Justice of 14 December 1995, Peterbroeck, Case C-312/93. Available at: EUR-Lex – 61993CJ0312 – EN – EUR-Lex. (See also Impact, para. 46).

[5] Judgment of the Court (Grand Chamber) of 13 March 2007, Unibet, Case C-432/05. Available at: https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX:62005CJ0432. (Hereinafter: Unibet.)

procedural system provides sufficient means for their protection.[6] At the same time, however, it noted that the procedural autonomy of Member States is limited by the principle of equivalence, according to which the procedural rules governing the exercise of EU rights must not be less favourable than those applicable to similar claims based on national law.

However, if national law lacks procedural means to provide such protection, individuals may rely on rights derived from EU law directly. Restrictions on access to the courts are permissible only if they do not render the exercise of rights under EU law impossible or excessively difficult.[7] The Court of Justice confirmed that effective judicial protection is a fundamental principle of EU law and that any restriction on access to the courts must be compatible with the requirement of effective exercise of rights under EU law.

In light of these decisions, Unibet can be understood as a conceptual basis for considerations of the proportionality of mandatory mediation – that is, whether the obligation to undergo mediation before filing a lawsuit constitutes a reasonable and legitimate restriction on access to the courts.

In addition to the principle of equivalence, the principle of effectiveness is a key limitation on procedural autonomy, which was further developed in the Impact judgment.[8] In this case, the Court emphasised that national rules must not render the exercise of rights under EU law practically impossible or excessively difficult. The Court of Justice set out the criteria for assessing compliance with this principle. The CJEU requires national courts to take into account the specific circumstances of the procedural framework in question, including the length of the proceedings, the financial burden, the procedural complexity and the risk of delay, which may significantly affect the position of the parties to the proceedings. The judgment thus represents a further step in the systematic development of the doctrine of effective judicial protection, which the Court of Justice has also applied in subsequent decisions, including those concerning mediation.

The case law in the Unibet and Impact cases shows that the Court of Justice does not examine national procedural rules in isolation but assesses their functioning within the overall procedural system. It is not the mere existence of a procedural restriction or preliminary stage that is decisive, but its practical effect on the possibility for parties to seek judicial protection. It is precisely

6 Unibet, para. 30.

7 Ibid., paras 42, 43. The legal standing of a party to proceedings is determined by national law; however EU law requires that national procedural rules do not undermine the right to effective judicial protection and comply with the principles of equivalence and effectiveness.

8 Judgment of the Court (Grand Chamber) of 15 April 2008, Impact, Case C-268/06. Available at: https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX:62006CJ0268. (Hereinafter: Impact.)

this substantive approach that makes it possible to assess whether procedural rules preserve real and effective access to the courts. These conclusions are also of fundamental importance in the field of out-of-court dispute resolution, in particular when it is introduced as a mandatory procedural preliminary stage to court proceedings. The obligation to undergo an out-of-court procedure, an information meeting or another form of conciliation may be a legitimate procedural tool, but only if it respects the limits arising from the principles of equivalence and effectiveness, as defined in the case law of the Court of Justice. In other words, such a procedure must not lead to discriminatory treatment of EU rights or effectively prevent or disproportionately impede access to the courts.

The Unibet and Impact case law thus establishes a general methodological framework according to which the right of access to a court is subject to certain procedural restrictions, but these restrictions must pass a test based on the principles of equivalence and effectiveness. This framework subsequently became the basis for assessing the compatibility of mandatory out-of-court procedures, including mediation, with the right to effective judicial protection, as developed by the Court of Justice in later case law. The case law shows how the Court of Justice seeks to strike a balance between the requirement for effective access to justice and the promotion of alternative mechanisms.

3. The birth of case law in the context of mediation: the Rosalba Alassini case

3.1. The right to effective judicial protection in the context of mediation: general case law framework

In the early days of the Court of Justice's case law, alternative dispute resolution mechanisms were not considered equivalent to judicial review, and there was concern as to whether such procedures could provide sufficient procedural protection, in particular the requirement for effective judicial protection and the effective exercise of rights[9] arising from EU law.

In its case law, the CJEU has gradually addressed the question of the extent to which Member States may restrict direct access to judicial protection by offering or even requiring the use of alternative dispute resolution mechanisms, in light of the principle of effective judicial protection enshrined in Article 47 of the

[9] National procedural rules must not render the exercise of rights conferred by EU law impossible or excessively difficult. See Impact, paras 43–49.

Charter[10] and arising from Article 6 of Convention.[11] The content and limits of this right have been primarily developed by the case law of the European Court of Human Rights (ECtHR), to which the Court of Justice repeatedly refers in its case law.

The judgment in Rosalba Alassini[12] was unprecedented, as it was the first time that it explicitly assessed the compatibility of mandatory mediation with the right to effective judicial protection. In this case, the Court of Justice formulated for the first time the criteria according to which the proportionality and acceptability of mandatory mediation in relation to the right of access to a court can be assessed. In assessing the compatibility of mandatory mediation with the right to effective judicial protection, the Court of Justice draws on existing case law, in particular its own case law and that of the ECtHR. This case law framework was then systematically applied in the Alassini judgment.

The dispute itself arose in Italy between several customers (including Ms Alassini) and telecommunications service providers over the quality of the services provided.[13] Under Italian law, consumers had to attempt to resolve the dispute out of court, usually through conciliation proceedings, before bringing an action. Consumers challenged this obligation on the grounds that it violated their right to effective judicial protection under EU law, as it effectively constituted an obstacle to access to the courts.

The essence of the questions referred for a preliminary ruling was whether mandatory mediation is compatible with the right to effective judicial protection. The Court of Justice had to assess whether the obligation to undergo mandatory mediation interferes with the very essence of the right of access to a court and whether it can, under certain conditions, be considered a legitimate means of achieving the objectives.[14] At the heart of the matter was the assessment of whether

10 Charter of Fundamental Rights of the European Union. Available at: https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:12012P/TXT.

11 European Convention on Human Rights. Available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG.

12 Judgment of the Court (Fourth Chamber) of 18 March 2010, Rosalba Alassini and Others (joined cases C-317/08 to C-320/08) v Telecom Italia SpA. Available at: https://curia.europa.eu/juris/document/document.jsf?docid=79647&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=CS&cid=1533192. (Hereinafter: Rosalba Alassini or Alassini.)

13 This was Directive 2002/22/EC on universal service, which was repealed on 20 December 2020 and replaced by the European Electronic Communications Code (Directive EU 2018/1972), which consolidated several directives into a single framework. The Directive aims to ensure the availability of basic electronic communications services at an affordable price for all users in the European Union, regardless of their geographical location, and to protect end-users' rights in an open and competitive telecommunications market. Available at: https://eur-lex.europa.eu/legal-content/CS/TXT/HTML/?uri=CELEX:32002L0022.

14 These objectives may include, for example, reducing the workload of the courts or promoting amicable dispute resolution.

mandatory mediation constituted an unreasonable obstacle to access to judicial protection and whether it was consistent with the principle of effectiveness.

In this case, the Court of Justice systematically drew on existing case law, confirming its commitment to establishing a consistent and continuous line of case law on procedural issues relating to the protection of individuals' fundamental rights. The principle of effective judicial protection formulated in the Unibet case and the limits of procedural autonomy defined in the Impact case created a general framework that the Court of Justice also used in assessing the proportionality and compatibility of mandatory mediation with EU law.[15]

The Dokter case was also significant for the decision in the Alassini case.[16] Although this case did not concern alternative dispute resolution or mediation itself, its conclusions were nevertheless adopted, applied and used as a basis for argument in the Alassini judgment. In the Dokter judgment, the Court of Justice ruled that the right to effective judicial protection is not absolute and may be subject to limitations if they pursue a legitimate aim and do not interfere with the very essence of that right.[17]

The Court of Justice followed up on this line of argument with another important decision in the Mono Car Styling case.[18] In this case, it assessed the compatibility of Belgian industrial property law with EU law. The national legislation in question stipulated that, before bringing an action, the parties must attempt to reach a settlement before a professional body.[19] This was a classic mandatory conciliation procedure, which was similar in nature to mediation, but was not mediation in the strict sense of the word. The Court concluded in the Mono Car Styling judgment that is such an obligation is not incompatible *in abstracto* with EU law, provided that it does not deprive the parties of the possibility of effectively exercising their rights before the courts. It follows that a mandatory attempt at conciliation (or mediation) may be compatible with EU law if it does not restrict the exercise of substantive rights. The significance of the judgment is therefore

[15] Rosalba Alassini, paras 61–70. The Court recalled that effective judicial protection is a general principle of EU law, based on Articles 6 and 13 of the Convention, in the sense that the right to judicial protection is not absolute but may be restricted if that restriction pursues a legitimate aim and preserves the essence of that right.

[16] Judgment of the Court of Justice of the European Union of 15 June 2006, Dokter and Others, Case C28/05. Available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=F6B5F1EDCC5A645D03035B32DA46374D?text=&docid=55361&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=3073752

[17] Dokter, para. 75.

[18] Judgment of the Court (Fourth Chamber) of 16 July 2009, Mono Car Styling, Case C-12/08. Available at:https://curia.europa.eu/juris/document/document.jsf?text=&docid=72480&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=1552951.

[19] Specifically, in the case of a professional body in the automotive industry (Comité paritaire pour la carrosserie).

also evident because the procedural rules of the Member States must not render the exercise of rights under EU law impossible or excessively difficult.[20] It lies in confirming and specifying the principle of effectiveness at the procedural level.

To strengthen its argument, the Court of Justice also referred to the established case law of the European Court of Human Rights (ECtHR), in particular the decision in Fogarty v. the United Kingdom.[21] This judgment is key to defining the limits of the right of access to a court under Article 6(1) of the Convention and represents an important interpretative basis for the EU concept of the principle of effective judicial protection.

In Fogarty, the applicant lodged an application with the ECtHR, claiming that the dismissal of her action by the British courts on the grounds of state immunity constituted a violation of her right of access to a court under Article 6(1) of the Convention.[22]

The finding of the ECtHR can be considered crucial, as it recognised that the right of access to a court is not absolute but may be subject to restrictions that are in accordance with the principle of proportionality.[23] However, when imposing restrictions, the court must be satisfied that the rights exercised are not restricted in such a way and to such an extent that the essence of the right is impaired – the principle of proportionality must be upheld and the restriction must pursue a legitimate aim.[24] The ECtHR concluded that the application of state immunity constituted a legitimate restriction pursuing the objectives of international relations and state sovereignty, and that in this case there had been no violation of Article 6(1) of the Convention.[25]

The case law of the European Court of Human Rights represents the fundamental conceptual basis from which the Court of Justice proceeds. In its established case law, the ECtHR repeatedly emphasises that the right of access to a court under Article 6(1) of the Convention is not absolute. The first decision in which the court explicitly derived the right of access to a court was Golder v. the United Kingdom[26], where it formulated the existence of this right as an integral part of the right to a fair trial. This laid the foundation for a doctrine that was

[20] Rosalba Alassini, paras 48, 49.

[21] Judgment of the European Court of Human Rights of 21 December 200, Fogarty v. the United Kingdom, Case no. 37112/97. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59886%22]}

[22] Fogarty, paras 22, 23.

[23] Ibid., para. 33.

[24] Ibid.

[25] Ibid., para. 39.

[26] Judgment of the European Court of Human Rights (Plenary) of 21 February 1975, Golder v. the United Kingdom, Case no. 4451/70.

subsequently developed in later case law. Subsequently, in Deweer v. Belgium[27], the Court acknowledged the relative nature of this right, i.e. that access to court may be restricted if proportionality between the aim and the means is maintained. This idea was further developed in the judgment in Ashingdane v. the United Kingdom[28], in which the ECtHR introduced the requirement of proportionality between the aim pursued and the means used.

3.2. Conditions for the compatibility of mandatory mediation with the right to effective judicial protection: application in the Alassini judgment

On the basis of this interconnected case law of both European courts, a general framework gradually emerged, which the Court of Justice used as the basis for its decision in the Alassini case. This framework made it possible to assess whether national legislation making the bringing of an action conditional on the mandatory completion of mediation proceedings before an administrative authority is compatible with the right to effective judicial protection guaranteed by Article 47 of the Charter and, at the same time, Article 6 of the Convention.[29]

The Court of Justice's answer to this question is apparent from the introductory passages of the Alassini judgment. The key wording of the decision is that making access to the courts conditional on a mandatory attempt at mediation is not in itself contrary to the right to effective judicial protection under Article 47 of the Charter and Article 6 of the Convention. However, this is subject to certain conditions being met, which the Court of Justice has defined comprehensively.[30] These conditions constitute the criteria that must be satisfied for mandatory mediation to be regarded as compatible with the principle of effective judicial protection.[31]

[27] Judgment of the European Court of Human Rights (Chamber) of 27 February 1980, Deweer v. Belgium, Case no. 6903/75.

[28] Judgment of the European Court of Human Rights (Chamber) of 28 May 1985, Ashingdane v. the United Kingdom, Case no. 8225/78.

[29] It is particularly important to note that the Court of Justice found support in the case law of the European Court of Human Rights. In accordance with Article 52(3) of the Charter, it interpreted the right to effective access to a court in accordance with Article 6 of the Convention. Although the Court of Justice did not explicitly refer to any specific ECtHR decision in the Alassini judgment, its approach is consistent with cases in which the ECtHR has allowed for the possibility of restricting the right to a court, provided that a legitimate aim is pursued and proportionality is maintained (e.g. Deweer v. Belgium, Kudla v. Poland).

[30] KRAMER, X. *Mandatory Mediation Procedures in Effective Access to Courts: CJEU Sets Down Criteria*. 11 July 2017. Conflict of laws. [online]. Available at: https://conflictoflaws.net/2017/mandatory-mediation-procedures-v-effective-access-to-courts-cjeu-sets-down-criteria/

[31] Rosalba Alassini, para. 67.

In the Alassini case, the Court of Justice systematically formulated for the first time six cumulative conditions that must be met in order for mandatory mediation to be compatible with the right to effective judicial protection.[32] These conditions can be understood as institutional safeguards to ensure that mandatory mediation does not exceed the limits of legitimate restrictions on access to the courts. These conditions are as follows:

- the outcome of mediation must not result in a binding decision for the parties,
- mediation proceedings should not cause a significant delay in court proceedings,
- the limitation periods for claims must be suspended during mediation,
- mediation must not entail significant costs,
- participation in mediation must not be exclusively linked to the use of electronic means, i.e. it should be accessible to all persons, and the obligation to undergo mediation must not prevent the parties from applying to the court for interim measures.[33]

The Court of Justice has left it to the national courts to assess whether specific national legislation meets these conditions, which must be verified in each individual case to determine whether mandatory mediation actually preserves effective access to the courts.

In essence, these criteria are intended to ensure that mandatory mediation does not exceed the limits of legitimate restrictions on the right to judicial protection under Article 47 of the Charter. In doing so, the Court of Justice has effectively established a normative framework for the admissibility of mandatory mediation in EU law.

Advocate General Juliane Kokott played a key role in formulating this test, presenting in her opinion the theoretical basis for applying the principle of proportionality in the area of access to a court.[34] She acknowledged that the obligation to undergo mediation constitutes an interference with the right of access to court, but that this right is not unlimited.[35] Such a restriction may be permissible if it pursues a legitimate objective of general interest and does not constitute a disproportionate interference with the very nature of the right to effective judicial protection.[36] The Court of Justice adopted and developed this formulation,

32 Rosalba Alassini, paras 54–59.

33 The article deals with preliminary measures below in the context of case law.

34 Opinion of Advocate General Juliane Kokott in the Rosalba Alassini case, delivered on 19 November 2009. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=73696&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=6595977 Hereinafter: Opinion of AG Kokott in Cases C-317/08 to C-320/08.

35 Opinion of GA Kokott in Cases C-317/08 to C-320/08, para. 47.

36 Ibid., para. 58.

thereby transforming the principle of proportionality from a theoretical principle into a specific legal test applicable to mandatory mediation.

At the same time, it follows from the judgment that the Court of Justice's approach can be described as more pragmatic, as it did not require formal perfection of the Italian legislation, but was satisfied that the Italian legislation essentially fulfilled the conditions.[37]

The Court also adopted an explicit quotation from Advocate General Kokott's opinion, according to which there is a less restrictive alternative to mandatory conciliation, as purely voluntary out-of-court dispute resolution does not constitute a sufficiently effective means of achieving the objectives in question.[38] The Court of Justice thus made clear its position that voluntary mediation alone may not be sufficiently effective and that certain restrictions on access to the courts may therefore be justified if they comply with the principle of proportionality.

The Alassini judgment thus ultimately became the basis for applying the proportionality test in the context of mandatory mediation. The Court emphasised that mandatory mediation must not disproportionately restrict access to the courts and that its compatibility with EU law is conditional on the effectiveness of judicial protection being preserved.[39] In the literature, there is an interpretation according to which the obligation to participate in mediation is fulfilled by the mere attempt at mediation, not by continuing the proceedings until their conclusion.[40] The judgment paved the way for EU Member States to enshrine certain forms of mandatory mediation in their national legal systems without fear of conflict with EU law.

The fundamental conclusion of the Alassini judgment is the confirmation that the right of access to a court is not absolute but may be restricted, provided that its essence is preserved and the restriction pursues a legitimate aim. It also systematically defined for the first time the conditions under which mandatory mediation may be compatible with the right to effective judicial protection. This also created a normative framework that allows for the compatibility of mandatory out-of-court dispute resolution mechanisms with EU law.

The Court of Justice has shown continuity in its decision-making practice. It is noteworthy that the selection of previous case law by the Court of Justice was

37 The fact that the Italian Government is pursuing legitimate objectives of general interest was also confirmed by the Advocate General in her Opinion in Cases C-317/08 to C-320/08, para. 45.

38 Rosalba Alassini, para. 65.

39 Ibid., paras 61–67.

40 JAGTENBERG, R. Het Alassini arrest en verplichte bemiddeling. *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement*. 2010, no. 2, pp. 35–43. [online]. Available at: https://pure.eur.nl/en/publications/het-alassini-arrest-en-verplichte-bemiddeling?

instrumental rather than mechanical. The Court did not seek factual similarities between individual cases, but rather general principles that would support its legal argumentation. This approach showed that the doctrine of proportionality, as applied by the Court of Justice, has its theoretical roots in the case law of the European Court of Human Rights.

4. Development of case law in the field of mediation: the Menini and Rampanelli case

4.1. Application of the proportionality test in the context of mandatory mediation

The Court of Justice explicitly followed up on the conclusions of the Alassini judgment on this issue in the Menini and Rampanelli case.[41] In this decision, it further developed the application of the proportionality test and applied it for the first time to specific national legislation in practice, thereby providing a practical interpretation. While the Alassini case had a broader impact on the procedural framework for mediation, the Menini and Rampanelli judgment focuses specifically on consumer relations and interprets Directive 2013/11/EU on alternative dispute resolution[42] in conjunction with Directive 2008/52/EC on mediation.

From the perspective of EU law, this was an interpretation of the ADR and mediation directives, while from the perspective of national law, it was an assessment of Italian legislation,[43] specifically Article 5 of Legislative Decree No 28/2010,[44] adopted as part of the transposition of the Mediation Directive. This provision stipulated that participation in mediation proceedings was a condition for the admissibility of legal action in certain types of civil and commercial disputes.[45]

In 2010, Italy introduced mandatory mediation for selected types of civil and commercial disputes, with non-participation in mediation being

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41 Judgment of the Court (First Chamber) of 14 June 2017, Menini and Rampanelli, Case C-75/16. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=191706&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=3600837. Hereinafter: Menini and Rampanelli.

42 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes. Hereinafter: ADR Directive.

43 Menini and Rampanelli, para. 15.

44 Decreto legislativo n. 28/2010. Available at: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2010-03-04;28. Hereinafter: Legislative Decree.

45 Legislative Decree No. 28/2010, Article 5 (1 bis). In 2022, the category of disputes was expanded through the Cartabia reform (Legislative Decree No. 149/2022 of 10 October 2022).

sanctioned.[46] This legislation raised doubts as to its compatibility with EU law, which came to light in the Menini and Rampanelli case. This was a consumer dispute arising from a credit agreement in which the Italian court stayed the proceedings because, under national law, the bringing of an action was conditional on a mandatory attempt at mediation, and referred questions to the Court of Justice for a preliminary ruling on the compatibility of this provision with EU law.[47]

The first preliminary question concerned the compatibility of Italian legislation on mandatory mediation, which stipulates that an attempt at mediation is a condition for the admissibility of a lawsuit, with Article 47 of the Charter with the right to effective judicial protection, and with the principles of effectiveness and equivalence. The second preliminary question focused on the nature of the penalties for non-participation in mediation proceedings, specifically whether the obligation to pay an amount corresponding to the court fee[48] is compatible with EU law in terms of maintaining access to justice and consumer protection.

In relation to the first question, the Court of Justice's finding that the ADR Directive does not affect the scope of the Mediation Directive is crucial.[49] It recalled that although the Mediation Directive primarily has cross-border scope, nothing prevents Member States from extending national mediation rules to purely domestic disputes. The Court of Justice took into account the opinion of the Advocate General, according to which the extension of the national scope of Regulation No 28/2010 cannot in itself lead to an extension of the material scope of the Mediation Directive.[50] For this reason, the Court concluded that it was not necessary to rule on the relationship between the Mediation Directive and the ADR Directive in the case at hand, as the Mediation Directive did not apply to the dispute in question. At the same time, the two directives are not in conflict with each other, as each has a different purpose, operates in parallel and complements the other.[51]

As regards the answer to the first question itself, the Court did not consider it necessary to rule again on whether a Member State may make access to the

46 See The Italian Mediation Law on Civil and Commercial Disputes. [online]. Available at: https://mediatorsbeyondborders.org/wp-content/uploads/2017/09/The-Italian-Mediation-Law.pdf

47 The consumers stopped repaying their debts, and the bank initiated proceedings against them for a payment order under Italian procedural law. See KRAMER, Xanda. *Mandatory Mediation Procedures in Effective Access to Courts: CJEU Sets Down Criteria*. 11 July 2017. Conflict of laws. [online]. Available at: https://conflictoflaws.net/2017/mandatory-mediation-procedures-v-effective-access-to-courts-cjeu-sets-down-criteria/.

48 Italian legislation regulated the situations in which a court may draw inferences within the meaning of Article 116(2) of the Italian Code of Civil Procedure.

49 Menini and Rampanelli, para. 30.

50 Opinion of Advocate General Henrik Saugmandsgaard Øe delivered on 16 February 2017 in Menini and Rampanelli, para. 60. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CC0075. (Hereinafter: Opinion of AG Øe in Case C-75/16).

51 Opinion of GA Øeho in Case C-75/16, para. 61.

courts subject to a mandatory attempt at mediation, as it had already resolved this issue in previous case law, in particular in the Alassini case. This approach may be seen as an expression of judicial continuity – the Court of Justice does not return to issues that have already been clearly defined in its case law and focuses instead on the practical application of existing principles.

In relation to the second preliminary question, the Court addressed three fundamental aspects that are of key importance for the assessment of mandatory mediation from the perspective of EU case law.[52] First, it was necessary to determine whether the ADR Directive must be interpreted as precluding national legislation such as that at issue in the main proceedings, which makes the use of mediation compulsory as a condition for the admissibility of an action. Secondly, the Court examined whether the Directive allows the consumer's participation in mediation to be made conditional on mandatory representation by a lawyer, and, thirdly, it examined whether national legislation may limit the possibility for consumers to avoid mediation only to cases where they demonstrate the existence of a legitimate reason, and whether such a limitation must be assessed in terms of its proportionality in relation to the right to effective judicial protection.

4.1.1. Mandatory use of mediation as a condition for the admissibility of an action and the question of the principle of voluntariness

In the first part of this question, the Court of Justice, no longer focusing on the relationship between the directives but rather on the material scope of the ADR Directive, considered whether that directive was applicable at all to the Italian legislation at issue in the main proceedings. It pointed out that the ADR Directive does not apply to all disputes involving consumers, but only to those that meet three cumulative conditions.[53] The first of these conditions is that the referring court must verify that the opposition to the order for payment and the application for suspension of provisional enforceability were lodged by the consumer and not by the trader. The second condition requires that the procedure in question complies with and meets the requirements of EU law laid down in Article 4(1)(g) of the ADR Directive.[54] The third condition is that the procedure in question must be entrusted to an alternative dispute resolution entity.[55]

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[52] Menini and Rampanelli, para. 37.

[53] Ibid., para. 40.

[54] The judgment sets out, in particular, the requirements of independence, impartiality, transparency, effectiveness, speed and fairness.

[55] It emphasises that the entity must complywith Article 4(1)(h) of the ADR Directive and be listed in accordance with Article 20(2) of the ADR Directive, which is notified to the European Commission.

As regards the second and third conditions, the Court pointed out that the questions referred for a preliminary ruling do not specify whether the Italian compulsory mediation procedure is actually conducted before a recognised ADR entity, nor whether that entity meets the requirements laid down in the ADR Directive. It was therefore for the referring court to verify those criteria and assess whether they were met. Subject to those verifications, the Court concluded that the ADR Directive is applicable to the Italian legislation at issue in the main proceedings and must therefore be interpreted in the light of the right to effective judicial protection under Article 47 of the Charter.[56]

In the Menini and Rampanelli judgment, the Court of Justice dealt in detail with the issue of the voluntary nature of mediation. The principle of voluntariness is a fundamental feature of mediation, as it means that the parties act without external coercion and that mediation is based on their willingness to find an agreement.[57] As the Court of Justice pointed out, the first sentence of Article 1 of the ADR Directive expressly uses the term 'voluntary', but the second sentence of that article also allows Member States to make participation in alternative dispute resolution procedures compulsory, provided that such an obligation does not impede the exercise of the right of access to the courts. A similar concept of voluntariness appears in the Mediation Directive, on which the Court of Justice also relies.[58] The definition of the very essence of voluntariness provided by the Court of Justice in this judgment is of fundamental importance. According to its interpretation, the voluntary nature of mediation does not lie in the fact that the parties can choose whether to undergo mediation, but in the fact that the parties retain control over the course of the procedure – they conduct the mediation at their discretion, can terminate it at any time and are not forced to accept the outcome if they disagree with it.[59]

The Court further emphasised that the Italian legislation, which introduced a mandatory attempt at out-of-court dispute resolution as a condition for access to the courts, does not jeopardise the objectives of the ADR Directive, as it respects the fundamental principles of voluntariness and effectiveness. This interpretation is also consistent with the judgment in Alassini, to which the Court expressly referred, thereby confirming the consistency of case law not only on

[56] Menini and Rampanelli, para. 44.

[57] See SHTEFAN, A., PRYTYKA, Y. *Mediation in the EU: Common characteristics and advantages over litigation.* ProQuest, 2021, pp. 184-185. [online]. Available at: https://www.proquest.com/docview/ 2705075462?accountid=16730

[58] See Article 3(a) of the Mediation Directive and also Article 5(2) of the Mediation Directive.

[59] See recital 13 of Directive 2008/52/EC on mediation. See also CJEU holds that mandatory mediation is not inherently precluded by EU law. *Herbert Smith Freehills Kramer.* 4 July 2017. [online]. Available at: https://www.hsfkramer.com/notes/adr/2017-07/cjeu-holds-that-mandatory-mediation-is-not-inherently-precluded-by-eu-law.

issues of the compatibility of mandatory mediation with the right to effective judicial protection.[60]

A particularly important point in the decision is the reminder that fundamental rights are not absolute but may be restricted under certain conditions, provided that the restriction pursues a legitimate aim and is not disproportionate in relation to that aim.[61] The Court of Justice thus reaffirmed the application of the principle of proportionality, which is the central criterion for assessing the admissibility of mandatory mediation. It concluded that the requirement of mandatory mediation as a condition for the admissibility of an action is compatible with the principle of effective judicial protection, provided that the conditions set out in the Alassini judgment are met.[62]

4.1.2. Mandatory legal representation and (penalties for) non-participation in mediation

With regard to the issue of mandatory legal representation of consumers, the Court expressly referred to the wording of Article 8 of the ADR Directive, according to which parties to alternative dispute resolution procedures may be represented or assisted by a third party, but this is not mandatory.[63] In its judgment, it explicitly stated that the Directive must be interpreted as precluding national legislation which requires consumers to be represented by a lawyer during mediation. Such a restriction would be contrary to the principle of effectiveness and would make it disproportionately difficult for consumers to access out-of-court dispute resolution.

The second preliminary question focused on the issue of withdrawal from mediation proceedings and penalties for non-participation in mediation. The Court emphasised that Member States must ensure that parties have the possibility to withdraw from mediation at any time, at any stage of the proceedings, if they are not satisfied with its progress, which is directly in line with the interpretation formulated in the Alassini judgment.[64]

In relation to Italian law, the penalty mechanism provided for in Article 8 of Legislative Decree No 28/2010 stipulates that if a party fails to participate in mediation without a valid reason, the court may draw conclusions in the subsequent court proceedings when assessing the evidence within the meaning of Article 116(2) of the Italian Code of Civil Procedure.[65] At the same time, the court may

60 Menini and Rampanelli, paras 53, 54.
61 Ibid., para. 45.
62 Ibid., para. 85.
63 See Article 8(b) of the ADR Directive and also Article 9(1)(b) of the same Directive.
64 Menini and Rampanelli, para. 67.
65 At the time of the judgment, the penalties for non-participation in mediation were regulated in Article 8(4-bis) of Legislative Decree No. 28/2010, but the Cartabia reform – Legislative

impose on the participant an obligation to pay an amount to the state budget corresponding to the standard court fee.[66] The Court of Justice found that such a system of sanctions is not contrary to EU law, provided that it is proportionate and does not impede effective access to the courts. It expressly stated that imposing a penalty only for failure to participate in mediation without a valid reason (and not for terminating participation during the proceedings) is compatible with the ADR Directive. However, it is for the referring court to assess the specific proportionality of these penalties.[67] At the same time, it took into account that the Italian system guarantees a swift and effective procedure and therefore meets the requirement of proportionality within the meaning of Article 47 of the Charter.

The answer to the second preliminary question thus confirmed that the ADR Directive does not preclude national legislation which provides for proportionate penalties for failure to participate in mediation without a valid reason, but at the same time excludes mandatory legal representation or restrictions on the possibility of terminating mediation. Mandatory mediation is thus understood in EU law not as a compelled settlement, but as a mandatory attempt at out-of-court dispute resolution, which must respect the principles of proportionality, effectiveness and voluntariness.

The Court of Justice further confirmed its previous case law from the Alassini judgment, according to which a mandatory mediation system must not prevent the parties from seeking interim measures. At the same time, it stated that it is for the national court to verify whether, in exceptional cases where it is necessary to take interim measures, the dispute resolution procedure allows or does not prevent such measures.[68] In the Menini and Rampanelli case, the Court of Justice reiterated this with reference to the Alassini judgment.[69]

Finally, the Court of Justice also ruled on the conditions under which the obligation to participate in mediation can be considered to have been fulfilled, which is of particular importance for legal practice. It stated that the obligation to undergo mediation is fulfilled by the mere attempt to initiate it, i.e. by participating in the initial information meeting with the mediator.[70] From that moment on, the parties have the right to terminate the process at any time without being

Decree No. 149/2022 moved them to Article 12-bis. Available at: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2010-03-04;28. According to the Italian Code of Civil Procedure, these are procedural consequences enabling the court to draw *argomenti di prova*, that is, evidentiary inferences, from a party's the non-participation of one party in mediation, which the judge may later take into account when assessing the evidence.

[66] Menini and Rampanelli, para. 17.

[67] Ibid., para. 70.

[68] Rosalba Alassini, paras 59 and 67.

[69] Menini and Rampanelli, para. 61.

[70] Ibid., para. 70.

subject to sanctions. This interpretation confirms that mandatory mediation under European law must not be a forced settlement, but only a mandatory attempt at out-of-court dispute resolution, which must remain within the limits of proportionality and voluntariness.

4.2. The proportionality test as the key to mandatory mediation

The proportionality test, which the Court of Justice first formulated in the Alassini judgment, was confirmed and further developed in the Menini and Rampanelli case. It reiterated that mediation under the Mediation Directive is compatible with EU law if it respects the principle of effective judicial protection and fulfils the conditions laid down by case law. This emphasis was also supported by the opinion of Advocate General Henrik Saugmandsgaard Øe, which constitutes an important interpretative element that was reflected in the reasoning of the Court of Justice itself. The Advocate General stated that the obligation to undergo mediation as a condition for bringing an action may be compatible with the right of access to a court, provided that procedural safeguards are maintained.[71] The Court of Justice essentially adopted this conclusion and formulated its key considerations on that basis.

As mentioned above, in its judgment, it expressly referred to the opinion of the Advocate General, in particular with regard to the question of extending the application of Legislative Regulation No 28/2010 to domestic disputes, which cannot in itself lead to an extension of the scope of the Mediation Directive.[72] In assessing the nature of mandatory mediation, the Court further emphasised that what is decisive is not whether mediation is mandatory or voluntary, but whether the right of the parties to access judicial protection is preserved. In this context, it relied on point 75 of the Opinion, according to which Member States retain legislative autonomy as long as the useful effect of the ADR Directive is ensured.[73] In his Opinion, Advocate General Øe referred to Alassini and Others and stated that the considerations adopted by the Court of Justice in that judgment are applicable to national legislation imposing the mandatory use of other forms of alternative dispute resolution, such as mediation.[74]

This line of case law, culminating in the Menini and Rampanelli judgment, represents a fundamental shift in the European concept of mediation. In it, the Court of Justice explicitly acknowledged that Member States may make access

71 Opinion of Advocate General Øeho in Case C-75/16, para. 79.
72 Menini and Rampanelli, para. 34.
73 Ibid., para. 51.
74 Ibid., para. 55.

to the courts conditional on a mandatory attempt at mediation, provided that such a provision is proportionate and preserves the essence of the right to effective judicial protection. The proportionality test has thus become a key criterion for the legitimacy of mandatory mediation in EU law.

The case law of the Court of Justice confirms that the conclusions adopted in the Menini and Rampanelli case represent a permanent interpretative framework for the interpretation of the Mediation Directive. Even in its most recent decisions, such as the judgment in Investcapital[75], the Court of Justice directly refers to its earlier opinion that EU law does not preclude mandatory mediation or mandatory information meetings on mediation, provided that this obligation does not prevent effective access to the courts.[76] This confirms the stability and continuity of the interpretation of Article 5(2) of the Mediation Directive, according to which there is considerable scope for national regulation, but limited by the requirement to maintain judicial protection. At the same time, it should be noted that the Mediation Directive itself does not impose an obligation on Member States to introduce mandatory mediation but merely allows for such legislation on condition that it is proportionate and voluntary.

In conclusion, it can be said that the case law of the Court of Justice has created a comprehensive interpretative framework that allows Member States to introduce various forms of mandatory mediation, but only on condition that the essence of the right to effective judicial protection is preserved. This framework also requires that any national legislation on mandatory mediation must be subject to a proportionality test, which is a key criterion for assessing its compatibility with EU law. Mediation is understood here not as a restriction on access to the courts, but as a procedural tool pursuing the legitimate objectives of EU law.

5. Conclusion

This article focused on a systematic reflection of the case law of the Court of Justice of the European Union concerning mandatory mediation and the gradual development of a general framework within which Member States may restrict access to the courts through mandatory out-of-court dispute resolution mechanisms. It aims to analyse *how the Court of Justice of the European Union*, *through its case law*, *has shaped the general framework for assessing mandatory*

[75] Judgment of the Court of Justice of 3 September 2024, Investcapital, Case C-658/23. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=290002&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=2092714.

[76] Investcapital, para. 23.

mediation and its compatibility with EU law, and how it balances legitimate objectives with the protection of fundamental procedural rights.

An analysis of selected key judgments shows how the Court of Justice has gradually constructed a proportionality test and how it has balanced the promotion of effective procedural tools with the protection of the fundamental right to effective judicial protection under Article 47 of the Charter of Fundamental Rights of the EU and Article 6 of the European Convention on Human Rights. In doing so, it has gradually shaped its interpretation by methodically anchoring it in the general principles of EU law and by developing its reasoning through subsequent case law or by supplementing its arguments with inspiration from the case law of the European Court of Human Rights.

The line of case law from the Unibet judgment through Impact to the key decisions in Rosalba Alassini and Menini Rampanelli has led to the establishment of a coherent normative framework within which Member States may make access to the courts conditional on a mandatory attempt at mediation. The key outcome of the Court of Justice's decision-making practice is the development and gradual refinement of the proportionality test, which has become a key criterion for assessing the compatibility of mandatory mediation with the right to effective judicial protection. This test was first systematically formulated in the Alassini judgment, which defined six cumulative conditions that must be met in order for mandatory mediation not to constitute a disproportionate restriction on access to the courts and thus be compatible with the principle of effective judicial protection.

In the subsequent judgment Menini Rampanelli, the Court of Justice did not address the general admissibility of mandatory mediation, but rather its practical impact in terms of the obligation to participate, penalties for non-attendance at an information meeting with a mediator, the issue of voluntariness and mandatory representation by a lawyer. The Court's reasoning thus represents a shift towards a more specific, pragmatic interpretation, which emphasises whether mediation in the national context actually preserves effective access to the courts. According to the Court of Justice, mandatory mediation is compatible with EU law not *per se*, but only if it pursues a legitimate objective, does not make access to the courts practically impossible or excessively difficult, and preserves the essence of the right to effective judicial protection under Article 47 of the Charter of Fundamental Rights of the EU and Article 6 of the European Convention on Human Rights.

The analysis also shows that, when balancing legitimate objectives in relation to the protection of fundamental procedural rights, the Court of Justice relies on a combination of the proportionality test and the principle of preserving the essence of the right of access to a court. Its reasoning and arguments are based on the case law of the European Court of Human Rights, which understands access to a court as a relative right. There is a considerable degree of consistency between the Court of Justice of the European Union and the European Court of Human Rights in assessing the effectiveness of judicial protection in the sense that it is not the formal existence of a procedural condition that is decisive, but its impact on the possibility of effectively exercising rights.

In answer to the research question posed, mandatory mediation is permissible under EU law if it passes the proportionality test, which is a key tool for balancing the procedural autonomy of Member States and the protection of the fundamental right of access to justice. This framework provides Member States with discretion for introducing mandatory mediation, but at the same time sets clear limits, the exceeding of which would lead to a violation of EU standards of effective judicial protection.

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Years after Brexit: Which British Politicians Opposed the United Kingdom's Membership in the European Economic Community/ European Union?

Viona Rashica*

Summary: The United Kingdom's membership in the European Economic Community marked a very important step in British history. However, a considerable part of British politicians were dissatisfied with EEC. With its transformation into the European Union, their dissents with a number of EU policies increased and the UK's withdrawal from EU membership was seen as the right option. This article aims to specify the British politicians who held opposing views on the EEC/EU within 1974–2016. For the realization of the research was applied qualitative methodology, with special emphasis data analysis method such as content, narrative and discourse. The research results showed that within the period 1974–2016, there were British politicians who considered EEC/EU policies to be the greatest threats to the UK's national security and saw withdrawal from membership as the only solution. The conclusions of the article contribute to increasing knowledge about Brexit, which in 2026 marks a decade.

Key words: United Kingdom; British politicians; opposing viewpoints; European Economic Community; European Union

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1. Introduction

During the 2016 referendum campaign in the United Kingdom (UK) regarding its membership in the European Union (EU), there were a large number of

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politicians who supported Brexit. However, not only in 2016 there were British politicians who opposed Britain's membership in the EU. Since the accession of the UK to the European Economic Community (EEC), there have been politicians who expressed their skepticism with the policies and functioning of the EU. The country's sovereignty, the well-being of the people and national security, according to them, were thought to be threatened by being a member country in the EU.

Brexit, or the voluntary withdrawal of the UK from membership of the EU is considered as one of the main events of the international arena in the twenty-first century[1]. It has opened new chapters in British history and will be known as one of the biggest crises of the EU[2]. Even after 10 years, the names of the British politicians who contributed to this process have not been forgotten. Therefore, the main purpose of this research article is to present the historic of the main British politicians who have raised their voices against the EEC/EU since the UK's membership in the EEC until the Brexit vote.

The research question of the paper is: *Who were the British politicians who most opposed the UK's membership in the EEC/EU and what were the main reasons they aimed to withdraw the country from EEC/EU membership?* While, the hypothesis of this paper is: *The opposing views of a considerable part of British politicians towards the EEC/EU resulted from the fact that the UK's membership of this sui generis entity was seen by them as a threat for the sovereignty and national security of the UK.*

In order to answer the research question as accurately as possible and to verify the raised hypothesis, the paper, in addition to the abstract, introduction, conclusion and references, consists of four specific sections. The second section, in two subsections, explains the UK's membership of the EEC, as well as its decision and withdrawal from EU membership. Meanwhile, the third, fourth and fifth sections are the most important sections of this paper because they present the historic of those British politicians who constantly opposed the UK's membership in the EEC/EU. The third section mentions the British politicians who opposed Britain's membership in the EEC, as well as their reasons. The fourth section highlights the British politicians who requested the review of the UK's membership in the EU, attaching here their reasons. Meanwhile, the fifth section mentions all the British politicians who showed maximum support for Brexit. This section also includes some politicians from other countries inside

1 RASHICA, V. The United Kingdom's Brexit decision in the context of the 2000s enlargements of the European Union. *Europa XXI*, 2025, vol. 48, p. 5.

2 RASHICA, V. The Main Concerns towards the European Union that Led the British to Vote for Brexit. *European Studies – the Review of European law, Economics and Politics*, 2024, vol. 11, no. 1, p. 178.

and outside the European continent, who saw Brexit as the right option for the future of the UK.

The article has a descriptive, explanatory, analytical and comparative nature and or its realization was used the qualitative methodological approach. The method chosen to conduct the research is data analysis. Through content analysis, textual data were categorized, whereas narrative analysis has explored the experiences of British politicians during the period when the UK was a member of the EU, and discourse analysis studied the discourse of British politicians who held opposing views towards EEC/EU policies.

2. The UK's membership of the EEC and its withdrawal from the EU

2.1. The 1975 referendum regarding Britain's membership in the EEC

With the death of French President Charles de Gaulle in 1970, there were no longer any obstacles to block Britain's membership of the EEC. The UK's EEC membership treaty was signed on January 22, 1972 by the British Prime Minister, Edward Heath, whereas membership had entered into force on January 1, 1973[3]. However, two years after membership, a referendum was organized in the UK regarding its EEC membership. In 1974, two general elections were held in the UK[4], in which the Labour Party led by Harold Wilson had won. When he competed in these elections, he promised to renegotiate the terms of the UK's membership in the EEC, which would determine the direction Britain would follow, member state in the EEC with the new renegotiated conditions, or leaving the EEC[5].

The talks with the EEC were carried out by Harold Wilson and he set up a renegotiation committee which included: UK Foreign Secretary, James Callaghan;

[3] UNITED KINGDOM PARLIAMENT. *Into Europe.* [online]. Available at: <https://www.parliament.uk/about/living-heritage/transformingsociety/tradeindustry/importexport/overview/europe/> Accessed: 23.01.2025.

[4] During 1974, two pairs of general elections were held in the United Kingdom, on 28 February and 10 October. In the February election, the Labor Party led by Harold Wilson failed to secure a majority and after his party was unable to form a coalition with other parties, in September he called for early election, which was held on 10 October and in this election Labor secured the narrowest majority on record.

[5] BUTLER, D., KITZINGER, U. *The 1975 Referendum*. 2nd ed. UK: The Macmillan Press, 1976, p. 11.

Secretary of State for Industry, Tony Benn; and Secretary of State for Trade, Peter Shore. The Referendum Information Unit was also created, headed by Martin R. Morland, whose purpose was to inform the press and provide factual data about the renegotiation process and the referendum itself. James Callaghan had called for a radical review of EEC policies and substantial changes to its budget. He also had concerns about the EEC's relations with other states, especially its disputes with the US, emphasizing that the UK intended to remain a member of an effective Atlantic alliance. The main areas in which Britain had expressed concerns about its membership of the EEC were: the Common Agricultural Policy; Britain's contribution to the EEC budget; the aim of the Economic and Monetary Union; the harmonization of Value Added Tax; and the parliamentary sovereignty in the pursuit of regional, industrial and fiscal policies[6].

On June 5, 1975, the UK's EEC membership referendum was held, in which 17,378,581 people or 67.2 % voted for the UK to remain in the EEC, while 8,470,073 people or 32.8 % voted the option of leaving the EEC. As the table 1 shows, all British countries had voted to remain in the EEC:

Table 1. The 1975 referendum vote on the UK's membership of the EEC by British countries[7]

Countries	**Participation in voting**	**Yes**	**No**
England	64.6 %	68.7 %	31.3 %
Wales	66.7 %	66.5 %	33.5 %
Scotland	61.7 %	58.4 %	41.6 %
North Ireland	47.4 %	52.1 %	47.9 %

Source: Table prepared by the author.

[6] MILLER, V. The 1974-75 UK Renegotiation of EEC Membership and Referendum, 2015, *House of Commons Library*, no. 7253, p. 12.

[7] KING, A. *Britain Says Yes: The 1975 Referendum on the Common Market*. Washington: American Enterprise Institute for Public Policy Research, 1977, p. 145.

2.2. Britain's decision to withdraw from EU membership

The organization of the second referendum on Britain's EU membership was mentioned by David Cameron on January 23, 2013[8]. As one of the main promises of the Conservatives for the 2015 British general election, David Cameron after his victory started with the realization of this promise[9]. The EU was informed about the plans of this referendum in June 2015, while in October 2015 Cameron defined the four renegotiating issues with the EU, which were: sovereignty and subsidiarity; commercial competitiveness; non-discrimination in the Eurozone; and free movement and immigration[10]. For economic governance, the EU promised respect for the rights and competences of the UK as a non-member state of the Eurozone. Trade competition would increase as a result of maximum EU commitments as a whole. The UK would not commit to further political integration and the EU promised preventive measures for the abuse of free movement[11]. In February 2016, EU leaders agreed to reach an agreement that would strengthen Britain's special status in the EU. In the same month, David Cameron presented the results of the renegotiation with the EU to the British people, showing them the consequences that could follow from Brexit, especially for the security and economy of Britain[12].

However, on June 23, 2016, the British people voted to withdraw their country from EU membership. A total of 17,410,742 people or 51.9 % of voters had voted to withdraw their country from the EU, while 16,141,241 voters or 48.1 % had voted for the continuation of Britain's membership in the EU[13]. However, not all British countries voted for Brexit, as the table 2 shows:

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8 UNITED KINGDOM GOVERNMENT. *EU speech at Bloomberg.* [online]. Available at: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> Accessed: 25. 1. 2025.

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10 UNITED KINGDOM GOVERNMENT. *PM statement on European Council: 19 October 2015: UK renegotiation.* [online]. Available at: <https://www.gov.uk/government/speeches/pm-statement-on-european-council-19-october-2015> Accessed: 25. 1. 2025.

11 EUROPEAN COUNCIL. *Letter by President Donald Tusk to the Members of the European Council on his proposal for a new settlement for the United Kingdom within the European Union*. [online]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2016/02/02/letter-tusk-proposal-new-settlement-uk/> Accessed: 27.01.2025.

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13 THE ELECTORAL COMMISSION. *Report: 23 June 2016 referendum on the UK's membership of the European Union – Registration and turnout and the result of the referendum*. [online]. Available at: <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/report-23-june-2016-referendum-uks-membership-european-union> Accessed: 28.01.2025.

Table 2. The 2016 referendum vote on the UK's membership of the EU by British countries[14]

Countries	Participation in voting	Remain	Leave
England	73 %	46.6 %	53.4 %
Wales	71.7 %	47.5 %	52.5 %
Scotland	67.2 %	62 %	38 %
North Ireland	62.7 %	55.7 %	44.2 %

Source: Table prepared by the author.

The voluntary withdrawal of a member state from the EU is regulated by Article 50 of the Lisbon Treaty, which states:

– *Any member state may decide to withdraw from the EU in accordance with its own constitutional requirements;*
– *A member state which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the EU. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the EU. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament;*
– *The Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the Council, in agreement with the member state concerned, unanimously decides to extend this period;*
– *For the purposes of paragraphs 2 and 3, the member of the Council representing the withdrawing member state shall not participate in the discussions of the EC or in decisions concerning it. A qualified majority shall be defined*

[14] THE ELECTORAL COMMISSION. *Results and turnout at the EU referendum – Results by region.* [online]. Available at: <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum> Accessed: 28.01.2025.

in accordance with Article 238(3)(b)[15] *of the Treaty on the Functioning of the EU;*

– *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49*[16].[17]

On March 29, 2017, the UK confirmed to the EU its request for the activation of the article in question. Then, on May 22, 2017, the 27 EU member states approved the decision authorizing the start of Brexit negotiations[18]. Both the UK and the EU selected the brightest diplomatic figures for the successful realization of the Brexit negotiations.

Officially, the Brexit negotiations were opened on June 19, 2017. Their first phase was realized in the period June-December 2017, through six rounds. The three primary issues of the talks at this phase were: the rights of EU and British citizens; financial arrangements, including the obligations of the UK while it was still a member state of the EU[19]; the dilemma caused by the Irish Border[20]. In December 2017, "sufficient progress" on the main issues of this phase was reassessed and confirmed, and the guidelines for the opening of the second phase of negotiations were also approved[21].

15 Article 238 (3) (b) of the Lisbon Treaty states: Where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72% of the members of the Council representing the participating member states, comprising at least 65% of the population of these states.

16 Article 49 of the Lisbon Treaty states: Any European state which respects the values and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant state shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the EP, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the member states and the applicant state. This agreement shall be submitted for ratification by all the contracting states in accordance with their respective constitutional requirements.

17 EUROPEAN UNION LAW. *Consolidated version of the Treaty on European Union: TITLE VI – FINAL PROVISIONS: Article 50*. [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M050> Accessed: 28.01.2025.

18 EUROPEAN COUNCIL. General Affairs Council (Art. 50), 22 May 2017. [online]. Available at: <https://www.consilium.europa.eu/en/meetings/gac-art50/2017/05/22/> Accessed: 28.01.2025.

19 CARRAPICO, H., NIEHUSS, A., BERTHÉLÉMY, Ch. *Brexit and Internal Security: Political and Legal Concerns on the Future UK-EU Relationship*. UK: Palgrave Macmillan, 2019, pp. 19-20.

20 The Irish border or the border of Northern Ireland and the Republic of Ireland 500 km, was one of the most complicated issues of the Brexit negotiations because with the withdrawal of the UK from the EU it had to be decided to which the border would belong, the UK outside the EU or the Republic of Ireland inside the EU.

21 CURTIS, J., GOWER, M., KEEP, M., KENNEDY, S., LANG, A., MILLER, V., WEBB, D. Brexit: 'sufficient progress' to move to phase 2. *House of Commons Library*, 2017, no. 8183, p. 5.

The second phase of Brexit negotiations opened on February 6, 2018. In addition to the transition period and the withdrawal agreement, part of the negotiations of this phase was also the issue of the Irish border[22]. However, within the UK there were many disagreements regarding the Brexit process, in which case March 29, 2019 was not Brexit day. The extension of the period defined in Article 50 was requested three times by the British government, on March 20, 2019, on April 5, 2019 and on October 19, 2019[23]. The date 31 January 2020 is officially Brexit day because the Withdrawal Agreement came into force, Britain is no longer a member state of the EU, and it is considered as a third country[24].

The third phase of the Brexit negotiations was about the future UK-EU partnership, with the aim of reducing the economic consequences for both parties. But, in addition to the disagreements between the negotiating parties, this phase of talks was also affected by the COVID-19 pandemic, which received the greatest attention of the UK and the EU. Then, the movement restriction measures to prevent the spread of the coronavirus made the talks of this phase take place through video-conferences[25]. However, despite the very complicated circumstances, the EU-UK Trade and Cooperation Agreement was reached on December 24, 2020. This agreement was approved by the EC on December 29, 2020 and from January 1, 2021 it was temporarily implemented[26], until the EP's consent was received on April 27, 2021 for full implementation[27]. The EU-UK Trade and Cooperation Agreement entered into force on May 1, 2021[28].

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22 MILLER, V. Brexit: who has said what about transition. *House of Commons Library*, 2018, no. 8238, p. 5.

23 EUROPEAN COUNCIL. *Brexit: EU Council takes first formal step towards the conclusion of the withdrawal agreement*. [online]. Available at: <https://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/> Accessed: 28.01.2025.

24 EUROPEAN COUNCIL. *Council adopts decision to conclude the withdrawal agreement*. [online]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2020/01/30/brexit-council-adopts-decision-to-conclude-the-withdrawal-agreement/> Accessed: 28.01.2025.

25 RASHICA, V. *Tërheqja e Mbretërisë së Bashkuar nga anëtarësia e Unionit Evropian dhe implikimet e këtij procesi.* Prishtinë: Botime Artini, 2024, p. 62.

26 EUROPEAN COUNCIL. *EU-UK Trade and Cooperation Agreement: Council adopts decision on the signing*. [online]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2020/12/29/eu-uk-trade-and-cooperation-agreement-council-adopts-decision-on-the-signing/> Accessed: 28.01.2025.

27 EUROPEAN PARLIAMENT. *Parliament formally approves EU-UK trade and cooperation agreement.* [online]. Available at: <https://www.europarl.europa.eu/news/en/press-room/20210423IPR02772/parliament-formally-approves-eu-uk-trade-and-cooperation-agreement> Accessed: 28.01.2025.

28 EUROPEAN COUNCIL. *EU-UK trade and cooperation agreement: Council adopts decision on conclusion*. [online]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2021/04/29/eu-uk-trade-and-cooperation-agreement-council-adopts-decision-on-conclusion//> Accessed: 28.01.2025.

3. British politicians who opposed the UK's membership in the EEC

During the 1975 referendum campaign regarding the UK's membership in the EEC, there were two politicians who strongly supported the withdrawal of Britain from the EEC, *Tony Benn* from the Labour Party and *Enoch Powell*, a former Conservative who switched to the Ulster Unionist Party[29]. Benn had stated during the campaign that EEC membership had cost Britain 500,000 jobs within two years. This increase in unemployment, as well as the trade deficit between the UK and the rest of the EEC, had resulted from the fact that the British had imported more from European countries than they had exported their goods to the latter. Meanwhile, Powell during the campaign had repeatedly asserted that the Common Market "had determined in stages the union of Britain with France, Germany, Italy and other countries in a single nation", in which the UK would be only a "simple province"[30].

In 1979, *Margaret Thatcher* from the Conservative Party came to the head of the British government, who is also the first British female prime minister. Her first objections to the EEC began at the Dublin Summit of the EC on 29 and 30 November 1979. About 70% of the EEC budget was dedicated to agricultural subsidies, but this sector in the UK was small and the British economy was not based on it. She had opposed subsidizing European farmers to the sum of £1,000,000 per year, and as one of the poorest member of the three states that contributed the most to the EEC budget, Thatcher wanted Britain to stop providing this sum of money[31].

Promises and ideas for Britain's withdrawal from the EEC, as well as disagreements with certain policies of the latter, were also present in the 80s. Another Labour promise for the withdrawal of the UK from the EEC was presented by their leader *Michael Foot*. In the Labor manifesto for the 1983 British general election, he promised that if he became prime minister, he would start negotiations for the country's immediate withdrawal from the EEC[32]. But, in this election, Margaret Thatcher won her second mandate as prime minister[33].

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29 The Ulster Unionist Party is a political party from Northern Ireland, which was founded on March 3, 1905.

30 WHEELER, B. *EU referendum: Did 1975 predictions come true?*. [online]. Available at: <https://www.bbc.com/news/uk-politics-36367246?intlink_from_url=&> Accessed: 30.01.2025.

31 MARGARET THATCHER FOUNDATION. *Margaret Thatcher: Press Conference after Dublin European Council.* [online]. Available at: <https://www.margaretthatcher.org/document/104180> Accessed: 30.01.2025.

32 BBC NEWS. *Timeline: Campaigns for a European Union*. [online]. Available at: <https://www.bbc.com/news/uk-politics-15390884> Accessed: 30.01.2025.

33 BBC NEWS. BBC Politics 97 – 9 June 1983. [online]. Available at: <http://www.bbc.co.uk/news/special/politics97/background/pastelec/ge83.shtml> Accessed: 30.01.2025.

In a speech to the British Trade Union Congress at Bournemouth in 1988, President of the European Commission Jacques Delors asserted that in the next ten years the EEC would have responsibility for 80 % of the economic legislation, perhaps also the tax and social legislation in its 12 member states, thus taking the initial steps towards the embryonic stage of a "European government"[34]. He also said that within two years all the main decisions regarding the UK would be taken in Brussels. This statement greatly angered Margaret Thatcher, who turned into a severe Eurosceptic[35]. The image of "a European super-state" was her worst nightmare, because, according to her, such integration would undermine Britain's important positions in European affairs[36]. Then, in a speech on September 20, 1988 at the "College of Europe" in Bruges, Thatcher emphasized that the UK did not prefer a comfortable existence isolating itself within the borders of the EEC. She also said that British support for resistance movements during the Second World War helped to keep the flame of freedom alive in many countries until the last day of the war. This speech received a lot of criticism, being described as harsh, infamous and offensive to those present. She stated that cooperation between sovereign states was the best way to build a successful European community. However, the attempt to suppress nationality by concentrating power in the center of the European conglomerate would be very harmful and dangerous to British objectives[37].

4. British politicians who opposed the UK's membership in the EU

In 1991, the Anti-Federalist League was formed, a Eurosceptic political party, which in 1993 was renamed the United Kingdom Independence Party (UKIP). Its first leader was historian *Alan Sked*. The key priority of this party was the withdrawal of the UK from EU membership[38].

[34] EUROPEAN COMMISSION. 1992: *The Social Dimension: Adress by President Delors at the Trades Union Congress – Bournemouth, 8 September 1988.* [online]. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_88_66> Accessed: 30.01.2025.

[35] BERLINSKI, C. *There Is No Alternative: Why Margaret Thatcher matters.* New York: Basic Books, 2008, p. 320.

[36] CANNADINE, D. *Margaret Thatcher: A Life and Legacy*. UK: Oxford University Press, 2017, p. 108.

[37] MARGARET THATCHER FOUNDATION. *Margaret Thatcher: Speech to the College of Europe ("The Bruges Speech").* [online]. Available at: <https://www.margaretthatcher.org/document/104180> Accessed: 30.01.2025.

[38] UK INDEPENDECE PARTY. *UKIP – About.* [online]. Available at: <https://www.ukip.org/ukip-page.php?id=02> Accessed: 10.02.2025.

James Goldsmith, the billionaire businessman and investor of French-British descent, was known as one of the richest people in the UK. His critical views on the Maastricht Treaty oriented him into politics. He favored a strong society among European countries, but not a single and strong central government because, according to him, the loss of national sovereignty would follow, which would make Europe the political equivalent of a conglomerate with catastrophic consequences[39]. In 1994, Goldsmith founded the Referendum Party, which was a Eurosceptic party. This political party took part in the 1997 British general election and was focused on only one issue, holding a referendum on the UK's membership in the EU. However, this party had not won any seats in the House of Commons. Then, Goldsmith managed to pressure the two main British political parties, which are the Conservative Party and the Labour Party, to commit to such a referendum and as a result of this pressure the UK did not join the Eurozone[40].

The British Prime Minister from the ranks of Labour Party, Tony Blair, who had been at the head of the British government for a decade (1997-2007), had pointed out two major British problems related to the EU, while he was prime minister, which were:

– *The hysterical behavior of the Eurosceptic media in the UK, which were extremely hostile to the EU, which misinterpreted what the EU was doing and considered that everything that made Brussels happy, harmed Britain;*
– *His disagreement with Gordon Brown over the euro currency, for which Blair repeatedly stated that in a world of emerging new powers, Britain needed Europe in order to exert impact and advance its interests. Brown had negative attitudes towards the euro, while Blair had claimed that even if the UK would not join the Eurozone, mainly for diplomatic reasons, such a union sounded positive. Tony Blair in relation to the Eurozone claimed that it would be better for Britain to join the latter and be full players in European economic decision-making*[41].

When there is a strong constitutional issue for a direct democracy such as the UK, British politicians have sought the consent of the governed through a referendum. Referendums related to the EU were mentioned since 2007 by David Cameron. The latter promised that as long as he was in charge of the British government, he would organize a referendum on any treaty that would follow from the Lisbon process. The Lisbon Treaty was ratified by all EU member states in 2009, but regardless of UK ratification, Cameron declared that no substantial

39 SIR JAMES GOLDSMITH. *Sir James Goldsmith: Financier, Politician, Thinker and Environmentalist*. [online]. Available at: <https://www.sirjamesgoldsmith.com/businessman/> Accessed: 10.02.2025.

40 SIR JAMES GOLDSMITH. *Politician*. [online]. Available at: <http://www.sirjamesgoldsmith.com/politician/> Accessed: 10.02.2025.

41 BLAIR, T. *A Journey: My Political Life.* New York: Alfred A. Knopf, 2010, pp. 1498-1499.

transfer of future British powers would take place without the approval of the British people[42].

Nick Clegg, leader of the Liberal Democrats from 2007-2015 and known for his pro-European viewpoints, on February 25, 2008 expressed the necessity of organizing a referendum where the British people would decide whether Britain would remain in the EU or withdraw from it. Such a referendum would put an end to the poisonous debates over the reforms of the Lisbon Treaty, which destabilized British Europhile and Eurosceptic politicians. According to Clegg, those who were Europhiles faced accusations of being "sellouts", while those who held Eurosceptic viewpoints were considered as "crazy or eccentric people"[43].

Conservative MP *Peter Bone*, known for his Eurosceptic viewpoints, on February 1, 2011 sought to amend the EU Bill, which currently promised referendums in Britain whenever there were major changes to the EU treaties. He proposed that if there was a "no" vote in any referendum on certain issues of the EU, the next referendum would follow on the continuation of the UK's membership in the EU, or even the withdrawal from the latter. But, this amendment was rejected with 269 votes, because out of 295 MPs, only 26 had voted for it tij[44].

On October 24, 2011, former Conservative MP *David Nuttall* introduced a motion proposing a debate on the request to hold a referendum in May 2013, which would offer the British people three options for their country: The UK should remain a member of the EU under the current conditions; the UK withdraws from the EU; and renegotiate the terms of the UK's membership of the EU in order to create a new relationship based on trade and cooperation. Described by Nuttall as a historic debate, the latter was tabled by the Backbench Business Committee[45] following the delivery of a petition supported by 100,000 signatories. But this motion was rejected with 372 votes, because out of 483 MPs, 111 MPs supported it[46].

[42] BBC NEWS. *Timeline: Campaigns for a European Union*. [online]. Available at: <https://www.bbc.com/news/uk-politics-15390884> Accessed: 30.01.2025.

[43] WATT, N. *Clegg calls for EU referendum to end 'crazy' debate.* [online]. Available at: <https://www.theguardian.com/world/2008/feb/25/eu.liberaldemocrats> Accessed: 30.01.2025.

[44] BBC NEWS. *MPs reject Tory MP's call for 'in-out' EU referendum*. [online]. Available at: <https://www.bbc.com/news/uk-politics-12340799> Accessed: 30.01.2025.

[45] The Backbench Business Committee is the first business committee which was established on 15 June 2010 by the House of Commons and which enables British MPs to bring to parliament subjects that they suggest, which are to be argued. The committee can consider any topic for debate, including subjects raised in national or local campaigns, reports from select committees and other groups, and issues suggested by constituents, including people who have signed an online petition or a traditional petition.

[46] UNITED KINGDOM PARLIAMENT. *Backbench business debate on the holding of an EU referendum.* [online]. Available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/backbench-business-committee/news/eu-referendum-debate/> Accessed: 30.01.2025.

Former Conservative MP *James Wharton* on July 5, 2013 brought forward the bill regarding the promise made by David Cameron on January 23, 2013 to organize a referendum on Britain's membership in the EU before the end of 2017. The draft bill in question passed its second reading with 304 votes, as well as the question that had to be submitted in this referendum, which was expected to be: "Do you think the UK should be a member of the EU?"[47].

UKIP leader *Nigel Farage*, before the EP elections were held on 22-25 May 2014, declared on May 5, 2014 that he wanted an immediate referendum in the UK regarding its membership in the EU. Farage and his party achieved extraordinary success in these elections, taking 24 seats in the EP, although his party did not have any MPs in the House of Commons[48].

5. British and non-British politicians who supported Brexit

The 2016 referendum campaign in the UK regarding its membership in the EU divided British politicians into two groups, pro-EU and anti-EU. *Chris Grayling,* which served as Leader of the House of Commons in 2015-2016 and Secretary of State for Northern Ireland *Theresa Villiers*, declared that they would resign from their posts if they were not allowed to campaign for Brexit. Therefore, David Cameron on January 4, 2016 agreed to allow his cabinet ministers to join the Brexit campaign because imposing pro-EU lines risked resignation from them[49]. Chris Grayling declared that the continuation of Britain's membership in the EU would be devastating for the future of the country[50]. Theresa Villiers was asked to resign from her post by those who considered Britain's withdrawal from the EU a danger to the peace process in Northern Ireland[51]. From his cabinet, Cameron had the support of 24 members, while 6 others favored Brexit. In addition to the

[47] UNITED KINGDOM PARLIAMENT. *European Union (Referendum) Bill 2013-14-progress of the bill.* [online]. Available at: <https://commonslibrary.parliament.uk/research-briefings/sn06711/> Accessed: 30.01.2025.

[48] BBC NEWS. *Timeline: Campaigns for a European Union*. [online]. Available at: <https://www.bbc.com/news/uk-politics-15390884> Accessed: 30.01.2025.

[49] SHIPMAN, T. *All Out War: The Full Story of How Brexit Sank Britain's Political Class*. UK: William Collins, 2016, p. 17.

[50] BBC NEWS. EU vote: *Where the cabinet and other MPs stand – Cabinet ministers (24 for remain; six for leave).* [online]. Available at: <https://www.bbc.com/news/uk-politics-eu-referendum-35616946> Accessed: 31.01.2025.

[51] MCDONALD, H., HELM, T. *Theresa Villiers called upon to quit if she campaigns to leave EU.* [online]. Available at: <https://www.theguardian.com/politics/2016/jan/09/theresa-villiers-called-upon-to-quit-if-she-campaigns-to-leave-eu> Accessed: 31.01.2025.

two mentioned above, four others were: Secretary of State for Culture, Media and Sport *John Whittingdale*; Secretary of State for Justice *Michael Gove*; Secretary of State for Employment *Priti Patel*, and the former Mayor of London *Boris Johnson*[52]. The latter on May 15, 2016 made a severe statement against the EU, saying that the latter was becoming a "superstate" and was violating Britain's autonomy. According to him, the EU's intentions to unify Europe were similar to Hitler's efforts to dominate the European continent[53].

Of the Conservatives, 185 MPs were against Brexit and 138 MPs supported it. Those who supported Britain's withdrawal from EU membership were: *Nigel Adams; Adam Afriyie; Lucy Allan; David Amess; Stuart Andrew; Caroline Ansell; Richard Bacon; Steven Baker; Stephen Barclay; John Baron; Henry Bellingham; Andrew Bingham; Bob Blackman; Crispin Blunt; Peter Bone; Victoria Borwick; Graham Brady; Julian Brazier; Andrew Bridgen; Fiona Bruce; Conor Burns; David Burrowes; Bill Cash; Maria Caulfield; Rehman Chishti; Christopher Chope; James Cleverly; Geoffrey Clifton-Brown; Geoffrey Cox; Christopher Davies; David Davies; Glyn Davies; James Davies; Mims Davies; Philip Davies; David Davis; Nadine Dorries; Steve Double; Richard Drax; James Duddridge; Iain Duncan Smith; George Eustice; Nigel Evans; Michael Fabricant; Suella Fernandes; Liam Fox; Mark Francois; Richard Fuller; Marcus Fysh; Nusrat Ghani; Cheryl Gillan; Zac Goldsmith; James Gray; Chris Green; Rebecca Harris; John Hayes; Chris Heaton-Harris; Gordon Henderson; Philip Hollobone; Adam Holloway; Gerald Howarth; Stewart Jackson; Ranil Jayawardena; Bernard Jenkin; Andrea Jenkyns; Gareth Johnson; David Jones; Daniel Kawczynski; Greg Knight; Kwasi Kwarteng; Andrea Leadsom; Edward Leigh; Charlotte Leslie; Julian Lewis; Peter Lilley; Jack Lopresti; Jonathan Lord; Tim Loughton; Karen Lumley; Craig Mackinlay; Anne Main; Kit Malthouse; Scott Mann; Paul Maynard; Karl McCartney; Jason McCartney; Stephen McPartland; Stephen Metcalfe; Nigel Mills; Penny Mordaunt; Anne-Marie Morris; Sheryll Murray; Andrew Murrison; David Nuttall; Matthew Offord; Owen Paterson; Mike Penning; Andrew Percy; Stephen Phillips; Christopher Pincher; Tom Pursglove; Will Quince; Dominic Raab; John Redwood; Jacob Rees-Mogg; Laurence Robertson; Andrew Rosindell; Paul Scully; Henry Smith; Royston Smith; Andrew Stephenson; Bob Stewart; Iain Stewart; Julian Sturdy; Rishi Sunak; Desmond Swayne; Robert Syms; Derek Thomas; Justin Tomlinson; Michael Tomlinson; Craig Tracey; Anne-Marie Trevelyan; Andrew Turner; Martin Vickers; Charles*

52 <https://www.bbc.com/news/uk-politics-eu-referendum-35616946>.

53 JOHNSON, B. *The UK & Great Britain – What's the Difference?.* [online]. Available at: <https://www.historic-uk.com/HistoryUK/HistoryofBritain/The-UK-Great-Britain-Whats-the-Difference/> Accessed: 31.01.2025.

Walker; David Warburton; James Wharton; Heather Wheeler; Bill Wiggin; Mike Wood; William Wragg; and Nadhim Zahawi[54].

Then, there were MPs from other parties who had supported Brexit. Of them, there were 10 Labour MPs: *Ronnie Campbell; John Cryer; Frank Field; Roger Godsiff; Kate Hoey; Kelvin Hopkins; John Mann; Dennis Skinner; Graham Stringer; and Gisela Stuart*. Eight MPs from the Democratic Unionist Party who supported the withdrawal of the UK from the EU were: *Gregory Campbell; Nigel Dodds; Jeffrey M. Donaldson; Ian Paisley; Gavin Robinson; Jim Shannon; David Simpson; and Sammy Wilson*. Also, *Douglas Carswell* from UKIP and *Tom Elliott* from the Ulster Unionist Party were pro-Brexit[55].

The Brexit referendum was not only seen as an internal issue of the UK, as the latter served as a gateway to the EU for many countries in the world. Presidents of the US, France and China (Barack Obama, François Hollande and Xi Jinping), together with the prime ministers of Germany, the Netherlands, Norway, Canada, India, Japan and Australia (Angela Merkel, Mark Rutte, Erna Solberg, Justin Trudeau, Shinzō Abe, Narendra Modi and Malcolm Turnbull), called on the British people to vote for the continuation of Britain's membership in the EU. However, Brexit was just one of the main world events that showed the rise of populism in 2016. The presence of populist politicians in the founding states of the EU had incited major fear in the European continent. Their comments on the issue of Brexit were not absent. Eurosceptic politicians such as *Marine Le Pen* from France, *Geert Wilders* from the Netherlands and *Frauke Petry* from Germany, in addition of supporting Brexit, saw it as an encouraging example that should be followed in their countries in the future. Before *Donald Trump* won the 2016 US presidential election, during his campaign he suggested to the British people to vote for the withdrawal of the UK from the EU because he considered the latter to be the main culprit for the refugee crisis in 2015. It should be mentioned that there was total silence regarding the referendum on Britain's membership in the EU in 2016 from the Russian president Vladimir Putin. But, comments about such silence were not absent from David Cameron's side, where according to him Brexit would make Putin happy[56].

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[54] BBC NEWS. EU vote: *Where the cabinet and other MPs stand – Cabinet ministers (24 for remain; six for leave).* [online]. Available at: <https://www.bbc.com/news/uk-politics-eu-referendum-35616946> Accessed: 31.01.2025.

[55] BBC NEWS. EU vote: *Where the cabinet and other MPs stand – Cabinet ministers (24 for remain; six for leave).* [online]. Available at: <https://www.bbc.com/news/uk-politics-eu-referendum-35616946> Accessed: 31.01.2025.

[56] BBC NEWS. *EU referendum: Would Brexit make Putin happy?.* [online]. Available at: <https://www.bbc.com/news/uk-politics-eu-referendum-36461020> Accessed: 31.01.2025.

6. Conclusion

The UK became a member of the EEC in 1973, but immediately after a year the review of this membership began, while in 1975 the decision for the future of Britain, inside or outside the EEC, would be taken by the British people. Despite the anti-EEC voices of Tony Benn and Enoch Powell, the results of the 1975 referendum were in favor of UK membership in the EEC. The Euroscepticism of the first female British prime minister, Margaret Thatcher, began with her opposition to the provision of a large sum of money in the EEC budget for agricultural subsidies. Then such declarations that the EEC can be responsible for the economic and legislative issues of its member states made Thatcher a severe Eurosceptic.

During the 90s, there were two British politicians who founded Eurosceptic parties, Alan Sked founded UKIP and James Goldsmith founded the Referendum Party. Although they did not manage to secure any seats in the House of Commons, they have continuously opposed EU policies. The UK never became part of the Eurozone and Gordon Brown is known as one of its biggest opponents. Before David Cameron entrusted the future of the United Kingdom to the British people in 2016, he had promised to hold referendums in Britain whenever changes were made to EU policies. The Lisbon Treaty reforms have sparked fierce debates between Eurosceptic and Europhile British politicians over the years. In order to escape these debates, politicians like Nick Clegg, Peter Bone, David Nuttall, James Wharton and Nigel Farage called for a referendum on the UK's EU membership.

During the Brexit referendum campaign in 2016, from David Cameron's cabinet there were six politicians who strongly supported the withdrawal of the UK from the EU, which were Chris Grayling, Theresa Villiers, John Whittingdale, Michael Gove, Priti Patel and Boris Johnson. Then, there were 138 Conservative MPs, 10 Labour MPs, 8 MPs from the Democratic Unionist Party, Douglas Carswell from UKIP and Tom Elliott from the Ulster Unionist Party who considered that Brexit was the right way for the future of the UK. Brexit was voted, processed and finalized within the period 2017-2021, and the UK is now considered a third country for the EU. Brexit negotiations have been extremely complicated, while the UK and the EU are still suffering the economic and political consequences of Brexit. The year 2026 marks 10 years since the British voted to withdraw their country from the EU. The goal of all the British politicians mentioned in this article has already been achieved, but in this world of countless problems and challenges, it cannot be denied that the UK needs the EU as much as the EU needs the UK.

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EU PIL, Blockchain, Smart and Ricardian Contracts 2.0

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Summary: This study analyses blockchain technologies and smart contracts within the framework of European Union private international law. It shows that the EU has not recognized blockchain or smart contracts as autonomous legal institutions but regulates them through a technologically neutral and sector-based approach. From a private international law perspective, smart contracts are not independent connecting factors. They are technical tools for concluding and performing contracts, and the applicable law is therefore determined by the Rome I Regulation. Party autonomy remains central, and in the absence of a valid choice of law, the applicable law is identified by objective criteria such as the characteristic performance or, in residual cases, by the test of the closest connection. The decentralized and global nature of blockchain does not in itself displace these rules. The study identifies Ricardian contracts, and especially possible Ricardian 2.0, as a legally compatible architecture for smart contracts. By linking legally binding text with code and blockchain execution, they preserve choice of law, judicial interpretation and mandatory rules while enabling automated performance. The EU approach thus integrates new technology into the existing legal order rather than replacing it.

Keywords: Smart contracts; tokens; cryptocurrencies; contract formation; offer and acceptance; party autonomy; blockchain; EU PIL

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1. Introduction

The development of distributed ledger-based technologies, especially blockchain, is an important technical and legal process.[1] Along with it, the so-called smart contracts, i.e. software tools that enable the automated execution of predefined operations, are coming to the forefront of debates.[2] These technological innovations are eroding traditional legal categories, especially in the areas of private law, private international law, and the regulation of financial and digital markets.[3]

The European Union is responding to these developments by gradually creating a legal framework that is to be characterised by technological neutrality and a sectoral approach.[4] Instead of codifying blockchain or smart contracts as separate legal institutes, EU regulation focuses on the activities, risks, and legal relationships that are implemented through these technologies.[5] This approach leads to the intertwining of public regulation with private law institutes, the application of which remains dependent on interpretation and collision mechanisms in relations with a cross-border element.[6]

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1 PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.* 2021, pp. 1–4 (defining blockchain as a distributed ledger technology and highlighting its systemic impact on digital economic relations). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

2 PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.* 2021, pp. 1–7 (describing smart contracts as self-executing, automated transactions operating on blockchain infrastructures). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

3 WETENKAMP, L. IPR and Digitization – Does Private International Law Need an Update? *Beiträge zum Transnationaler Wirtschaftsrecht*, 2019, no. 161, pp. 11–26 (on the disruptive impact of digital technologies on private law and conflict-of-laws categories). [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com DILEK, D. The International Private Law of Digital Values. Conflict of law interests in the digitization of assets. Tübingen: Mohr Siebeck, 2024, esp. §§ 1, 4; [online]. Available at:

4 DOMURATH, I.; MICKLITZ, H.W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, vol. 20, no. 4, pp. 263–319 (explaining the EU's technology-neutral and sector-specific regulatory strategy within the digital acquis). [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html?utm_source=researchgate.net&utm_medium=article

5 KOHLLER, Ch. On the External Policy of the European Union in the Field of Private Law. *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 2025, vol. 89, no. 3, pp. 451–482 (describing how EU legislation regulates activities, risks and relationships rather than specific technologies through unilateral scope rules and regulatory techniques); [online]. Available at: https://www.mohrsiebeck.com/en/article/zur-aussenprivatrechtspolitik-der-europaeischen-union-101628rabelsz-2025-0041/?utm_source=chatgpt.com see also MiCAR, DSA, DMA and Data Act as technology-neutral instruments. [online]. Available at: https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica?utm_source=chatgpt.com, https://eur-lex.europa.eu/eli/reg/2022/2065/oj, https://eur-lex.europa.eu/eli/reg/2022/1925/oj, https://eur-lex.europa.eu/eli/reg/2023/2854/oj

6 DOMURATH, I.; MICKLITZ, H.-W. *EU Digital Private Law*, 2024, pp. 270–310 (on the interpenetration of public regulatory law and private law concepts in the EU digital order) [online].

The aim of this study is to define the European legal framework for blockchain technologies and summarize the qualifications of smart contracts. The text focuses on EU public law as well as on the private law area, especially EU private international law (EU International Law), which is confronted with the methods of private international law. Based on these methods, the given problematic areas can be assessed through the application of collision and direct tools.[7]

In the case of legal norms of the EU ICJ regulating legal relations established by a treaty with an international element, it is necessary to take into account aspects related to a group of international conventions, European regulations and directives, standardized treaties, customs and customs, individual national regulations not subject to the unification platform, as well as the national legal matter in question.

Smart contracts have been intensively analyzed in legal and interdisciplinary professional literature in recent years.[8] The prevailing view is that their nature remains primarily technological, not normative.[9] Therefore, the definition of basic concepts and institutes, as well as the identification of the relevant EU legal framework, are crucial for a legal understanding of this issue.[10] It is also

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Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html?utm_source=researchgate.net&utm_medium=article ; KOHLLER, C. On the External Policy of the European Union in the Field of Private Law, 2025, pp. 460–470 (on the cross-border reach of EU regulatory private law and the role of conflict-of-laws mechanisms). [online]. Available at: https://www.mohrsiebeck.com/en/article/zur-aussenprivatrechtspolitik-der-europaeischen-union-101628rabelsz-2025-0041/?utm_source=chatgpt.com

7 DILEK, D. *Das Internationale Privatrecht digitaler Werte.*, 2024, esp. §§ 3–6, pp. 48-54 (on the application of conflict-of-laws and directly applicable rules to digital assets and blockchain-based legal relations) [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com;WETENKAMP, L. IPR und Digitalisierung – Braucht das internationale Privatrecht ein Update? 2019, pp. 11–26 (on the need to apply both conflict rules and substantive connecting factors to digital and AI-based contractual relations). [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

8 PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence. 2021, pp. 1–10 (surveying the growing legal and interdisciplinary literature on smart contracts and blockchain-based transactions).* [online]. Available at: [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

9 PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence., 2021, pp. 6–12 (arguing that smart contracts are primarily technical tools for automated performance rather than normative contracts in themselves)* [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787DOMURATH, I.; MICKLITZ, H.-W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 290–305 (on the distinction between technological infrastructures and normative legal ordering in the EU digital acquis). [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html?utm_source=researchgate.net&utm_medium=article

10 DOMURATH, I.; MICKLITZ, H.-W. *EU Digital Private Law*, 2024, pp. 263–319 (mapping the relevant EU digital regulatory framework affecting private law relations, including data,

necessary to have a precise characterization of the subject of digital transactions, i.e. digital assets. It is possible to agree with the view that in private international law, as a rule, it is not the technological architecture used that is decisive, but the way in which the technology is used to create, transfer and apply property values.[11]

2. Smart Contracts and Digital Assets

In the broad concept of digital assets, digital assets can be any digitally captured content or information that has an asset value.[12] This includes text content, e-books, electronic documents, online publications, audiovisual data, video, sound, digital images, and software. In the definitional sense, these are intangible data files stored in electronic systems that are individually attributable to a specific person, transferable and, to a certain extent, excluding simultaneous control by multiple entities.[13]

From a legal point of view, based on the above, the key question is whether a smart contract can be qualified as a contract or whether it is only a technical tool for the implementation of contractual arrangements. The prevailing opinion is that a smart contract is usually not a contract in itself.[14] While a classic contract is the

platforms and algorithmic governance). [online]. Available at: https://www.degruyterbrill.com /document/doi/10.1515/ercl-2024-2014/html?utm_source=researchgate.net&utm_medium=article

11 DILEK, D. The International Private Law of Digital Values. Conflict of law interests in the digitization of assets. Tübingen: Mohr Siebeck, 2024, esp. §§ 1, 4, pp. 29-31 (explaining that in private international law the legal characterization of digital assets depends on their economic and legal function rather than on the underlying technology) [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com;WETENKAMP, L. IPR and Digitization – Does Private International Law Need an Update? *Contributions to Transnational Business Law*, 2019, no. 161, pp. 20–26. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

12 DILEK, D. The International Private Law of Digital Values. Conflict of law interests in the digitization of assets. Tübingen: Mohr Siebeck, 2024, § 1 (defining digital values broadly as digitally represented assets or information capable of having economic value). pp. 59-60, [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com

13 DILEK, D. Das Internationale Privatrecht digitaler Werte., 2024, §§ 1, 4, pp. 74,85 (on digital assets as intangible data sets that are individually attributable, transferable and capable of exclusive control); PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.,* 2021, pp. 7–10 (on crypto-assets as digitally represented values or rights controlled via cryptographic keys).

14 PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 8–14 (arguing that smart contracts are generally not contracts in themselves but operate as a technological *performance layer* for pre-existing or parallel legal agreements). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

result of a consensus of the parties leading to the creation, change or termination of rights and obligations, a smart contract operates primarily at the technological level and serves as a tool for the implementation of the contract.[15] Situations in which the consensus of the parties is expressed exclusively through interaction with the code, for example by accepting pre-programmed terms without the existence of a separate text arrangement, cannot be ruled out. In such cases, a smart contract can perform not only the function of a technical tool, but also the function of a contract. These situations give rise to legal difficulties, especially in terms of interpretation of the content of the obligation and transparency of contractual terms.[16]

In this context, it is necessary to distinguish between two concepts that are often confused in practice: *smart contract code* and *legal smart contract*. *Smart contract code* refers to the very computer program stored on the blockchain, which is automatically executed when defined conditions are met. This code is deterministic, not subject to interpretation and not able to respond to vague legal concepts, changes in circumstances or value corrective of the law. From a legal point of view, therefore, it is usually not a legal act, but a technical instrument that can have legal consequences. On the other hand, the term *legal smart contract* refers to a contractual arrangement in the legal sense, the performance of which is ensured in whole or in part by means of *a smart contract code*. Legal binding in this case results from the expression of the will of the parties, while the code serves only for its automated execution.[17]

If smart contracts are used to define rights and obligations, as well as the conditions for their implementation, they are considered a variant of a smart legal contract. It is a "legally binding agreement in which some or all of the contractual terms are automatically determined and/or implemented by means of a computer program".[18] In the Commission's view, smart contracts can take

[15] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence*., 2021, pp. 8–14 (arguing that smart contracts are generally not contracts in themselves but operate as a technological *performance layer* for pre-existing or parallel legal agreements).

[16] DOMURATH, I.; MICKLITZ, H.-W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 295–315 (on problems of transparency, fairness and protection of weaker parties in algorithmically mediated and code-based contractual environments). [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html?utm_source=researchgate.net&utm_medium=article

[17] PINHEIRO, L. Arbitration, Blockchain and Artificial Intelligence., 2021, pp. 9–16 (distinguishing between *smart contract code* as deterministic software and *legal smart contracts* as legally binding agreements whose performance is automated by code). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

[18] EUROPEAN COMMISSION. Study on Smart Contracts and Distributed Ledger Technologies in the Financial Sector, 2021, defining a smart legal contract as "a legally binding agreement in which some or all of the contractual terms are automatically defined and/or executed by a computer program." [online]. Available at: https://blockchain-observatory.ec.europa.eu/document

three distinct formats: a natural language contract with automated execution, a hybrid contract or an all-code contract. The distinction between these types of smart legal contracts depends on the extent to which all or part of the contractual arrangement is automated or encrypted.

From the above, it follows that smart legal contracts should be considered as another type of contract, similar to standard forms, contracts generated electronically, and the like.[19] Smart contracts do not represent an alternative to contract law, but its technological extension, the legal relevance of which depends on the relationship to classic institutes of private law, not on the code itself.[20]

Regulation (EU) of the European Parliament and of the Council on harmonised rules on fair access to and use of data (the so-called 'Fair Access to and Use of Data'). *Data Act*, proposal No. 2022/0047) defines the term smart contract in a purely technical sense.[21] *A smart contract* is a computer program stored in an electronic ledger system, the execution of which is recorded in this ledger. At the same time, the Data Act deliberately avoids the private law classification of smart contracts: it does not address whether they are a contract, nor does it set out the conditions under which they could be of a contractual nature. Its regulation focuses exclusively on the technical and operational aspects of their operation.

This concept is directly related to the close connection of smart contracts to the blockchain (DLT) environment, which is understood as their necessary operational infrastructure. Blockchain plays the role of a technical layer ensuring the automated execution, recording and immutability of operations. Thus, the Data Act implicitly confirms that smart contracts are understood as a technical tool running on the blockchain, not as an autonomous legal institute.

As it stands, the Data Act provides for a specific legal regime for smart contracts used in the implementation of data-sharing agreements. The essential requirements are contained in Article 36 of the Data Act and aim to ensure their

/download/53a0aeb4-d144-4054-841e-dc169b44f94d_en?filename=SmartContractsReport_Final.pdf&utm_source=chatgpt.com

19 EUROPEAN COMMISSION. Study on Smart Contracts and Distributed Ledger Technologies in the Financial Sector, 2021 (distinguishing between natural language contracts with automated execution, hybrid contracts and code-only contracts). [online]. Available at: https://blockchain-observatory.ec.europa.eu/document/download/53a0aeb4-d144-4054-841e-dc169b44f94d_en?filename=SmartContractsReport_Final.pdf&utm_source=chatgpt.com

20 PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 8–16 (describing the dual-layer model of legal contracts and smart contract code and emphasizing that smart contracts extend, rather than replace, traditional contract law). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

21 Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (*Data Act*), defining *smart contract* as a computer program stored in an electronic ledger and executed and recorded therein. [online]. Available at: https://eur-lex.europa.eu/eli/reg/2023/2854/oj

secure and reliable functioning. Robustness and durability are a key requirement, according to which smart contracts must be designed to demonstrate high technical reliability, minimize the risk of functional errors, and be protected against unauthorized interference or manipulation.[22]

The Data Act thus confirms the approach whereby smart contracts are regulated as a technological mechanism, while questions of their private law classification and effects remain subject to general contract law.[23]

The Data Act requires smart contracts to include secure termination or interruption mechanisms to stop their execution in the event of technical or legal problems. It also stipulates the obligation of archiving and data continuity, including the retention of transaction data, logic and source code for the purpose of subsequent control. Smart contracts must also be protected by effective access control mechanisms to ensure that their operation, modification or deactivation is only possible for authorized persons.[24]

The Data Act also works with the concept *of electronic ledger,* which it defines as an electronic set of data resistant to unauthorized interference, ensuring the authenticity and integrity of data, their precise timing and chronological arrangement.[25] The terminology used and the basic definitional features correspond to *Distributed Ledger Technology* (DLT), which also includes blockchain systems. This terminological framework can be adopted and would be more appropriate in terms of designation than the term *smart contract*. The contracts could then be implemented based on *DLT contracts*. [26]

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[22] Regulation on harmonised rules on fair access to and use of data (*Data Act*), COM(2022) 68 final, Article 36; see recital and regulatory structure highlighting technical and operational requirements for smart contracts in data-sharing agreements. [online]. Available at: https://eur-lex.europa.eu/eli/reg/2023/2854/oj

[23] Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (*Data Act*), (the Regulation deliberately refrains from any private-law qualification of smart contracts and treats them as a technological tool). [online]. Available at: https://eur-lex.europa.eu/eli/reg/2023/2854/oj

[24] Data Act, Article 36 (requirements on safe termination and interruption, data archiving and continuity, access-control and security for smart contracts used in data-sharing agreements). [online]. Available at: https://eur-lex.europa.eu/eli/reg/2023/2854/oj

[25] Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (*Data Act*), (defining “electronic ledger” as an electronic data set resistant to unauthorized alteration, ensuring authenticity, integrity, precise time-stamping and chronological ordering of data — effectively corresponding to distributed ledger technologies such as blockchain). [online]. Available at: https://eur-lex.europa.eu/eli/reg/2023/2854/oj

[26] Data Act, Article 36 (compliance with the underlying data-sharing agreement and allocation of responsibility for conformity assessment and declaration of conformity, with liability left to national law). [online]. Available at: https://eur-lex.europa.eu/eli/reg/2023/2854/oj

3. Blockchain

From a technical point of view, blockchain is defined in the scientific literature as a distributed database replicated between nodes of a decentralized network, in which each node keeps an identical copy and participates in the validation and writing of new data through a consensus mechanism.[27] Although blockchain has traditionally been associated with cryptocurrencies, its use is more general and consists of ensuring the integrity and immutability of data across different domains. Immutability means that once entered, data cannot be subsequently changed or deleted without compromising the integrity of the entire chain.

Blockchain technology is a decentralized database infrastructure that enables cryptographically secure creation, storage, and use of data by multiple participants.[28] Within this infrastructure, transactions are carried out that are the subject of the data itself, while the blockchain performs the function of distributed ledgers ensuring the time sequence and integrity of recorded operations. Data records are aggregated into blocks, each of which is uniquely identified and cryptographically linked to the previous block through a so-called hash value. This creates a sequential chain that allows for the verifiability and immutability of all recorded transactions. As a rule, copies of the entire blockchain are distributed among network participants, which further strengthens its resistance to unauthorized interference.[29]

Each block usually contains its own identification number, data content, thumbprint of the previous block and timestamp, and may include other elements depending on the architecture of the system. This ensures unambiguous identification and sequential linking of individual records.[30]

Blockchain can be run centrally or in a distributed form. If the entire chain is stored simultaneously by several participants (nodes), it is a distributed ledger,

[27] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 1–6 (defining blockchain as a replicated distributed ledger maintained by peer nodes and secured through consensus mechanisms; noting general uses beyond cryptocurrencies to ensure data integrity and immutability across sectors). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

[28] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 1–5 (describing blockchain as a decentralized, shared and cryptographically secured distributed ledger). [online]. Available at:

[29] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 2–6 (on block structure, hashing, chaining of blocks and distributed replication ensuring integrity, immutability and resilience of the ledger). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

[30] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 2–5 (describing the structure of blocks, including hashes of previous blocks and timestamps ensuring sequential integrity of the ledger). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

which is organized as a peer-to-peer network in the event of equality of nodes. This decentralization eliminates the risks associated with centralized data storage.[31]

In terms of access, a distinction can be made between public and private blockchains. Public networks allow for unlimited participation, while private networks are limited to a predetermined range of entities and usually require institutional governance.[32]

In terms of content, it is possible to distinguish between blockchains that function as internal ledgers of digital assets, systems that record external assets, and registers that only serve to document information without a direct link to property rights.[33]

4. Cryptographic Technologies

Cryptographic technologies are used to ensure the authenticity, integrity, and security of a record created or transmitted within a blockchain.[34] The data recipient wants to be sure who the data comes from and that it has not been altered. The so-called hash function is used to convert the data record created by the blockchain application into a hash, i.e. a string of fixed length that uniquely represents the input data. Integrity verification consists of comparing the received hash value with the value recalculated from the data received; Their agreement confirms that there has been no change in content.[35]

[31] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 1–4 (on distributed ledger technology, peer-to-peer networks and the elimination of single points of failure through decentralization). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

[32] PINHEIRO, *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 3–6 (distinguishing public and private blockchains as well as permissionless and permissioned systems, and explaining their governance structures). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

[33] DILEK, D. Das Internationale Privatrecht digitaler Werte., 2024, §§ 1–2 and § 4 (differentiating between blockchains used to record digital assets, external assets and purely informational registries, and discussing their relevance for legal characterization). [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com

[34] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 2–6 (on the use of cryptography in blockchain to ensure authenticity, integrity and security of transactions). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

[35] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 4–7 (explaining cryptographic hash functions, fixed-length hashes and their role in verifying data integrity within blockchain systems). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

To reach a consensus on the validity and order of blocks, blockchain uses consensus mechanisms that fundamentally determine its architecture. These mechanisms can be broadly distinguished into models in which one node proposes a new block and the others validate it, and models in which the entire network of network participants is involved in the creation and confirmation of the next block. The most widely used mechanisms for validation and block creation are Proof-of-Work (PoW), Proof-of-Stake (PoS), and Practical Byzantine Fault Tolerance (pBFT). In addition to these, there are other, less widespread consensus mechanisms, such as delegated Proof-of-Stake (dPoS), Proof-of-Importance (PoI), delegated Byzantine fault tolerance (dBFT), and Proof-of-Authority (PoA), which represent alternative models for achieving compliance in blockchain networks.[36]

From several points of view, a smart contract is always tied to software code. In addition, this code brings another dimension to the legal view of smart contracts, as it allows the creation and cancellation of tokens. In addition to initiating and modifying the transactions that are carried out through it, this code is associated with another terminological question regarding the definition and legal qualification of tokens.[37]

5. Digital Assets and Tokens

In principle, any kind of data can be stored on the blockchain, including data that represents digital assets or values. These digital assets can also be digitally allocated to specific entities on the blockchain in the form of so-called tokens,

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[36] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 6–12; DILEK, D. Das Internationale Privatrecht digitaler Werte., 2024, § 2 (surveying consensus mechanisms such as PoW, PoS and pBFT and their relevance for blockchain architecture and governance). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com

[37] DOMURATH, I., MICKLITZ, H.W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 270–310 (on how digital infrastructures and tokenization reshape private law categories in the EU). [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html?utm_source=researchgate.net&utm_medium=article DILEK, D. Das Internationale Privatrecht digitaler Werte., 2024, §§ 1, 4 (on tokens as digitally represented values or rights created, transferred and extinguished through blockchain code); REGULATION (EU) 2023/1114 (MiCA) (defining and regulating crypto-assets and tokens as legally relevant digital representations of value or rights) [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com;

which represent data records in a distributed ledger.[38] As a rule, those records are clearly assigned to a specific person who is authorised to dispose of them and thus have an element of sole control.[39] A token is a digital unit existing on a blockchain that represents a certain value, right, or claim and is transferable between network users. It serves as a technical and economic tool for the functioning of blockchain systems.[40]

The value of tokens can be based on various mechanisms, by limiting their supply, which creates economic scarcity, or by being able to exchange them for consideration. Tokens may further embody or represent rights, claims, or other factual or legal positions.[41]Therefore, the functional classification of tokens into monetary, utility and investment tokens has become established in the professional literature.[42] Public and open blockchains usually feature a native token

[38] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 6–10 (on crypto-assets as digital representations of value or rights recorded and transferred on a blockchain) [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787; DILEK, D. Das Internationale Privatrecht digitaler Werte., 2024, § 1 (defining digital values as digitally represented assets or positions capable of being allocated to specific persons). [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com

[39] DILEK, D. *Das Internationale Privatrecht digitaler Werte.*, 2024, §§ 1, 4 pp, 13-26 (on individual attribution and exclusive control over digital assets through cryptographic keys and ledger entries); PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 7–9 (on control over crypto-assets via public and private keys). [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com

[40] PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 6–10 (defining crypto-assets and tokens as digital representations of value or rights transferable on a blockchain and serving both technical and economic functions) [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787;DILEK, D. Das Internationale Privatrecht digitaler Werte., 2024, § 1 (on digital values as digitally represented and transferable positions). [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com

[41] REGULATION (EU) 2023/1114 (MiCA) (defining crypto-assets as digital representations of value or rights that can be transferred and stored electronically using DLT, and covering tokens that embody economic or legal positions); [online]. Available at: https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica?utm_source=chatgpt.com

DOMURATH, I.; MICKLITZ, H.W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 270–300 (on tokenization as a key mechanism reshaping market relations and private law categories in the EU digital order) [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html?utm_source=researchgate.net&utm_medium=article.

[42] DILEK, D. *Das Internationale Privatrecht digitaler Werte.*, 2024, § 4 p. 74 (arguing that the common functional classification of tokens into payment, utility and investment tokens is insufficient for conflict-of-laws purposes and proposing a specific typology of digital values tailored

that is closely linked to a particular blockchain. Also referred to as a *coin, this token* incentivizes node operators to maintain the network and creates incentives for its users. At the same time, it allows you to regulate the use of blockchain and ensure its long-term sustainability. Since such a token is exchanged between participants in return for certain behaviour, it effectively functions as a means of payment and is referred to as cryptocurrency.[43]

However, in addition to cryptocurrencies, there are other types of tokens that do not represent money, but, for example, claims against a certain person, rights to certain property, or other economic value.[44]

At the same time, the token is used to determine who holds it, i.e. who has the right to dispose of the token. According to the nature of the rights attached to the token, a distinction is made in particular *between security tokens*, which give rise to a claim for financial consideration or are of an investment nature, and *utility tokens*, which provide other economic values, such as the right to use a certain service.[45] In short, a token is a universal digital carrier of value, right,

to private international law) [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com;WETENKAMP, L. IPR und Digitalisierung – Braucht das internationale Privatrecht ein Update? *Beiträge zum Transnationalen Wirtschaftsrecht*, No. 161, 2019, pp. 21–26 (highlighting the need for functional and interest-oriented qualification of digital assets in conflict-of-laws analysis) [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com.

43 PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 3–8 (on native tokens and cryptocurrencies as incentives for node operators and users, functioning as a medium of exchange in public blockchains) [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787;REGULATION (EU) 2023/1114 (MiCA) (on crypto-assets used as means of exchange and their regulatory classification). [online]. Available at: https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica?utm_source=chatgpt.com

44 REGULATION (EU) 2023/1114 (MiCA) (covering crypto-assets that represent claims, rights or other economic values beyond payment tokens) [online]. Available at: https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica?utm_source=chatgpt.com; DOMURATH, I.; MICKLITZ, H.W. EU Digital Private Law: Tattering or New Beginning*? European Review of Contract Law*, 2024, pp. 270–300 (on tokenization of claims, assets and contractual positions within the EU digital order). [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

45 DILEK, D. *Das Internationale Privatrecht digitaler Werte.*, 2024, § 4 p. 59, (on different types of tokens and the relevance of the underlying rights for legal qualification); REGULATION (EU) 2023/1114 (MiCA) (distinguishing between crypto-assets with investment features, such as asset-referenced and e-money tokens, and those granting access to services); WETENKAMP, L. IPR und Digitalisierung – Braucht das internationale Privatrecht ein Update? 2019, pp. 21–26 (on the legal relevance of the nature of the rights embodied in digital assets) [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com.

or information, whose specific meaning depends on what function is assigned to it within the blockchain.[46]

Records of token holdings and transfers are stored in a decentralized manner on blockchain systems through distributed ledger technology (DLT), and the network itself is often also managed in a decentralized manner. Digital tokens and the activities associated with their management and transfer thus show the nature of globally dispersed or ubiquitous objects that cannot be easily located in a single state.[47]

However, this feature fundamentally complicates the determination of the applicable law, as classic conflict-of-law law is based on the existence of an identifiable place, registered office or other geographically applaudable connecting factor. Such an element is usually absent in decentralized blockchain structures. At the same time, there is no internationally unified substantive regime for cryptocurrencies and tokens, and national legal systems do not agree on their legal nature.[48]

The legal classification of dematerialized tokens and their transfers is particularly problematic. It is indisputable that due to the absence of a physical form, tokens cannot be considered things in the traditional civil law sense. Moreover, in the absence of a special legal regime, it is highly questionable whether the token holder enjoys an absolute right to an intangible good, comparable to the right of ownership.[49]

[46] DOMURATH, I.; MICKLITZ, H.W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 270–305 (on functional, use-based qualification of tokenised assets in the EU digital order) [online]. Available at: https://www.degruyterbrill.com /document/doi/10.1515/ercl-2024-2014/html; DILEK, D. Das Internationale Privatrecht digitaler Werte., 2024, § 1 (emphasising that the legal meaning of digital assets depends on their assigned function rather than the underlying technology). [online]. Available at: https://www.mohrsiebe ck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=c hatgpt.com

[47] DILEK, D. *Das Internationale Privatrecht digitaler Werte.*, 2024, §§ 1–2, p. 12 (describing crypto-assets and tokens as digitally represented, globally distributed values recorded on DLT); PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence.*, 2021, pp. 1–8 (on the decentralized and borderless nature of blockchain-based transactions). [online]. Available at: https:// papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

[48] WETENKAMP, L. IPR und Digitalisierung – Braucht das internationale Privatrecht ein Update? *Beiträge zum Transnationalen Wirtschaftsrecht,* 2019, no. 161, pp. 17–26 (on the difficulty of applying traditional connecting factors to ubiquitous digital objects) [online]. Available at: https:// opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=ch atgpt.com; DILEK, D. *Das Internationale Privatrecht digitaler Werte.*, 2024, §§ 3–5 (on the absence of a harmonized private-law regime for crypto-assets and the resulting conflict-of-laws problems). [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-pr ivatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com

[49] DILEK, D. *Das Internationale Privatrecht digitaler Werte.*, 2024, § 4 (arguing that tokens cannot be treated as tangible things and that their qualification as objects of property rights is

From the point of view of private and public law, it is essential to distinguish between tokens that are subject to specific legal regulation by virtue of the rights or facts they represent, the regulation of financial supervision, and tokens that are subject to general provisions of private law. In addition to financial legislation, other specific regulatory regimes are also possible, in the areas of energy and health.[50]

Until 2024, European law, particularly the definition of financial instruments contained in MiFID II, did not know either cryptocurrencies or units of account. However, with the adoption of the Markets in Crypto-Assets Regulation (CMA), the European Union has created its own comprehensive regulatory framework (*Markets in Crypto-Assets Regulation – MiCA/MiCAR*), which is part of a broader range of sources of EU law.[51]

6. Relevant Sources of EU PILAW

The European Union does not subject blockchain technology to separate legal regulation, but regulates the activities, risks and legal relationships carried out through distributed ledger technologies based on a technology-neutral and functional approach. In EU law, blockchain is conceived as a technical infrastructure whose legal relevance depends on the specific field of use. Since 2020, EU law-making has focused mainly on financial markets, the digital economy and data protection, where both systemic risks and the regulatory need for legal certainty are concentrated.[52]

controversial in the absence of specific legislation) [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com; DOMURATH, I.; MICKLITZ, H. W. *EU Digital Private Law*, 2024, pp. 270–305 (on the unsettled private-law status of tokenised assets in EU law) [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/

50 DOMURATH, I.; MICKLITZ, H.W. *EU Digital Private Law*, 2024, pp. 270–305 (on the overlap between financial regulation and private law for tokenised assets) [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html.

51 REGULATION (EU) 2023/1114 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on markets in crypto-assets (MiCA), OJ L 165, 15.7.2023[online]. Available at: https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica?utm_source=chatgpt.com; DOMURATH, I.; MICKLITZ, H.W. *EU Digital Private Law*, 2024, pp. 263–290 (on the EU's shift from MiFID-based classification to a bespoke crypto-assets regime under MiCA) [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

52 DOMURATH, I.; MICKLITZ, H.W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 263–310 (on the EU's technology-neutral, functional approach to regulating digital infrastructures, including DLT and blockchain) [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html, MÖSLEIN, F. Distributed Ledger Technology and Smart Contracts. In: MÖSLEIN, F.; OMLOR, S. (eds.).

The basic public law regulation is the above-mentioned Regulation (EU) 2023/1114 on markets in crypto-assets (MiCA), which harmonises the rules for the issuance of crypto-assets, the provision of crypto-asset services and establishes a uniform supervisory regime in the EU. Regulation (EU) 2022/858 on the DLT Pilot Regime, which allows for regulated testing of DLT-based trading and settlement systems, as well as Regulation (EU) 2022/2554 (DORA), which imposes ICT and cyber risk management obligations on financial institutions, will apply in addition. Regulation (EU) 2023/2854 (Data Act) is also of particular importance, as it introduces public law requirements for smart contracts used in data sharing, but limits itself exclusively to their technical and operational characteristics and avoids their private law qualification.[53]

6.1. Global Harmonization

In addition to EU regulation, international unification institutions, in particular UNIDROIT and the Hague Conference on Private International Law (HCCH), are also dealing with digital assets and distributed ledger technologies. UNIDROIT has adopted the Principles of Digital Assets and Private Law, which represent a model private law framework for digital assets and govern the issues of possession, transfer, bona fide transferee protection and conflict-of-law localization based on a functional analogy to traditional property rights. HCCH, on the other hand, focuses primarily on the conflict-of-law aspects of digital assets, including the concept of determining the applicable law according to the law determined by the system or protocol itself, which reflects the technical nature of distributed ledgers, but at the same time raises issues of legal certainty and protection of weaker parties.[54]

FinTech-Handbuch. München: C.H. Beck, 2023, pp. 201–245 (on the EU Digital Finance Package and the focus on financial markets, data and systemic risk rather than on "blockchain" as such). Available at: https://cdn-assetservice.ecom-api.beck-shop.de/product/inhaltsverzeichnis/35466459/inhaltsverzeichnis-moeslein-omlor-fintech-handbuch-9783406804779.pdf?utm_source=chatgpt.com

[53] REGULATION (EU) 2023/1114 (MiCA) Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1114; REGULATION (EU) 2022/858 (DLT Pilot Regime); [online]. Available at: https://eur-lex.europa.eu/eli/reg/2022/858/ojREGULATION (EU) 2022/2554 (DORA); [online]. Available at: https://eur-lex.europa.eu/eli/reg/2022/2554/ojREGULATION (EU) 2023/2854 (Data Act); [online]. Available at: https://eur-lex.europa.eu/eli/reg/2023/2854/oj

[54] UNIDROIT, Principles on Digital Assets and Private Law, 2023 (model rules on control, transfer, good-faith acquisition and conflict-of-laws localisation of digital assets) [online]. Available at: https://www.unidroit.org/wp-content/uploads/2024/01/Principles-on-Digital-Assets-and-Private-Law-linked-1.pdf?utm_source=chatgpt.comHCCH, Digital Economy, Data Flows and Private

The UNIDROIT and HCCH initiatives indicate the possibility of deeper private unification in the future. However, the European Union's approach to the unification of private law has so far been restrained. Given the growing practical importance of blockchain applications, pressure can be expected to address private law issues more systematically, either through further CJEU case law or by gradually adopting elements from the UNIDROIT Model Rules and the HCCH conflict law concepts.[55]

6.2. EU Private International Law

The private law aspects of blockchain transactions are not regulated by a specific codification in European Union law but are subject to the general framework of private international law. The law applicable to contractual obligations is determined by Regulation (EC) No 593/2008 (*Rome I*), while non-contractual and tortious liability is governed by Regulation (EC) No 864/2007 (*Rome II).* The international jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters are governed by Regulation (EU) No 1215/2012 (*Brussels Ia*),[56] the Extension Agreement applies in Denmark and the Lugano Convention in Iceland, Norway and Switzerland.[57]

International Law, 2022–2024 (exploring system-based and protocol-based connecting factors for digital assets) [online]. Available at: https://assets.hcch.net/docs/62ba4cfa-098e-41a7-8441-afb800db2cd7.pdf?utm_source=chatgpt.comRÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (warning against replacing traditional connecting factors with purely technical ones). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

55 UNIDROIT, Principles on Digital Assets and Private Law, 2023; HCCH, Digital Economy, Data Flows and Private International Law, 2022–2024[online]. Available at: https://www.unidroit.org/wp-content/uploads/2024/01/Principles-on-Digital-Assets-and-Private-Law-linked-1.pdf?utm_source=chatgpt.com, https://assets.hcch.net/docs/62ba4cfa-098e-41a7-8441-afb800db2cd7.pdf?utm_source=chatgpt.com, RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). Blockchain, Law and Governance. Springer, 2020 (contrasting EU's reliance on existing PIL instruments with emerging international unification projects); DOMURATH, I.; MICKLITZ, H. W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 263–305. [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

56 DOMURATH, I.; MICKLITZ, H. W. ***EU Digital Private Law*****,** 2024, pp. 270–305 (on the interaction of MiCA, DLT Pilot Regime, DORA and Data Act as a layered public-law framework governing crypto-assets and smart contracts while leaving private-law qualification largely untouched). [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

57 DILEK, D. *Das Internationale Privatrecht digitaler Werte*. Tübingen: Mohr Siebeck, 2024, §§ 3–6, p. 186 (on the application of Rome I, Rome II and Brussels Ia to crypto-assets and blockchain-based contracts) [online]. Available at: https://www.mohrsiebeck.com/en/book/das

The legal framework of the EU ICLA is not limited to obligations and international jurisdiction but also includes other areas of private law that may be relevant to legal relationships implemented through blockchain technologies. In the field of enforcement in cross-border non-contentious cases, Regulation (EC) No 805/2004 on the creation of a European Enforcement Order for uncontested claims allows for direct enforcement without the need for a declaration of enforceability in another Member State. In matters of succession, including the transfer of digital assets and crypto assets within the estate, Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and on the establishment of a European Certificate of Succession is decisive.[58]

The matrimonial property regime is governed by Council Regulation (EU) 2016/1103, while the property regime of registered partnerships is governed by Council Regulation (EU) 2016/1104. These regulations are also relevant for blockchain assets registered in distributed ledgers, as they can determine the law applicable to their acquisition, management and settlement in family and inheritance relationships with an international element. Other sources of private international law are international conventions binding on the European Union or its Member States, as well as custom and case-law.[59]

Although the case law of the Court of Justice of the European Union does not explicitly concern blockchain and smart contracts, it does provide binding interpretative bases in the areas of digital services, electronic transactions, consumer protection, personal data processing and conflict-of-law law. Of particular

-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com;WETEN KAMP, L. IPR und Digitalisierung – Braucht das internationale Privatrecht ein Update? *Beiträge zum Transnationalen Wirtschaftsrecht*, No. 161, 2019, pp. 17–30 (on the suitability and limits of EU conflict-of-laws instruments for ubiquitous digital transactions) [online]. Available at:; DOMURATH, I.; MICKLITZ, H. W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 263–305 [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

58 DILEK, D. *Das Internationale Privatrecht digitaler Werte*, 2024, §§ 6–8, p. 279 (on enforcement, succession and the treatment of digital and crypto-assets under EU private international law); WETENKAMP, L. *IPR und Digitalisierung*, 2019, pp. 26–35 (on cross-border enforcement and succession involving digital assets) [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

59 DILEK, D. *The International Private Law of Digital Values*. Tübingen: Mohr Siebeck, 2024, §§ 6–8 (on the application of EU matrimonial property and partnership property regimes to digital and crypto-assets) [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com; WETENKAMP, L. IPR and Digitization – Does Private International Law Need an Update? *Contributions to Transnational Business Law*, 2019, no. 161, pp. 26–35. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

importance is the case law on the GDPR, which consistently promotes effective protection of data subjects, the enforceability of their rights and the responsibility of the controller, thus limiting the possibility of justifying interference with fundamental rights by the mere technical architecture of immutable distributed ledgers.[60]

Private international law formulates the principle of the closest connection, according to which the applicable legal order is the one to which the legal relationship resulting from the factual circumstances has the most intense link. Determining the closest link requires an assessment of the social, political, economic and cultural factors characteristic of cross-border relations.[61]

On this basis, the jurisprudence of private international law has gradually developed, which today forms the methodological framework for determining the law with the closest connection. These developments are of particular importance in the context of all digital assets. Digital assets are a new phenomenon that has only been marginally encountered in previous case law and legal doctrine, which complicates their legal classification and conflict-of-law classification; this also applies in intellectual property law, where there is still no comprehensive conflict-of-law framework for digital assets.[62]

Any attempt to exercise control over digital assets under the current conflict-of-law framework is associated with considerable difficulties. In the area of obligations, Regulation (EC) No 593/2008 (Rome I) and Regulation (EC) No 864/2007 (Rome II), their escape clauses, can continue to be applied to contractual and non-contractual obligations relating to digital assets. By contrast, there

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60 DOMURATH, I.; MICKLITZ, H.W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 295–320 (on the role of CJEU case law in shaping the application of digital and data law to private-law relationships) [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html SDEU, judgments on GDPR, e.g. Case C-131/12 Google Spain; Case C-311/18 Schrems II (on effectiveness, data subject rights and accountability overriding purely technical architectures). [online]. Available at:

61 WETENKAMP, L. *IPR und Digitalisierung*, 2019, pp. 10–20 (on closest connection as a multidimensional, not merely territorial, concept) [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com;RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (applying the closest-connection principle to blockchain-based contractual relations). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

62 DILEK, D. *Das Internationale Privatrecht digitaler Werte*. Tübingen: Mohr Siebeck, 2024, §§ 1–2, pp. 12–15 (on digital assets as a new category challenging traditional conflict-of-laws classifications) https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com;WETENKAMP, L. IPR und Digitalisierung, 2019, pp. 20–30 (on the lack of conflict-of-laws rules for digital and IP-related assets). [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

is no specific conflict-of-law regime in the area of rights in rem to digital assets, and the current EU ICA does not provide for a unified set of specific links.[63]

Digital assets, in particular tokens, are commonly subject to cross-border transactions, which makes the question of determining the applicable law extremely relevant. Private international law is applicable when there is a relevant international element. In the case of contracts, it is sufficient if parties from different countries are involved, if the contract is concluded or performed abroad, and, according to some opinions, also if a foreign language is chosen. In the context of smart contracts, such an element can be the very use of cross-border blockchain infrastructure, which includes nodes in different legal systems.[64]

The issue of cross-border contracts relating to digital assets is unsatisfactory and therefore contractual obligations related to tokens and smart contracts in the EU need to be assessed primarily under the Rome I Regulation.[65]

The scope of the Rome I Regulation applies to contractual obligations with an international element in civil and commercial matters (Article 1(1)), unless one of the exceptions under Article 1(1) applies. 2. The concept of a contractual obligation is an autonomous concept of EU law and designates an obligation voluntarily assumed by one party towards the other which creates a special legal relationship.[66]

Digital assets in the form of tokens are typically created and operated on fully or partially decentralized blockchain networks, and even participation in such

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63 RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (on the applicability of Rome I and Rome II to blockchain-based obligations and the role of escape clauses); DILEK, D. *Das Internationale Privatrecht digitaler Werte*, 2024, §§ 3–5. [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

64 RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (on the existence of an international element in blockchain-based contracts and the irrelevance of purely technical node location as a connecting factor); WETENKAMP, L. IPR und Digitalisierung – Braucht das internationale Privatrecht ein Update? *Beiträge zum Transnationalen Wirtschaftsrecht*, 2019, no. 161, pp. 17–26. [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

65 DILEK, D. *Das Internationale Privatrecht digitaler Werte*. Tübingen: Mohr Siebeck, 2024, §§ 3–5 (on the application of Rome I to contractual obligations relating to digital assets) [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com; DOMURATH, I.; MICKLITZ, H.-W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 263–305. [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

66 CJEU, Case C-147/12 ÖFAB; Case C-249/16 Kareda (on the autonomous EU concept of "contractual obligation" under Rome I); RÜHL, G., 2020 (on smart contracts executing voluntarily assumed obligations). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

a network may, in certain circumstances, give rise to a contractual obligation within the meaning of the Rome I Regulation.[67]

The purpose and architecture of a particular network are decisive, as they define the circle of participants, their rights and obligations. If a blockchain network creates structured cooperation between multiple entities, mutual contractual obligations may arise between them, often implicitly and without formalized contractual text. Such relationships may fall within the scope of the Rome I Regulation. This conclusion is relevant to decentralized autonomous organizations (DAOs) and decentralized finance (DeFi) structures, according to some opinions.[68]

7. Smart Contracts as Contractual Obligations

The question of whether smart contracts create contractual obligations depends on their definition. In a narrow, technical concept, smart contracts are just software that automatically performs certain operations without necessarily having legal significance. However, in a broader sense, it is software that manages, performs or documents legally relevant actions on the basis of digitally verifiable events and that may, under certain circumstances, be used to conclude contracts or exercise rights in rem and obligations or a combination thereof in connection with an external or parallel contractual arrangement.[69] The program code can serve as a means of expressing the will or as a tool for initiating legally or commercially relevant processes and thus produce legal effects outside the

67 RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (on blockchain participation as potentially creating contractual obligations under Rome I) [online]. Available at:; MÖSLEIN, F. Distributed Ledger Technology and Smart Contracts. In: MÖSLEIN, F.; OMLOR, S. (eds.). *FinTech-Handbuch*. München: C.H. Beck, 2023, pp. 210–230. [online]. Available at:

68 MÖSLEIN, F. *FinTech-Handbuch*, 2023, pp. 231–245 (on DAO and DeFi as contract-like governance structures); [online]. Available at: https://cdn-assetservice.ecom-api.beck-shop.de/product/inhaltsverzeichnis/35466459/inhaltsverzeichnis-moeslein-omlor-fintech-handbuch-9783406804779.pdf?utm_source=chatgpt.comRÜHL, G., 2020 (on implicit agreements and cooperative structures in blockchain networks).

69 RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (on the distinction between smart contract code and legal contracts) [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com. PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence*, 2021, pp. 8–16 (on smart contract code versus legal contracts) [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787; DOMURATH, I.; MICKLITZ, H.-W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 295–320. [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

technological layer, without creating a contractual obligation in itself. Although there is no full consensus as to whether smart contracts understood in this way can be considered contractual obligations within the meaning of the Rome I Regulation, it is methodologically necessary to distinguish between smart contracts and smart legal contracts.[70]

In a broader sense, it is software that manages, executes or documents legally relevant actions based on digitally verifiable events and that can be used under certain circumstances to conclude contracts or exercise rights in rem and obligations – typically in combination with a previous, parallel or subsequent contractual arrangement, i.e. in the concept of smart legal contracts.[71]

In the European Union, the area of conflict-of-law rules in this area is largely unified by the Rome I Regulation and the Rome II Regulation. As a result, all the courts of the EU Member States, with the systemic exception of Denmark under the Rome Convention of 1980, consider questions falling within their jurisdiction under the same conflict-of-law rules, both in relations within the Union, so also in relations with third countries.[72]

If there is no uniform regulation of the establishment of the applicable law worldwide, or at least at the EU level, it is necessary to consider the conflict of laws rules of all potential forum states before whose courts the dispute could be heard in the preventive (not only) conflict-of-law analysis.[73]

Within the EU, the question of forum states is regulated by the Brussels Ia Regulation, which lays down uniform rules for the international jurisdiction of courts and for the recognition and enforcement of judgments. In relations

[70] RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (on the distinction between smart contract code and legal contracts) [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com; PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence*, 2021, pp. 8–16. [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

[71] RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (on the distinction between smart contract code and legal contracts) [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com. DOMURATH, I.; MICKLITZ, H.-W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 295–320. [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

[72] REGULATION (EC) No 593/2008 (Rome I); REGULATION (EC) No 864/2007 (Rome II), [online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/oj;RÜHL, G., 2020 (on the uniform application of Rome I/II to smart legal contracts). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

[73] DICEY, MORRIS AND COLLINS. *The Conflict of Laws*, 15th ed., 2012, pp. 25–40; WETENKAMP, L., 2019, pp. 16–25. [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

between Member States and Denmark, the Brussels I Extension Agreement will apply, while in EU relations (including Denmark) with Iceland, Norway and Switzerland, the Lugano Convention will apply.[74]

To avoid complications in determining the international jurisdiction of courts and also to achieve a compact result, it is recommended from a practical point of view to use international prorogation agreements. For determining the ordinary court of the defendant pursuant to Article 4 of the Brussels I Regulation, it is possible for one of the parties, even after the conclusion of the contract, by a mere change of domicile, to establish international jurisdiction of the court which the other party could not have otherwise foreseen. In relations between entrepreneurs, the possibility of an agreement on the choice of court under Article 25 et seq. of the Brussels Ia Regulation and the corresponding provisions of international conventions is therefore crucial.[75]

However, Brussels Ia provides for a special, mandatory regime in consumer relations. If an entrepreneur within the meaning of Article 17 para. 1 lit. (c) Brussels Ia directs its activity to the consumer's domicile, and the contract falls within the scope of that activity, the consumer has a right to do so under Article 18(1) of the Regulation. 1 the right to choose whether to sue the entrepreneur before his general court or before the court of his residence. A trader may bring an action against a consumer only before the court of the consumer's domicile (Article 18(2)). Choice-of-court agreements are only permissible to a limited extent in the field of consumer contracts under Article 19 Brussels Ia.[76]

In addition, the foreign element in private international law activates both the conflict of laws regulation and the direct rules of the IPS. These direct norms take the form of unified substantive law, contained in international conventions, typically the 1980 United Nations Convention on Contracts for the International

74 REGULATION (EU) No 1215/2012 (Brussels Ia); Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments; Lugano Convention 2007. [online]. Available at:

75 REGULATION (EU) No 1215/2012 (Brussels Ia), Arts. 4, 25; CJEU, Case C-214/89 Powell Duffryn (on jurisdiction agreements in commercial matters); RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). Blockchain, Law and Governance. Springer, 2020 (on the importance of jurisdiction clauses in cross-border blockchain contracts). [online]. Available at: https://eur-lex.europa.eu/eli/reg/2012/1215/ojhttps://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

76 REGULATION (EU) No 1215/2012 (Brussels Ia), Arts. 17–19; CJEU, Case C-190/11 Mühlleitner; Case C-585/08 and C-144/09 Pammer and Alpenhof (on directing activities to the consumer's state in online and digital commerce) [online]. Available at: https://eur-lex.europa.eu/eli/reg/2012/1215/oj;DOMURATH, I.; MICKLITZ, H.-W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 295–320 (on consumer protection and jurisdiction in digital and platform-based contracts). [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

Sale of Goods (CISG). The CISG establishes a uniform substantive regime for international sales contracts and applies directly to contracts concluded between parties domiciled in different contracting states pursuant to Article 1 of the CISG; however, due to its internal gap, it is significantly supplemented by the Rome I Regulation.[77] A smart legal contract that fulfils the characteristics of a purchase contract within the meaning of the CISG would be subject to this regime directly, without the need to apply conflict-of-law rules. However, national conflict-of-law law applies in the alternative, to fill the gaps under Article 7(1) of the Charter. 2 of the CISG or if the scope of the Convention is excluded by law or by agreement of the parties pursuant to Articles 2 and 6 of the CISG.

8. Ricardian Contracts and Ricardian Smart Legal Contracts

In practice, the courts of the European Union Member States apply the Rome I Regulation to smart legal contracts and apply its rules for the choice of applicable law. However, the question of whether Rome I can be related to smart contracts understood as mere software is questionable. It is therefore correct to proceed with the question whether Rome I would have affected smart legal contracts, or more precisely Ricardian smart legal contracts, and not the accompanying code itself.[78]

The term Ricardian contract refers to a special type of contractual documentation that integrates the legal, economic and technical levels of the obligation into a single coherent artifact. Contrary to the common understanding of smart contracts as self-executing code, the Ricardian contract is not primarily a program, but a legal document that is at the same time designed to be human-readable, machine-interpretable, and cryptographically verifiable. Its aim is not to automate

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[77] CISG, United Nations Convention on Contracts for the International Sale of Goods, Arts. 1, 7[online]. Available at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods;RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). Blockchain, Law and Governance. Springer, 2020 (on the applicability of CISG to smart legal contracts and its relationship with Rome I) [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.comSCHLECHTRIEM, P.; SCHWENZER, I. *Commentary on the UN Convention on the International Sale of Goods* (CISG), 4th ed., 2016, pp. 75–95.

[78] RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (distinguishing between smart contract code and legally binding smart legal contracts for the purposes of Rome I); MANTE, J.; MAK, C. *"Smart Contracts" versus "Smart Legal Contracts": Shifting Terminology*, 2 October 2023, [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com

the creation of an undertaking, but to create a uniform reference framework for its legal content, technical implementation and evidentiary value.[79]

The Ricardian Treaty was created as a response to the structural contradiction between the legal treaty in natural language and its digital implementation. Traditional contracts are based on linguistic openness, allowing interpretation in the context of good faith and purpose, while digital systems require an unambiguous and formally structured representation suitable for automated processing. The Ricardian Treaty overcomes this tension by having the same document exist in two functional forms – as a legally binding text and as a data object.[80]

From a legal point of view, it is essential that the Ricardian treaty is not a new type of contract, but a special way of its documentation and representation. The content of the obligation is expressed in natural language and is subject to the normal rules of contract law, including interpretation, nullity, content control and weaker party protection. The technical layer of a Ricardian contract, typically in the form of a hashed document, metadata, or a structured description of the commitment, is used to identify, ensure integrity, and connect to other systems, such as tokens or smart contracts.[81]

It is this feature that makes Ricardian contracts a key tool in blockchain and decentralized application environments. While smart contracts as code perform predefined operations, they cannot express complex legal arrangements on their own, especially clauses on liability, applicable law, jurisdiction, contract changes or dispute resolution, the Ricardian contract allows these elements to be incorporated into a legally binding text and at the same time cryptographically linked to the code implementation.[82]

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[79] MANTE, J.; MAK, C., 2023 (defining Ricardian contracts as human-readable, machine-readable and cryptographically verifiable legal instruments) [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com; MÖSLEIN, F. Distributed Ledger Technology and Smart Contracts. In: MÖSLEIN, F.; OMLOR, S. (eds.). *FinTech-Handbuch*. München: C.H. Beck, 2023, pp. 215–225. [online]. Available at:

[80] MANTE, J.; MAK, C., 2023; DOMURATH, I.; MICKLITZ, H.W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 295–320 (on the tension between natural-language contracts and automated execution in EU digital private law). [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

[81] MANTE, J.; MAK, C. *"Smart Contracts" versus "Smart Legal Contracts": Shifting Terminology*, 2 October 2023 (on Ricardian contracts as a form of legally binding documentation combined with cryptographic identifiers) [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.comRÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020. [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

[82] MANTE, J.; MAK, C., 2023, [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com.

From the point of view of private international law, the Ricardian Treaty is of particular importance, since it makes it possible to capture in a transparent and evidentiary manner the will of the parties as to the applicable law, the jurisdiction of the courts and the nature of the obligation. Where the contractual relationship is technically implemented through a decentralized infrastructure without territorial anchoring, the Ricardian contract becomes a key carrier of conflict-of-law relevant information. It makes it possible to locate a contractual relationship to a certain legal order based on the autonomy of the will of the parties, not random technical links.[83]

The Ricardian Treaties also serve an important evidentiary function. Cryptographic assurance of document integrity makes it possible to prove that a certain text of the contract has been accepted at a certain time and has not been subsequently changed. In combination with a blockchain record, a strong audit trail can be created, usable in both court and arbitration, which is essential in an automated fulfilment environment.[84]

It is crucial to distinguish between a Ricardian contract and a smart contract. A Ricardian contract is a carrier of the legal obligation and will of the parties, whereas a smart contract is a tool of technical execution. Both elements can be linked, but they are not interchangeable; It is the textual expression of the autonomy of the will that is legally relevant, not the code.[85]

In this sense, Ricardian contracts represent a key element of the legal anchoring of decentralized transactions. They make it possible to maintain the basic institutes of contract law – consensus, interpretation, liability and protection of

DOMURATH, I.; MICKLITZ, H.-W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 300–320 (on the limits of code-based execution and the need for natural-language contractual safeguards). https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

83 MANTE, J.; MAK, C. *"Smart Contracts" versus "Smart Legal Contracts": Shifting Terminology*, 2 October 2023 (on Ricardian contracts as the legal anchor of blockchain transactions), [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com;RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). Blockchain, Law and Governance. Springer, 2020; REGULATION (EC) No 593/2008 (Rome I), Art. 3. [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

84 MANTE, J.; MAK, C., 2023, [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com[online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com. PINHEIRO, L. *Arbitration, Blockchain and Artificial Intelligence*, 2021, pp. 15–25 (on evidentiary value of blockchain-based contract records). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

85 RÜHL, G., 2020; DOMURATH, I.; MICKLITZ, H.W. EU Digital Private Law: Tattering or New Beginning? *European Review of Contract Law*, 2024, pp. 300–320. [online]. Available at: https://www.degruyterbrill.com/document/doi/10.1515/ercl-2024-2014/html

the weaker party – even in an environment controlled by algorithms and distributed systems. They are not a substitute for law, but its interface to technology. For the purposes of this study, they can therefore be referred to as *Ricardian smart legal contracts*.[86]

Under Article 1(1) of the Rome I Regulation, its scope is limited to determining the law applicable to contractual obligations. The substantive scope is clear from the title of the regulation, the regulation will be applied to contractual obligations under civil and commercial law, if there is a conflict of laws that could be applied to these contractual relationships. In relation to smart contracts, this raises the question of whether they themselves constitute "contractual obligations". However, it follows from the established interpretation of the Court of Justice of the EU that a contractual obligation is any obligation that one private person voluntarily accepts towards another, regardless of its reciprocity or unilaterality. This approach corresponds to the concept *of Ricardian smart legal contracts (Ricardian 2.0),* in which a legal obligation is expressed in text and technically executed in code.[87]

Moreover, there is a more substantive question, or rather a process, than the question of whether Rome I applies to the smart contract as a whole or only to the legal obligations that the code implements. It is the fact that Rome I is used based on methods of legal *qualification* and related criteria, which can also be used to verify its applicability, for example according to the two-stage qualification method. This is an aspect that is often neglected in the literature.[88]

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86 MANTE, J.; MAK, C., 2023, [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com;WETENKAMP, L. IPR and Digitization – Does Private International Law Need an Update? *Contributions to Transnational Business Law*, 2019, no. 161. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

87 REGULATION (EC) No 593/2008 (Rome I), Art. 1; CJEU, Case C-147/12 ÖFAB; Case C-249/16 Kareda (autonomous EU concept of contractual obligation) online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/oj;RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020[online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com; MANTE, J.; MAK, C. *"Smart Contracts" versus "Smart Legal Contracts": Shifting Terminology*, 2 October 2023, [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com

88 RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020[online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.comWETENKAMP, L. IPR und Digitalisierung – Braucht das internationale Privatrecht ein Update? *Beiträge zum Transnationalen Wirtschaftsrecht*, No. 161, 2019. [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

At the same time, the Rome I Regulation allows for the choice of law based on the autonomy of the will of the parties under Article 3. 3 par. Article 1(1) of the Regulation determines the applicable law for the contract regime to be chosen by the parties. This is either an express choice of law or one that is clearly apparent from the contract itself, or a choice resulting from the circumstances of the case is also permissible. The regulation also works with a split choice of law, where the parties can choose the law applicable to the whole contract or part of the contract.

The regulation also allows for a subsequent change in the chosen legal order, and because of this regulation, the parties may at any time agree that the contract will be governed by a different law than it was governed by the choice of law made earlier. The regulation also allows the parties to a contract to choose the law for a contract that is linked to only one legal order, i.e. the legal system of one state.

In these cases, however, it will not be possible to deviate from the mandatory provisions of the legal order that would otherwise be decisive for the contract in question. In these situations, the choice of law will concern only the supplementary provisions of the legal order to which it is directed. In this situation, it is also appropriate to analyze the provisions of Article 3 (1) of the Charter. 4 of the Regulation.

The parties can thus subject their contract to the legal order of their choice and thus link it to an advanced national law of obligations capable of addressing digital transaction issues. The chosen legal order then provides a measure of the validity, interpretation and consequences of breaches of smart legal contracts.[89]

However, the choice of applicable law cannot always be effectively expressed by the code itself and must be formulated at an appropriate legal level. The highest degree of legal certainty is therefore provided by an explicit choice of law contained in either a parallel contract or a Ricardian contract – that is, a legally binding text in natural language cryptographically linked to code. Ricardian smart legal contracts thus allow the incorporation of provisions that are not technically feasible, including a conflict of laws clause.[90]

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89 REGULATION (EC) No 593/2008 (Rome I), Art. 3; DILEK, D. The International Private Law of Digital Values. Tübingen: Mohr Siebeck, 2024, § 5.

90 MANTE, J.; MAK, C., 2023 [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com;RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020[online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.comPINHEIRO, L. Arbitration, Blockchain and Artificial Intelligence, 2021, pp. 15–25. [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272787

In addition to the express choice, Article 3(1) of the Constitution permits. 1 Rome I also an implicit choice resulting from the content of the contract or the circumstances of the case, for example from its systematic link to a particular legal order. However, such a choice must be obvious and demonstrated, i.e. supported by a sufficiently demonstrable real intention of the parties.[91]

In the smart contract environment, the parties often do not make any choice of law, or it cannot be reliably deduced. The algorithmic nature of smart contracts, their standardization and the use of pre-prepared protocols leads to the fact that the intention to subordinate the obligation to a certain legal order is usually neglected or legally illegible. In such cases, the objective conflict-of-law regime under Article 4 of the Rome I Regulation comes into play, the purpose of which is to establish a contractual relationship with the legal order with which it has the closest connection.[92]

Article 4 Rome I forms the basis of objective conflict-of-law resolution in the EU law on conflict-of-law obligations. It is conceived as a hierarchical system in which standardized connecting criteria are applied first for certain types of contracts, then the general rule of characteristic performance and finally the residual criterion of the closest connection corrected by an escape clause. This system combines legal certainty with the possibility of fair correction in atypical cases.[93]

The first step in the absence of a choice of law is the application of Article 4(1) of the Charter. 1 Rome I, which assigns a fixed follow-up factor to selected types of contracts. In the case of purchase contracts, the applicable law is the law of the seller's habitual residence, in the case of contracts for the provision of services, the law of the provider's habitual residence, in the case of real estate contracts, the law of the state in which the property is located, or the law of the parties' joint habitual residence.[94]

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91 REGULATION (EC) No 593/2008 (Rome I), Art. 3(1) [online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/ojCJEU, Case C-184/12 Unamar; Case C-64/12 Schlecker (on implicit choice of law). [online]. Available at:

92 REGULATION (EC) No 593/2008 (Rome I), Art. 4[online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/ojRÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020[online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com;MANTE, J.; MAK, C. *"Smart Contracts" versus "Smart Legal Contracts": Shifting Terminology*, 2 October 2023 . [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com

93 RÜHL, G. The Law Applicable to Contracts in the Rome I Regulation. In: DICKINSON, A.; LEIN, E. (eds.). *The Rome I Regulation*. Oxford University Press, 2015, pp. 93–120; WETENKAMP, L. IPR and Digitization – Does Private International Law Need an Update? *Contributions to Transnational Business Law*, 2019, no. 161. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.com

94 REGULATION (EC) No 593/2008 (Rome I), Art. 4(1) https://eur-lex.europa.eu/eli/reg/2008/593/oj;CJEU, Case C-133/08 Intercontainer Interfrigo; Case C-381/98 Ingmar (on characteristic

In relation to smart contracts, the conflict-of-law classification must therefore focus on the legal nature of the obligation and not on the technology used. Given that smart contracts are commonly used to make payments, deliveries, provide digital services or manage rights, most of these relationships can be subsumed under one of the categories listed in Article 4(1) of the Charter. 1 Rome I, which thus provides a direct and predictable determination of the applicable law.[95] Article 4(3) of Rome I allows for a derogation where the contract is manifestly more closely connected with another State than the primary connecting criterion provides, even if it is to be applied exceptionally and its application requires a clear link with another legal order.[96]

Not all contracts implemented through smart contracts can be subordinated to the standardized categories of Article 4(1) of the Convention. 1 Rome I. A typical example is contracts for the transfer of cryptocurrencies or other digital tokens. These do not constitute contracts of sale for goods, as they do not have the subject matter of tangible things, nor usually transactions within multilateral trading facilities.[97]

In such cases, Article 4(2) of Rome I, which links the applicable law to the habitual residence of the party providing the characteristic supply the non-monetary supply, could be applied. In the case of a cryptocurrency transfer agreement, this performance is the transfer of digital value itself, so the applicable law will usually be the law of the transferor's habitual residence. However, this rule is also subject to the corrective of Article 4(1) of the Charter. 3 and may exceptionally be suppressed if the treaty is manifestly more closely connected

performance and fixed connecting factors). [online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/oj

95 REGULATION (EC) No 593/2008 (Rome I), Art. 4(1), [online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/oj;RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). Blockchain, Law and Governance. Springer, 2020https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com; MANTE, J.; MAK, C. "Smart Contracts" versus "Smart Legal Contracts": Shifting Terminology, 2 October 2023 [online]. Available at: https://rgu-slss.blog/2023/10/02/smart-contracts-versus-smart-legal-contracts-shifting-terminology/?utm_source=chatgpt.com

96 REGULATION (EC) No 593/2008 (Rome I), Art. 4(3) https://eur-lex.europa.eu/eli/reg/2008/593/oj;CJEU, Case C-133/08 Intercontainer Interfrigo; Case C-498/16 Schrems (on the exceptional nature of the escape clause). [online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/oj

97 DILEK, D. *Das Internationale Privatrecht digitaler Werte*. Tübingen: Mohr Siebeck, 2024, § 5 (on token transfers not qualifying as sales of goods under Rome I) [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com;RÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020. [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

with another State.[98] If a contract cannot be classified under Article 4(1) or a characteristic service can be determined under paragraph 2, Article 4(4) of Rome I, which refers to the law of the State with which the contract has the closest connection, applies. The case law of the Court of Justice of the EU has developed a two-step test on this provision: the court must first identify all the objective factors characterizing the contractual relationship and then determine which of them are decisive for the location of the relationship.[99]

In addition to traditional criteria such as the parties' habitual residence, place of performance and place of performance, the language of the contract, the currency of the performance, the structure of the contractual arrangement or the economic context of the transaction may also be relevant in determining the closest concentration under Article 4(4) of Rome I. The circle of these factors is not closed and must be assessed functionally regarding the real socio-economic center of gravity of the relationship.[100] In this context, the importance of the geographical distribution of blockchain nodes is also discussed. However, due to their variability, decentralization and often random distribution, the prevailing opinion is that they cannot represent a stable and legally meaningful follow-up determinant. When applying Article 4 para. 4 Rome I will therefore be decisive primarily the actual center of gravity of the contractual relationship between the parties, not the technical infrastructure on which it is implemented.[101]

[98] REGULATION (EC) No 593/2008 (Rome I), Art. 4(2)–(3); CJEU, Case C-381/98 Ingmar; Case C-133/08 Intercontainer Interfrigo (on characteristic performance and the escape clause) [online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/ojRÜHL, G., 2020 (applying characteristic performance to digital asset transfers). [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004&utm_source=chatgpt.com

[99] REGULATION (EC) No 593/2008 (Rome I), Art. 4(4), CJEU, Case C-133/08 Intercontainer Interfrigo; Case C-190/11 Mühlleitner (on the two-step test for closest connection). [online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/oj

[100] REGULATION (EC) No 593/2008 (Rome I), Art. 4(4) [online]. Available at: https://eur-lex.europa.eu/eli/reg/2008/593/ojDILEK, D. Das Internationale Privatrecht digitaler Werte. Tübingen: Mohr Siebeck, 2024, § 5. [online]. Available at: https://www.mohrsiebeck.com/en/book/das-internationale-privatrecht-digitaler-werte-9783161639364?utm_source=chatgpt.com

[101] WETENKAMP, L. IPR und Digitalisierung – Braucht das internationale Privatrecht ein Update? *Beiträge zum Transnationalen Wirtschaftsrecht*, 2019, no. 161 (rejecting node location as a connecting factor [online]. Available at: https://opendata.uni-halle.de/bitstream/1981185920/80366/1/BeitraegeTWR_161.pdf?utm_source=chatgpt.comRÜHL, G. Smart (legal) contracts, or: Which (contract) law for smart contracts? In: CAPPIELLO, B.; CARULLO, G. (eds.). *Blockchain, Law and Governance*. Springer, 2020 (on the irrelevance of blockchain topology for Rome I localization). [online]. Available at: https://papers. ssrn.com/ sol3/ papers.cfm?abstract_id=3552004&utm_source=chatgpt.com;

9. Conclusion

An analysis of the legal status of blockchain technologies and smart contracts in the legal order of the European Union confirms that the European regulatory approach is consistent, but structurally incomplete. The EU has not consciously recognized blockchain or smart contracts as autonomous legal institutes, but has subordinated them to existing categories of law through sector-oriented regulation, especially in the financial area thanks to MiCA, the DLT Pilot Regime and DORA, and in data protection through the GDPR and the Data Act, while the private law dimension remains regulated by the general rules of contract and conflict of laws.

However, the decentralized architecture of the blockchain weakens traditional territorial localization criteria. This led to proposals such as *lex systematis*, i.e. linking to the protocol or rules of the network. However, such an approach is complicated in the EU PIL , the blockchain protocol is not a legal order and cannot replace the normative authority of states or the Union, it can only serve as a factual reference framework for the interpretation of the treaty.

Tokens require special attention. As digital units, they have a problem with physical localization and are not things in the traditional sense. Therefore, the lex rei sitae is only applied indirectly, in relation to the asset that the token represents. Tokenization does not change the conflict-of-law regime of the represented property and is not intended to create new substantive effects outside the applicable substantive law, which is key to preventing circumvention of mandatory norms.

A fundamental limitation of smart contracts is their inability to carry normative content. The code, without additional interventions, does not express legal terms, value corrections or conflict of law agreements. Ricardian contracts, especially their eventual well-grasped concept of the second generation of Ricardian 2.0, can therefore represent a systemic solution, as they connect legal text in natural language with machine-readable representation and code, with Ricardian 2.0 modeling rights and obligations as a state machine synchronized with the blockchain.

From the point of view of the PIL, this makes it possible to preserve the choice of law, consumer protection, judicial interpretation and application of mandatory norms, without sacrificing the effectiveness of automation. Ricardian 2.0 is thus a legally compatible architecture for the integration of smart contracts into the EU conflict of laws system without replacing the lex contractus with purely technological rules.

The European blockchain framework is in a stage of controlled adaptation, public regulation is more advanced than private regulation, which is based on the interpretation and application of existing conflict-of-law instruments. In the future, we can expect further development of CJEU case law and the adoption of inspirational elements from UNIDROIT. The public regulation of blockchain is already relatively mature, while the private and conflict-of-law dimensions remain based on the discretion of the application of traditional instruments, Rome I, Rome II, Brussels Ia or CISG. This approach provides flexibility, but at the same time generates legal uncertainty in cross-border relations. In the future, it can be expected that the pressure of practice will lead to the development of the case law of the Court of Justice of the EU and to the gradual adoption of inspirational elements from international model rules, especially UNIDROIT, but without abandoning the basic principles of private international law. However, it is crucial that this development does not erode the basic principles of PIL.

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Digital Platforms and the Role of Shared Economy

Eva Zorková*

Summary: The shared economy is currently a rapidly developing segment of the economy, which is gaining more and more popularity, especially in cities and highly populated areas. The shared economy is closely linked to digital markets, as it usually uses digital platforms for its operation. This article focuses on shared economy definition as well as digital platform differentiation and related EU primary and secondary legislation, as well as case law.

Keywords: Shared Economy, Digital Platform, Uber, Airbnb, Booking.com, Price Parity Clauses, Czech Competition Authority.

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1. Introduction

The shared economy (or collaborative consumption) is currently a rapidly developing segment of the economy, which is gaining more and more popularity, especially in cities and highly populated areas. The shared economy is closely linked to digital markets, as it usually uses digital platforms for its operation. Within the first chapter will be analysed who is actually involved because digital platforms can be divided into six types, based on the forms of exchange these platforms facilitate. Another discussed problem is enshrined a legally binding definition of shared economy in European union law and related issues. Although shared economy takes a non-negligible part of European markets, and creates new jobs

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and sources of income for a certain part of people, European law does not yet provide any legal definition of this term. From the problematic legal anchoring, we can also get to the inconsistency of the used terminology, a "collaborative economy" may also be known as a "shared economy," "sharing economy," or a "peer-to-peer economy."

Speaking about the European regulations with this field, the assessment of the consequences of collaborative platforms has generated some controversy since it's needed to adequate them into the current legal framework. One has to know if platforms are service providers stricto sensu – submitted to the Services Directive – or providers of "information society services" – and, in this context submitted to the E-commerce Directive. The consequences of subsuming collaborative platforms to one or the other Directive are not negligible. Qualification of shared platforms was appreciated by the European Union Court of Justice. Within this article the *Elite Taxi/Uber* case is analysed, as well as the European Commission's approach to the issue. One of the questions is whether they should be regulated by specific legislation – and in this case, whether this should be developed by the European Union or, subsidiarily, by the Member States – or, on a different way, only be submitted to the general regime applicable to all sectors of economic activity, such as the general regulation on data protection etc. Another case that is analysed within this article is *the Airbnb Ireland and Airbnb Payments UK* case related to Italian taxation system and an obligation to provide information. Last but not least, the decision of the Czech Competition Authority and Czech courts related to Booking.com and the application of price parity clauses applied in the travel sector is analysed.

2. What are digital platforms and how are they divided?

Digital platforms are business models that use online infrastructure to facilitate interactions between groups. In other words, digital platforms are online ecosystems that connect users, businesses, and services. They facilitate interactions by providing infrastructure, algorithms, and tools to enable seamless transactions. These platforms thrive on network effects; the more users they have, the more valuable they become.[1] They also enable businesses to scale globally with minimal costs compared to traditional brick-and-mortar models. Although those are technical definitions rather than a legal one, digital platforms can be defined

[1] The general idea of a network effects is that an increased number of users improves the value of a good or service.

through their basic features as they have several features that enhance their functionality and appeal. For one, they can grow and accommodate transactions without significant cost increases. That scalability is essential to expanding market reach with minimal business infrastructure. Accessibility is another important feature. Digital platforms operate continuously and are accessible regardless of time zone or geographic location. This boosts user engagement by enabling real-time interactions and transactions. Digital platforms also streamline business processes and automate complex tasks, such as reducing the need for extensive manual labour, minimizing operational costs, and improving resource management. All these features allow digital platforms to generate substantial value.[2]

There are many different types of online platforms, each with their own unique features and functions. The first group is related to social networks, those are online platforms such as Facebook, Twitter, Instagram, and LinkedIn, where users can communicate with friends, family, colleagues, and others. The second group is related to E-commerce platforms, such as Amazon, eBay, and Alibaba, where users can buy and sell products. The third group is related to freelancing, those online platforms such as Upwork, Fiverr, and Freelancer, where freelancers can find assignments and work for clients. The fourth large group consists of marketplaces, those are platforms such as Etsy and Airbnb, where users can offer and find goods or services. The fifth group consists of online learning platforms such as Udemy, Coursera, and Skillshare, where users have access to courses and educational material. Another group is formed by gaming platforms, such as Steam, Xbox Live, and PlayStation Network, where gamers can play games and communicate with each other. And the last group introduced are crowdfunding platforms, such as Kickstarter and Indiegogo, where users can raise money for projects and ideas. These are just a few examples of online platforms. There are many more types and the number continues to grow as technology advances more and more.[3]

As already mentioned above, digital platforms are closely linked to digital markets and shared economy as shared economy traditionally uses digital platforms for its operation. In the next part of this article, I therefore consider it necessary to clarify the current definition of shared economy and related legislation, including EU case law.

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2 GIBSON, K. *Digital Platforms: What They Are & How They Create Value,* 8 May 2024, [online]. Available at: https://online.hbs.edu/blog/post/what-is-a-digital-platform (Accessed: 14 October 2024).

3 *Types of online platforms What online platforms are there?*, 13 May 2022, [online]. Available at: https://start-platform.com/types-of-online-platforms (Accessed: 14 October 2024).

3. Is there any legally binding definition of shared economy?

The shared economy is a very fast-growing industry that is becoming more and more popular. At the same time, there is a large number of individuals who actively participate in it is growing, and thanks to that, shared economy is becoming a phenomenon of the 21st century. The shared economy refers to peer-to-peer exchanges of goods and services facilitated by digital platforms. Instead of owning assets, individuals can rent, share, or trade them. Without a doubt, this trend would not be possible without advances in IT that create new ways of communication, new payment options, but also new potential ways of violating the law. In particular, in this context, I would like to draw your attention to the growth of the internet, smartphones and their applications, which significantly shape the way in which the entire society and the economy work. These innovations necessarily lead to situations that might be atypical from the point of view of law, since the character of the shared economy is in some cases different from the regime known by the current law, thus the law is facing new challenges and problems. It is therefore a logical step for states and transnational organizations to try to respond to these facts and create an applicable legal framework that would fill the legal vacuum and uncertainty. I consider it important to mention that the term shared economy (just like the term digital platform) is a rather economic and technical, however it significantly affects a whole range of sectors such as competition law, data and information protection, the right to privacy, system of taxation, liability, labour law and many others.

To sum it up, the shared economy as such is not a new phenomenon,[4] but due to the use of modern technologies, it is necessary to look at it from a different point of view. And not only legal. As a result of this fact, there is no proper legal definition and comprehensive legal regulation, for instance the European law

[4] Historically, the first traceable definition of shred economy can be found in the work of Marcus Felson and Joe L. Spaeth from 1978 (FELSON, M., SPAETH, J. L. *Community Structure and Collaborative Consumption: A Routine Activity Approach*. American Behavioral Scientist, 1978, pp. 614–624). Although the authors use the term “collaborative consumption”, it is a similar term that can be used in the sence of shared economy. After all, this aptly shows the large degree of inconsistency even in basic terms, which we are still dealing with nowadays. In their article, Felson and Spaeth state that these are events in which one or more persons consume economic goods or services as part of the process of engaging in joint activities with one or more persons. A different definition is provided by Botsman and Rogers (BOTSMAN, R., ROGERS, R. *What's mine is yours: how collaborative consumption is changing the way we live.* Rev. and updated ed. London: Collins, 2011.) The mentioned authors claim that it is an economic model promoting the use of ownership, which enables the optimization of consumption through the sharing, exchange, renting and lending of goods and services.

does not yet provide any legally binding definition of this term. For example, in 2016 the European Commission tried to modify the concept of the shared economy and offered the following definition:

"For the purposes of this communication, the concept of", "sharing economy" refers to business models in which activities are facilitated by collaborative platforms that create an open market for the temporary use of goods or services often provided by private individuals. The sharing economy includes three categories of actors:

- *service providers who share assets, resources, time and/or skills – they can be private individuals offering occasional services (so-called "peers", entities at the same level) or service providers acting in the exercise of their profession ("professional service providers"),*
- *their users and*
- *intermediaries who – through an online platform – connect providers with users and facilitate transactions between them ("collaboration platforms"). Transactions in the sharing economy generally do not involve a change in ownership and can be conducted for profit or not-for-profit".*[5]

This is the definition that I consider the most relevant from the EU law point of view. However, it is necessary to keep in mind that this is only a definition included in communication of the European Commission, i.e. an act that creates the so-called *soft law*. It is therefore not legally binding and thus does not create a binding legal definition. There are several definitions in use, but a unified definition can not be found at the moment.

As mentioned above, the sharing economy is not a new phenomenon, what is revolutionary is the way in which relations between subjects are created. Their implementation is often conditioned by the use of information technology in the form of mobile applications. They create a kind of online platform where a person who plans to use someone else's property can find a person who will provide it without the need for any personal contact. That is, without these entities knowing each other in any way. Such applications are currently used by Uber, Blabla Car, Booking.com, Airbnb and other platforms.

3.1. Relevant primary EU legislation

Within the European Union, several primary laws (treaties) are relevant to digital platforms and the sharing economy. The key legal foundations include the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), namely Art. 26

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A European agenda for the collaborative economy. COM/2016/0356 final.

which establishes the internal market, ensuring free movement of goods, services, capital, and persons; Art. 56-62 which guarantee the freedom to provide services across the Union and applies to digital platforms as such; as well as Art. 101 and 102 that are covering competition law, namely preventing anti-competitive agreements and abuse of dominant positions which is important for big tech companies. Art. 114 is related to harmonization of laws for the functioning of the internal market, including digital services; and Art. 169 is providing consumer protection and ensuring fair practices in digital transactions. Besides, the Treaty on European Union (hereinafter 'TEU') includes several provisions relevant to digital platforms and shared economies as well. For example Art. 3(3) promotes a highly competitive social market economy, relevant for balancing innovation and fairness in digital markets; and Art. 5 establishes the principle of subsidiarity.[6]

Last but not least, Charter of Fundamental Rights of the EU guarantees respect for private and family life that might be linked to data protection in digital services,[7] as well as protection of personal data, relevant for digital platforms handling user information[8] and freedom to conduct business, supporting digital entrepreneurship.[9] All of the above mentioned Articles serve as the legal basis for secondary EU legislation.

3.2. Related secondary EU legislation

The assessment of the consequences of collaborative platforms has generated some controversy since it's needed to adequate them into the current European legal framework. One has to know if platforms are service providers stricto sensu – submitted to the Services Directive[10] – or providers of "information society services" – and, in this context submitted to the Electronic Commerce Directive.[11] Answering this question is essential in order to determine what the internal and relevant national market access requirements are. At the same time, the consequences of subsuming collaborative platforms to one of these directives are not negligible.

Regarding the mutual relationship between the two directives, it is also necessary to clarify, since both directives regulate the area of service provision by

[6] Meaning EU intervention is justified only if local or national measures are insufficient.
[7] *See* Art. 7.
[8] *See* Art. 8.
[9] *See* Art. 16.
[10] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. OJ L 376, 27. 12. 2006, p. 36–68.
[11] 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.OJ L 178, 17. 7. 2000, p. 1–16.

providers who are established in a EU member state. Directive on services in the internal market is a general regulation that applies only in those cases that are not regulated by another special regulation. This is precisely the case with the Electronic Commerce Directive, which applies to information technology services.[12] Specifically Art. 3 para. of the Service Directive which lists the regulations that take precedence. Considering the word 'in particular' used and at the same time taking into account the argument of Advocate General M. Szpunar, who calls this a demonstrative list and admits that this interpretation can be extended to those norms that are not explicitly mentioned here.[13]

The basic assumption behind this division lies in what the platform as a service actually provides. The first question that is offered here is whether it is a mere mediation of contact between the passenger and the driver/seller, etc. or it is a complex service consisting of this mediation, but also of the realization of a separate service (transportation, sales, teaching, etc.)?

The implementation of the first – the Electronic Commerce Directive – determines that, the so-called "internal market clause" provided in Art. 3, para 2 of the Directive, which prevents Member States from restricting the free movement of information society services from another Member State, should be respected. In a different way, the regulation of the Services Directive to platforms not covered by the Electronic Commerce Directive determines a subsequent and specific analysis of the services provided through the platform since, in some cases, they may be excluded from the subjective scope of the Services Directive as it does not apply to sectors such as transport, financial services, temporary work and health services. This is a problem that has been discussed in the past by the European Commission in the Communication issued in 2016 entitled *'A European Agenda for the Collaborative Economy'*.[14] In this document, the Commission considered that the equalization of a collaborative platform to a provider of the service considered the preliminary inquiry about the level of control or influence exercised over the person that, at the end, performed the service:

This would require compliance with the following conditions:

- price – in this case, it should be the platform to set the final price to be paid by the user as beneficiary of the underlying service.

[12] KRUPA, M. *Dopravní aplikace sdílené ekonomiky a jejich veřejnoprávní regulace.* 1. vydání. Praha, Leges, 2019, p. 37.

[13] Opinion of Advocate General Maciej Szpunar delivered on 11 May 2017, marg. no. 92 [Online]. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=190593&doclang=CS (Accessed: 15 October 2024).

[14] Communication from the Commission to the European Parliament, the COuncil, the European Economic and Social Committee and the Commitee of the Regions: A European agenda for the collaborative economy. COM/2016/0356 final.

– ownership of key assets – the collaborative platform would own the key assets used to provide the underlying service.
– other essential contractual conditions.

Thus, it would be for the platform to establish other terms and conditions, apart from price, that determine the contractual relationship between the underlying service provider and the user. For the European Commission, the cumulative fulfilment of these three conditions would determine the qualification of the collaborative platform as the provider of the underlying service, in particular with a view to assure the application of the Services Directive. If not, the platform would be qualified as an "information society service provider" and would therefore be submitted to the Electronic Commerce Directive.

3.3. Related case law

As mentioned above, shared economies and the way they operations significantly affects a whole range of sectors such as competition law, data and information protection, the right to privacy, system of taxation, liability, labour law and many others. In this chapter, some decisions concerning digital platforms and related issues will be analysed in order to show examples of issues with which the Court of Justice of the European Union (but also national courts and authorities) had to deal with.

3.3.1. Uber case[15]

Qualification of shared platforms was appreciated by the Court of Justice of the European Union (hereinafter 'CJEU'). The court was answering the question whether the Uber collaborative platform was subject to the Electronic Commerce Directive or to the Services Directive on the other hand.

In this case, the CJEU first considered that Uber could be regarded as an intermediary and, in that case, be described as provider of an 'information society service'. On the other hand, a non-collective[16] urban transport service, such as a taxi service, should be classified as a 'transport service'. However, the CJEU noted that a service such as Uber is not limited to intermediation as it

" [...] simultaneously offers urban transport services, which it renders accessible, in particular, through software tools such as the application at issue in

[15] C-434/15 *Elite Taxi/Uber,* ECLI:US:C:2017:981.

[16] Uber Technologies Inc. is an American multinational transportation and mobility company that enables the ordering of transportation by personal car. The company operates under the category "network transport company". It works to develop, market and operate the Uber mobile application which allows consumers with a smartphone to submit ride requests that are then forwarded to drivers connected to the Uber network using their own cars.

the main proceedings and whose general operation it organises for the benefit of persons who wish to accept that offer in order to make an urban journey."[17]

The existence of the platform/application Uber is, to the CJEU, essential to the activity so that without the application, *" [...] those drivers would not be led to provide transport services and persons who wish to make an urban journey would not use the services provided by those drivers".*

The application can therefore be considered essential for the functioning of the market and Uber can to be considered as a market-maker. According to the CJEU Uber exerts a decisive influence on the conditions of the provision of drivers by applying at least the maximum price of the journey it charges the customer before delivering a part of it to the unprofessional driver of the vehicle and ensures a certain degree of control over the quality of the vehicles and their drivers' behaviour, which may entail, when appropriate, their exclusion.

The CJEU concluded that Uber forms an integral part of a global service whose principal element is transport. In other words, although a mixed service is involved, the main element in is transport. Uber should therefore be classified as 'service in the field of transport' and not 'information society service'.

As it qualifies as 'service in the field of transport', it is not covered by Art. 56 TFEU which concerns the freedom to provide services in general. It is the Art. 58 para.1 TFEU which concerns the principle of freedom to provide services that have to be applied through the implementation of a common transport policy.

According to the CJEU knowing that non-collective urban transport services and services inextricably linked to it, such as Uber intermediary service, did not result in the adoption, by the European Parliament and the Council of the European Union, of common rules or other measures, on the basis of Art. 91 para 1 TFEU and so it is up to the Member States to regulate the conditions for the provision of such services.

In summary, the CJEU applied a test which came to be known as the "Uber test", which aims to determine whether a given collaborative platform acts as a mere intermediary – consequently covered by the Electronic Commerce Directive – or as service provider – in this case covered by the Services Directive – in the light of which it will be necessary to examine whether the following conditions are fulfilled:

i. The indispensability of the platform (application) for the provision of the service (market-maker);
ii. The exercise, by the platform, of a decisive influence on the conditions of the provision of the service, namely, by fixing:
    - Price (for example the maximum price),

[17] C-434/15 *Elite Taxi/Uber,* ECLI:US:C:2017:981, par. 38.

- Control over the quality of the service provided,
- Possibility of exclusion of service providers.

The Uber test will surely be used in the future to be applied to other collaborative platforms such as Airbnb. In that regard, in the Uber conclusions, Advocate General Maciej Szpunar[18] seemed to qualify Airbnb[19] as being part of the information society services.

European Commission's response

The emergence of collaborative platforms has resulted in a kind of 'spontaneous liberalization' in the European Union and in the Member States. One of the questions is whether collaborative platforms should be regulated by specific legislation – and in this case, whether the regulation should be adopted by the European Union or, subsidiarily, by the Member States – or in a different way, only a general regime applicable to all sectors of economic activity should be submitted, e.g. the General Regulation on Data Protection.[20]

The signals given by the European Commission allows to anticipate that the Commission did not want to intervene directly in the sector by adopting a stricto sensu regulation of some platforms operating collaboratively but choose a strategy that some call 'wait and see' instead. This strategy can be understood in light of the principle of conferral powers on the one hand and the principle of subsidiarity on the other. There are activities for which the European Union has no powers and in other cases, the principle of subsidiarity may require the Member States to exert regulatory jurisdiction, as explained by the CJEU in the case of Elite Taxi/Uber vis-a-vis the transport sector. The neutrality followed by the European Commission makes it possible to move away from fracturing discussions around collaborative platforms, while ensuring de jure the essential legal regulation of collaborative platforms. This particular strategy for collaborative platforms and its specific regulation may be also understood because many of the questions raised can be addressed

[18] Opinion of Advocate General Maciej Szpunar delivered on 11 May 2017, marg. no. 92 [Online]. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=190593&doclang=CS (Accessed: 15 October 2024).

[19] Airbnb is a global group which operates the eponymous property intermediation platform on the internet, facilitating the connection, on the one hand, of lessors who have accommodation and, on the other hand, persons seeking that type of accommodation, Airbnb collects the payment for the provision of the accommodation from the customer before the start of the rental and transfers that payment to the lessor, if there has been no challenge on the part of the lessee.

[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). OJ L 119, 4. 5. 2016, p. 1–88.

through already existing legal instruments, such as competition law or legislation, such as the Services-Directive[21], the Electronic Commerce-Directive[22], the Payment Services Directive[23] or the General Regulation on Data Protection[24]. Incidentally, in April 2018 the Commission submitted a proposal for a Regulation on promoting fairness and transparency for business users of on-line brokering services[25]. However, this proposal does not apply to collaborative platforms but only the 'services of online intermediation'.

3.3.2. Airbnb Case[26]

A 2017 Italian law establishes a new tax regime for short-term property rentals outside a commercial activity. That law applies to contracts for the rental of residential property by natural persons outside a commercial activity for a maximum period of 30 days, whether concluded directly with the lessees or through the involvement of property intermediaries, which include persons who, like Airbnb, operate online platforms. As from 1 June 2017, income from such rental contracts is – where the owners concerned have opted for that preferential rate – subject to a withholding tax at a rate of 21 % owed to the Treasury and data relating to the rental agreements must be transmitted to the tax authority. When they receive rents, or take part in their collection, persons who act as property intermediaries must, as tax collectors, withhold 21 % of the amount of the rents and pay it to the Treasury. Non-resident persons who do not have a permanent establishment in Italy are obliged to appoint, in their capacity as persons liable to pay the tax, a tax representative.

Airbnb Ireland UC and Airbnb Payments UK Ltd, which belong to the global Airbnb group, brought an action seeking the annulment of the decision of the

21 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. OJ L 376, 27. 12. 2006, p. 36–68.

22 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.OJ L 178, 17. 7. 2000, p. 1–16.

23 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC. OJ L 337, 23. 12. 2015, p. 35–127.

24 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, p. 1–88.

25 Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services. COM/2018/238 final.

26 C-83/21 *Airbnb Ireland and Airbnb Payments UK,* ECLI: ECLI:EU:C: 2022:1018.

Director of the Tax Authority implementing the new tax regime. Seized of the appeal brought by Airbnb against the ruling dismissing that action, the Consiglio di Stato (Council of State, Italy) asked the Court to interpret several provisions of EU law in the light of the obligations imposed by national law on intermediaries facilitating the short-term rental of immovable property.

The CJEU holds that the three obligations introduced in 2017 into Italian law fall within the field of taxation and are therefore excluded from the scope of certain directives relied on by Airbnb. Thus, the CJEU examines the lawfulness of the three measures solely in the light of the prohibition on restrictions to the freedom to provide services within the EU laid down in Art. 56 TFEU.

In the first place, it observes that the obligation to collect and communicate to the tax authorities data relating to rental contracts concluded following property intermediation applies to all third parties, whether they are natural or legal persons, whether or not they are resident or established in that territory, and whether they act via digital means or via other means of putting the parties in contact. The Court infers, in accordance with the case-law,[27] that such an obligation does not contravene the prohibition laid down in Article 56 TFEU since it is applicable to all operators exercising their activity on the national territory.

In the second place, the obligation to withhold tax at source is also incumbent both on providers of property intermediation services established in a Member State other than Italy and on undertakings which have an establishment in Italy. The Court therefore rules out that that obligation may be regarded as prohibiting, impeding or rendering less attractive the exercise of the freedom to provide services.

In the third place, the obligation to appoint a tax representative in Italy applies however, for its part, only to certain providers of property intermediation services without a permanent establishment in Italy. Since that obligation requires them to take steps but also to bear the cost of paying that representative, such constraints cause, for those operators, a hindrance of such a kind as to deter them from providing property intermediation services in Italy, in any event in the manner they wish to do so. That obligation must thus be regarded as a restriction on the freedom to provide services prohibited, in principle, by Article 56 TFEU. Although that tax measure pursues the legitimate objective of ensuring the effective collection of tax, which may be capable of justifying a restriction on the freedom to provide services, it nevertheless exceeds what is necessary to achieve that objective. That measure applies without distinction to all providers of property intermediation services without a permanent establishment in Italy who have chosen, in the context of providing their services, to collect rents or consideration

[27] C-674/20 *Airbnb Ireland*, ECLI:EU:C:2022:303.

relating to the contracts covered by the 2017 tax regime, or to intervene in the collection of those rents or consideration. However, that measure makes no distinction based on, for example, the volume of tax revenue collected or liable to be collected annually on behalf of the Treasury by those providers. Moreover, the fact that the tax authority has already received information concerning the taxpayers is such as to facilitate its supervision and, therefore, contributes to the disproportionate nature of the obligation to appoint a tax representative. It follows that the obligation to appoint a tax representative is contrary to Article 56 TFEU. To sum it up, EU law does not preclude the requirement to collect information or to withhold tax under a national tax regime. However, the obligation to appoint a tax representative constitutes a disproportionate restriction on the freedom to provide services.

3.3.3. Booking case

The decision-making practice of several competition authorities seems to go in the opposite direction than the above mentioned approach of the Commission ‘wait and see’. Several national competition authorities (e.g. in the UK, Germany, France, Sweden or Czechia) considered recently in cases involving online travel agencies (such as Booking.com[28] or Expedia[29]) that they did not act as mere intermediaries, as they impose conditions essential for the definition of the price, in particular by means of tariff parity clauses.[30] For example, in April 2024, the Czech Supreme Administrative Court issued a final decision[31] upholding the fine of 8.336 million CZK (approx. 330,875 EUR) imposed by the Czech Competition Authority (hereinafter the ‘CCA’). According to the CCA’s 2018 decision[32], Booking entered into vertical agreements with short-term accommodation providers between 2009 and 2015, requiring them to ensure price and availability parity as part of the service’s general terms and conditions. Furthermore, the accommodation providers could only offer more favourable

[28] Booking.com is one of the world’s largest travel platforms that enables properties from around the world to reach a global audience and grow their business, whether they are established companies or private properties of various sizes.

[29] Expedia Group, Inc. is a travel technology company that owns and operates travel price aggregators and travel metasearch engines, including Expedia, Hotels.com, Vrbo, Travelocity, Hotwire.com, Orbitz, Ebookers, CheapTickets, CarRentals.com, Expedia Cruises, Wotif and Trivago.

[30] Basically, price parity clauses in the travel sector restrict hotels from offering rooms on their own websites at rates lower than what they’re offered on an online platform like Booking.com. Depending on how they’re written, they can also restrict the price at which hotels offer their rooms on other online platforms.

[31] Decision of the Czech Supreme Administrative Court 6 n. As 35/2022–54 of 17th April 2024.

[32] Decision of the Czech Competition Authority n. S0664/2015/KD-37030/2018/830/DKl of 12th December 2018.

conditions to customers who booked their accommodation through the Booking platform. As a result, customers using the Booking platform would always pay a lower price than if they had used another booking method or contacted the provider directly. This practice was confirmed by hundreds of accommodation establishments in Czechia. At the end of 2019, the CCA's decision was upheld by the CCA's Chairman in the appellate proceedings[33]. In its appeal, Booking disagreed with the definition of the relevant product market, claimed there were no anticompetitive effects and that its practices were covered by the VBER[34] (then applicable Regulation 330/2010, no longer in force, valid till the end of May 2022). The Chairman, however, found none of the objections to be justified. Booking filed a lawsuit with the Regional Administrative Court in Brno, which dismissed it[35], agreeing with the conclusions of the CCA and its Chairman. With reference to the German Competition Authority's decision, the court held that the parity agreements did not fall within any block exemption. Finally, the Supreme Administrative Court upheld the first-instance court's decision and the fine in its entirety, agreeing that Booking prevented the development of effective competition in the market. The Supreme Administrative Court's judgment was final.

As mentioned above, the CCA is one of the few EU competition authorities to find Booking's conduct in breach of competition law, and subsequently imposing a fine for it.

Furthermore, within the context of the Booking.com case, the Rechtbank Amsterdam (District Court in Netherlands) has sought a preliminary ruling[36] – in particular on how the relevant market should be defined and whether parity clauses constitute an ancillary restraint under Art.101 para. 1 TFEU. Importantly, the CJEU held that price parity clauses in this context – both wide and narrow – are not 'ancillary restraints' and therefore will not fall outside the scope of the prohibition against anticompetitive agreements set out in Art. 101 para 1 TFEU. In particular, the inclusion of a price parity provision in such agreements is not indispensable to the main operation of the agreement – i.e., the operation of Booking.com is not rendered 'impossible' without inclusion of the price parity provision. Consequently, any price parity provision in a Booking.com agreement must be individually assessed for compliance with Art.101 para 1. Price parity

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[33] Decision of the Czech Competition Authority n. j. ÚOHS-R0219/2018/HS-29914/2019/310/Aši of 1st November 2019.

[34] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23. 4. 2010, p. 1–7.

[35] Decision of the Regional Administrative Court in Brno n. 30 Af 2/2020–135 of 31st of January 2022.

[36] C-264/23 *Booking.com BV and Booking.com (Deutschland) GmbH v 25hours Hotel Company Berlin GmbH and Others,* ECLI:EU:C:2024:764.

restrictions may still be compatible with EU competition rules if they either benefit from a safe harbour under the Vertical Agreements Block Exemption Regulation[37] or qualify for individual exemption under Art. 101 para 3. In practice, wide price parity provisions will not benefit from a safe harbour under the VBER (which treats wide parity restrictions as "excluded", meaning they require individual assessment), and the bar for demonstrating efficiencies under Art.101 para. 3 is high.

To sum it up, this CJEU decision represents an important development in the context of the assessment of price parity clauses under EU competition rules. The Court's decision does not mean all price parity provisions will infringe competition law, and any form of price parity could still comply, depending on the facts in each case.

4. Conclusion

Overall, many people support and encourage digital platforms and shared economy because of the benefits they bring to consumers, in particular because of the prices and innovation that underlie them. Many others criticize them for, among other reasons, calling into question typical traditional business models (e.g. taxis); for contributing to speculation and removal of local populations in large urban centres (e.g. Airbnb) or even for being anti-democratic by qualifying platforms that aggregate data. Whether you belong to one group or the other, one thing is for sure, development cannot be stopped and probably should not be slowed down. The European Union and its institutions are facing a milestone.

As already mentioned and demonstrate on case law, a strategy for collaborative platforms and its specific regulation may be addressed through already existing legal instruments, such as competition law or other relevant legislation.

Specifically speaking about the personal transport sector, in the case of taxis, licensing regulation was understood as a response to market failures and ensuring quality. The practice of regulated prices, to the adjustment of ex ante demand, is a way to avoid congestion in cities and, in the end, to protect consumers. However, in the opposite way, many say that regulation only allowed the interests of incumbents to be safeguarded, generating an inability to increase competition. In this last dimension, the emergence of electronic platforms helped to enhance

[37] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11. 5. 2022, p. 4–13.

competition and the welfare of consumers and, doing so, raised the quality of the services provided and introduced better price adjustments and more innovative offerings.

In addition, there is one more important fact, Europe currently lags behind North America and Asia when it comes to digital tech industry. If we want to gradually change this situation (and if it is even possible to change this situation and catch up with the European lag), we have to change the way we think and the way we understand regulation in general.

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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.

Types of online platforms What online platforms are there? 13 May 2022, [online] Available at: https://start-platform.com/types-of-online-platforms.

EU Customs Policy Development and its Legal Limits in The Slovak Republic

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Summary: The aim of this paper is to identify the process of shaping the customs policy of the European Union, its legal framework, and the limits of the competences of a Member State, using the Slovak Republic as an example. The authors base their analysis on the provisions of the EU Treaties and on national legislation implementing European norms. The paper identifies key areas of EU policy-making that restrict the sovereign powers of the Slovak Republic and highlights the practical implications of these limitations for the functioning of the customs administration. In conclusion, the authors propose recommendations to enhance the coordination between EU and Slovak customs policies, including *de lege ferenda* proposals related to measures that could improve the effectiveness of customs policy implementation in the Slovak Republic.

Keywords: Customs policy, EU Customs Code, Constitutional limits, Customs law

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1. Introduction

The European Union is one of the most important political and economic groupings, integrating countries with similar political and legal systems. For

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the purpose of the EU to be effective, it is necessary, that certain policies must be created directly at the EU level. One such area is customs policy. Historically, the creation of customs policy was considered the *domaine reserve* of individual states, i.e., a means of regulating the import and export of goods. For the creation of European Communities,[1] however, it was necessary for member states to transfer their powers in the area of customs policy to an international organization[2] that brought together the member states. However, the creation of a customs union did not only involve the abolition of all customs duties in trade between individual member states and the introduction of a single customs tariff at the common border. With such limited objectives, the customs union would not have been very stable (Walsh, 2016, p. 57). In addition to removing the fundamental obstacles of a uniform customs policy, it was necessary to prevent any deviation from uniform customs administration in trade. Until the decision in the „van Gend & Loos“[3] case, the European Economic Community was perceived as a typical international organization with specific powers in the area of (among other things) customs policy. This decision is considered groundbreaking in the context of confirming the existence of another, new, legal-political system, which is today's European law.

1.1. Methodology of research

In line with the set objective, the authors of the paper set out to verify the following hypothesis and research question:

Hypothesis: The customs policy of the European Union is implemented uniformly throughout the whole Union.

In order to confirm or reject the above hypothesis, a research question was also formulated in relation to the achievement of the objective defined by the authors, as follows: "To what extent and in what way is the Slovak Republic, as a member state, limited in the implementation of its customs policy?"

The authors' research is based on legal analysis using several interconnected methods of scientific examination of law and political processes. This involves an analytical method that will be used to identify and analyze the legal provisions of primary and secondary EU law that determine the scope and content of customs

[1] The European Coal and Steel Community and the European Economic Community

[2] At the time The European Coal and Steel Community

[3] Court of Justice. (1963). *Judgment of the Court of Justice in Case 26/62*. N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos vs Nederlandse administratie der belastingten. Available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=C1F38FB246696F189F82635405736C27?text=&docid=87120&pageIndex=0&doclang=sk&mode=lst&dir=&occ=first&part=1&cid=1674527.

policy (in particular Articles 30 and 31 TFEU, Regulation No. 952/2013 – Union Customs Code, and the draft new Customs Code of 2023). A comparative method will be used to compare constitutional provisions and limits on the exercise of customs policy in the Slovak Republic with the systems of other Member States (e.g., the Czech Republic, Hungary, Poland). The aim will be to identify differences in the scope of national autonomy and in implementation mechanisms. The historical method will be used to explain the development of customs policy from the Treaty of Rome (1957) to the present and to capture the transformation trends from non-binding acts (recommendations, directives) to binding norms (regulations). To interpret the objectives and purpose of EU legal norms in the area of customs policy, particularly from the perspective of their compliance with the principles of the internal market, consumer protection, and environmental sustainability, a teleological method will be used. The authors of the paper will also examine the interconnections between EU institutions (the European Commission, the Council of the EU, the European Parliament) and bodies such as the Directorate-General for Taxation and Customs Union (hereinafter referred to as DG TAXUD) and their competences in relation to the customs policy-making process. At the conclusion of the research, the authors will propose a conclusion, confirmation, or rejection of the established hypothesis based on a normative analysis and the identified problems.

2. Legal framework for the development of customs policy

The term "customs policy" itself is not legally defined in primary law, even though it is a commonly used term in European Union law. For the purposes of defining customs policy, it is necessary to refer to *soft law*[4] documents, which serve as a political framework for the adoption of binding acts or as a supporting source for the interpretation of European law. The term customs policy refers to the definition of the scope of activities in which customs administrations may act to achieve current objectives at the national level that are consistent with EU objectives[5]. Based on the above, we can therefore de-

[4] Soft law is understood as rules contained in a non-binding form; their violation does not result in the application of international liability. See on it: MALENOVSKÝ, J. *Medzinárodní právo veřejné, jeho obecná část a pomeř k jiným právním systémum, zvlášte k právu českému.* 5. vyd. Brno: Doplňek a Masarykova univerzita Brno, 2008, p. 237.

[5] European Parlament. *Report on the proposal for a regulation establishing the Union Customs Code and the European Union Customs Authority. A9-0065/2024.* [online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2024-0065_EN.html

fine "European customs policy as the set of rights, obligations, and powers defined in secondary law, which are implemented by the individual customs administrations of the EU Member States in order to achieve predefined trade and policy objectives."

The purpose of customs policy, on the other hand, is clear, unlike its definition. EU customs policy protects the internal market, ensures compliance with regulations, and facilitates international trade. Within the protection of the internal market, the purpose of customs policy in the context of the challenges set out in the proposal for a new Customs Code from 2023 is to protect small and medium-sized enterprises and consumers. Ensuring compliance with legislation, customs policy is in the context of the aforementioned draft new Customs Code a tool for protecting the environment, which is standardly classified as one of the European Commission's priorities. Given the planned expansion of the powers of customs administrations, environmental protection policy will be an essential part of the effective implementation of customs services.

Before analyzing EU primary law, which forms the basis for customs policy, it is appriopriate to look at the historical development of customs policy since the 1960s. The original primary law, i.e. the Treaty of Rome (1957), contained only one provision relating to the formulation of customs policy (Article 27). The content of that article was the assumption that Member States would take the necessary steps to approximate their provisions of laws, regulations, or administrative measures relating to customs matters on the basis of recommendations from the Commission. Since the development of customs policy was defined in recommendations, it was not possible to speak of a common customs policy. In Community law, as in European law, recommendations are non-binding and it is therefore up to each Member State to decide whether to implement them in its legal order. As a result of that, no real harmonization of customs provisions or customs policies was possible in this way.

Given the need for a common customs policy, the General Agreement on Tariffs and Trade (1963) was adopted in a directive establishing common customs duties on goods from third countries. We believe that the General Agreement on Tariffs and Trade remains a fundamental element of European customs policy in today's EU. Despite the adoption of the customs tariff agreement, Member States were unable to implement a unified customs policy to the extent planned by the then Commission of the European Communities. This is also documented in the 1977 Communication of the Commission to the Council and the European Parliament on the State of the Customs Union of the European Economic Community (hereinafter referred to as the Communication). According to the Communication: *„there was in practice no alternative to the directive (...) while leaving the national authorities responsible for the choice* *of the form and means to be used, was the Community legal form most suited tc the intended purpose.*"[6]

In addition to the above, the Commission also identified a problem in the objectives set on the basis of the customs policy at the time. According to the Communication, the objectives in most binding acts were insufficiently precise and Member States often implemented them inadequately.[7] Based on the above, it was necessary to adopt a new method for creating customs policy, namely regulations. It can be said that since the 1980s, the content of customs policy has been expressed almost exclusively in regulations that are directly applicable in Member States.

Historically, Council Regulation (EEC) No. 2913/92 of October 12, 1992, establishing the Community Customs Code, can be considered a landmark legislative act. The Community Customs Code replaced 105 existing regulations and directives.[8] However, this code lacked transparency, was incomprehensible due to the absence of a preamble, and the interpretation was difficult.[9] The first common customs code should be considered groundbreaking in the context of the creation of a common customs policy. In view of the above-mentioned legislative problems and the accession treaties (2003, 2005), the Community was forced to adopt a new (modernized) customs code. Applying the historical and teleological methods, it can be concluded that the other customs codes contained the basic frameworks of European customs policy set out in the first Customs Code and therefore, for the purposes of this paper, it is not necessary to discuss them in detail.

Regarding to the legal framework on the basis of which customs policy is developed, its fundamental limits are identified in the primary law of the European Union. It is then appropriate to refer to secondary legislation (regulations and directives) as well as implementing and delegated acts, the significance of which lies in clarifying European customs policy. In order to develop European

6 Commission of the european communities. *Communication of the Commission to the Council and to the European Parliament on the State of the Customs Union of the European Economic Community (COM(77)210 final).* [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51977DC0210&rid=4

7 Commission of the european communities. Communication of the Commission to the Council and to the European Parliament on the State of the Customs Union of the European Economic Community. [online]. Available at: (COM(77)210 final). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51977DC0210&rid=4

8 WALSH, T. The establishment and application of the DNA of customs law and practice. *World Customs Journal*, 2015, vol. 15, no. 2, pp. 3–22. [online]. https://worldcustomsjournal.org/Archives/Volume%2015%2C%20Number%202%20(Sep%202021)/1922%2001%20WCJ%20v15n2%20Walsh.pdf

9 Ibidem.

policy, it is necessary for Member States to give up some of their rights to the EU. Under Article 7(2) of the Constitution of the Slovak Republic [10], the Slovak Republic may transfer some of its powers to the EU. Based on this legislation, European norms are binding in the Slovak Republic.

Primary EU law consists of the Treaty on European Union,[11] the Treaty on the Functioning of the European Union [12] (hereinafter also referred to as TFEU) and a number of treaties on accession to the European Union. For the purposes of European policy-making, the most important source is the TFEU, which regulates the powers of the EU. For the sake of completeness, it should be added that the EU does not have the so-called power of powers, i.e. the power to determine what is and what is not within its competence.[13] For the success of policies developed directly by the EU, it is most appropriate to classify them as exclusive competences. For example, according to Article 128 TFEU, the EU has full exclusive competence for the issue of new banknotes. Relative exclusive powers are those powers that are available to the EU, which has them in their entirety, but their exercise must be carried out through national authorities. Customs policy within the meaning of Article 3(1)(a) is one of the (relative) exclusive powers of the EU. Based on the inclusion of the customs union among the exclusive powers, it is clear that the main and sole creators of EU customs policy will be the EU institutions and bodies.

The development of customs policy is clearly defined in Articles 30 and 31 TFEU, which prohibit customs duties between Member States and stipulate that the Common Customs Tariff shall be determined by the Council on a proposal from the Commission. The development of customs policy between Member States is explicitly prohibited by primary law in Article 30. In relation to third countries, customs policy is based on the Common Customs Tariff, which prevents Member States from imposing other or additional customs duties on goods imported into the EU.

In terms of secondary law, it is necessary to mention the "*lex generalis*" of European customs law, Regulation (EU) No. 952/2013 of the European Parliament and of the Council of October 9, 2013, laying down the Union Customs Code (hereinafter referred to as the Customs Code). The content of the Customs Code essentially constitutes the current EU customs policy, which is based on model for importing goods and services from third countries for a fee (customs duty). The draft of the new Customs Code changes the basic framework of

[10] Zákon č. 460/1992 Zb. Ústava Slovenskej republiky, v z. n. p.

[11] In slovak legal order published as Oznámenie MZV SR 185/2004 Z. z.

[12] In slovak legal order published as Oznámenie MZV SR 486/2009 Z. z.

[13] MAZÁK, J., JÁNOŠÍKOVÁ, M. *Základy práva Európskej únie. Ústavný systém a súdna ochrana.* Bratislava: Wolters kluwer (Iura Edition), 2009, pp 42.

customs policy, particularly in the context of protecting the European economy from unfair trade practices (especially) by Asian trading companies (European Commission, 2025).[14] As mentioned above, delegated and implementing acts are also an important source of secondary law, the purpose of which is to supplement customs policy in order to ensure its effective implementation. A good example of the completion of European customs policy is Commission Implementing Regulation (EU) 2020/761[15], which regulates the system of managing tariff quotas based on licenses. Tariff quotas are one of the most significant limits on the creation of independent customs policies by Member States.

2.1. The process of customs policy-making

Several EU institutions and bodies are involved in the development of European customs policy, as expressed in the proper legislative process. The most important institutions include the European Commission, the European Parliament, and the Council of the European Union. The most important body involved in the development of European customs policy is DG TAXUD. We will demonstrate the process of customs policy development using the example of the ongoing adoption of the new Customs Code presented in 2023. Given the complexity of adopting certain secondary legislation, it is not possible to predict when it will be adopted, and therefore the authors will point out both possibilities for its adoption, i.e., after the second or third reading.

The European Commission is considered to be the "driving force" behind the legislative process, as it is the only institution with the power to initiate proposals. When developing customs policy, the European Commission conducts public consultations, impact assessments, and institutional negotiations in order to assess the consequences of adopting a new customs policy. Once a proposal (Customs Code) has been approved by the College of Commissioners, it is submitted to the European Parliament and the Council of the European Union..[16] If necessary, after the successful adoption of the act, the European Commission may issue delegated (Article 290 TFEU) or implementing acts (Article 291 TFEU).

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[14] European commission. *Commission preliminarily finds Temu in breach of the Digital Services Act in relation to illegal products on its platform*. [online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1913

[15] Commission Implementing Regulation (EU) 2020/761 of 17 December 2019 laying down rules for the application of Regulations (EU) No 1306/2013, (EU) No 1308/2013 and (EU) No 510/2014 of the European Parliament and of the Council as regards the management system of tariff quotas with licences

[16] European commission. *Beter rgulation toolbox*. [online]. Available at: https://commission.europa.eu/law/law-making-process/better-regulation/better-regulation-guidelines-and-toolbox/better-regulation-toolbox_en

The activities of the European Commission are followed up by DG TAXUD, which is authorized to draft legislative acts in the field of customs union, thereby directly participating in the process of customs policy-making. In addition, it has a wide range of powers related to the uniform application of customs law in Member States.

With the revision of primary law (in particular by the Treaty of Lisbon), the European Parliament has become an important player in the development of European customs policy through its influence on legislation. The European Parliament acts as a co-legislator in the ordinary legislative procedure. After receiving a proposal from the European Commission, the Parliament is required to discuss it in committees in order to familiarize itself with the possible consequences of the proposed changes and any amendments. The most important parliamentary committee for customs policy-making is the Committee on International Trade, which has an influence on acts relating to customs administration, the fight against customs fraud, and the digitization of customs processes.[17]

In addition to the European Parliament, the Council of the European Union also acts as a co-legislator and is an equal institution in the adoption of secondary acts. In the area of customs policy, the most important body is the Economic and Financial Affairs Council (hereinafter referred to as ECOFIN). When formulating customs policy, ECOFIN decides by qualified majority. This is one of the most important protective mechanisms when adopting policies that could jeopardize the interests of Member States.

Other EU bodies that influence European customs policy include the European Economic and Social Committee (EESC) and the European Committee of the Regions, both of which are consultative bodies. The EESC is an advisory body authorized to issue non-binding opinions on European Commission proposals regarding their impact on employers, employees, and civil society.[18] The European Committee of the Regions also has an advisory function, but given its membership, it draws attention to the territorial impact of customs measures.

Based on the aforementioned powers of individual institutions and bodies of the European Union, the process of creating European customs policy is divided into six phases, which are distinguished as obligatory and facultative.[19] The first

[17] European parliament. *Report on the proposal for a regulation establishing the Union Customs Code and the European Union Customs Authority. A9-0065/2024*. [online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2024-0065_EN.html

[18] HÖNNIGE, C., PANKE, D. Is anybody listening? The Committee of the Regions and the European Economic and Social Committee and their quest for awareness. *Journal of European Public Policy*, 2015, vol. 23, no. 4, pp. 624–642. [online]. DOI: https://doi.org/10.1080/13501763.2015.1066839.

[19] van GRUISEN, P., CROMBEZ, C. The Commission and the Council Presidency in the European Union: Strategic interactions and legislative powers. *European Journal of Political Economy*, 2021, vol. 70, no. 2 [online]. Available at: https://doi.org/10.1016/j.ejpoleco.2021.102040.

stage is the initiation of the legislative process for the creation of customs policy at the level of the European Commission, which derives this right from Article 17(2) of the TEU. As mentioned above, the legislative proposal itself is prepared by DG TAXUD. After approval by the European Commission, the proposal is submitted to the European Parliament and the Council of the EU.

The second stage is the so-called first reading in the European Parliament. At the beginning, the President of the EP assigns the proposal to the responsible committee, which in the case of customs policy is the Committee on International Trade, which may approve it or propose amendments. The third stage is the first reading in the Council of the EU, which examines the proposal together with the EP's opinion. Unlike the EP, the Council of the EU votes on customs policy issues by a qualified majority in accordance with Article 16(3) TEU and Article 238 TFEU.

The fourth stage is the so-called second reading in the EP, in which the Parliament can approve or reject the position of the Council of the EU, or submit new amendments. This is the most important stage of the entire legislative process, as it involves the harmonization of two often conflicting or at least inconsistent positions. On customs issues, the European Parliament usually advocates the digitization of customs processes, data protection, and alignment with digital single market policies.[20] It should be noted that this is the last mandatory stage of the legislative process, as it is at this stage that a proposal may be adopted or rejected. In the case of customs policy, it is natural that the legislative process continues to the fifth and sixth final stage, given its complexity and conflicting views.

The fifth stage involves the conciliation committee, which is convened if the Council of the EU and the EP fail to reach agreement but there is still interest in adopting the final act. The conciliation committee consists of an equal number of representatives from both institutions, with Commission representatives acting as mediators. The committee's task is to prepare a joint text, which is sent to both institutions for approval. According to Article 294(10-12) TFEU, the Conciliation Committee has six weeks to reach an agreement. The final sixth stage is the third reading, during which the EP and the Council of the EU vote on the compromise proposal. If it is accepted, it is published.

The current draft of the new Customs Code from May 2023 is in its fourth phase, whereas, by comparison, the Customs Code submitted in 2012 was adopted after the first reading, i.e., after the third phase.

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[20] European parliament. *Report on the proposal for a regulation establishing the Union Customs Code and the European Union Customs Authority. A9-0065/2024.* [online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2024-0065_EN.html

3. Legal limits of European customs policy in the Slovak Republic

The Slovak Republic became part of the European Community in 2004 and naturally also became part of the customs union, which has been one of the fundamental elements of European integration since its inception in the post-war order of Europe. The customs union ensures the free movement of goods and services between European Union member states. A uniform customs policy, created at the level of European institutions, is applied in relation to third countries. Like other Member States, the Slovak Republic can only implement customs policy through EU institutions, in particular the European Commission and the Council of the EU, and has no autonomous powers in its formulation.[21]

The legal basis for the lawful transfer of powers in the field of customs policy to an entity other than the Slovak Republic is set out in Article 7(2) of the Constitution of the Slovak Republic. In practice, this means that the Slovak Republic does not create customs policy, but only implements and enforces it. At the national level, it is authorized exclusively to ensure the implementation of EU customs policy. To this end, Act No. 652/2004 was adopted during the accession process, which was repealed by Act No. 35/2019 Coll. on Financial Administration. The framework for the implementation of customs policy at the national level is completed by the Customs Act No. 199/2004 Coll.

The term "limits of European customs policy" also refers to the limits of national decision-making on key issues related to its implementation. From the perspective of national law, these limits include: the inability to change customs rates, restrictions on customs quotas, a ban on additional customs duties, and the obligation to respect the customs union. Defining the limitations of European customs policy in EU Member States is relatively problematic, given the inconsistent regulation of processes related to its implementation and the lack of harmonization or inconsistency of provisions contained in primary and secondary law.

The basis for limiting customs policy can be abstracted from the Accession Treaty, which is part of primary law and is referred to in practice (according to the place of adoption) as the Athens Treaty (2003).[22] Article 27 of the Treaty

[21] CRAIG, P., de BÚRCA, G. *EU Law: Text, Cases and Materials (7th ed.).* Oxford: Oxford University Press, 2020, pp. 107–118.

[22] Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the

regulates customs duties that are part of the common customs tariff applied by the European Community in trade relations with third countries as a *domaine réservé* of European customs policy. In addition to the above article, the Athens Treaty also limits Member States in the scope of cash and survivor benefits, as well as old-age and health insurance benefits, so that individual Member States must bear all costs *per se*. In the context of the proposed new Customs Code, it is therefore necessary to point out the establishment of the European Customs Agency (hereinafter also referred to as EUCA), whose employees will have the legal status of employees of a European agency, which will be obliged to pay all benefits without the participation of individual Member States.

The Athens Treaty specifically limits the powers of fisheries management. The acceding states have designated customs offices that will be responsible for implementing European fisheries policy. The Slovak Republic has designated all customs offices in the territory of the Slovak Republic as authorities with powers to implement fisheries policy. Compared to other Member States neighbouring the Slovak Republic, this is a non-standard decision, as the Republic of Hungary has designated only the customs office in Budapest, the Czech Republic the customs office in Prague and the Republic of Poland the customs office in Gdansk. The most significant limitation on the creation of a sovereign customs policy by Member States contained in the Treaty of Athens is the independent determination of the customs value of goods. The practical consequence of this limitation is that the customs value of goods is determined by the Member State in whose territory the goods enter the customs union.

In addition to the limits specified in primary law that affect the Slovak Republic, there are further limits in secondary EU law, i.e. the Customs Code. In terms of practical application, there are three types of limits in the implementation of European customs policy, which can be divided into the impossibility of changing import or export rates and conditions, customs quotas created at the level of European institutions, and the third limit being the performance of customs controls.

The most significant of these limits is the inability of the Slovak Republic to set its own customs tariffs or import and export conditions. Customs duties and preferential regimes are set out in the Common Customs Tariff [23]. The level of

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Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union.

[23] COMMISSION IMPLEMENTING REGULATION (EU) 2025/1926 of 22 September 2025 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical

customs duties is decided by the Council of the EU on a proposal from the European Commission. An example of preferential regimes are free trade agreements concluded by the Commission, which are binding on all Member States.[24] Customs quotas are defined as an exception to the normal state of affairs, as they allow the complete or partial suspension of normal customs duties on imported goods for the duration of the measure.

The third limitation is the actual performance of customs controls by the authorities of an EU Member State. According to EU customs policy, national authorities must carry out controls in accordance with European legislation. Another limitation is Article 46 of the Customs Code, according to which national customs authorities are authorized to verify the accuracy of the information in customs declarations, but the scope and methods of customs controls are coordinated within the EU *customs risk management framework*. In practice, this means that customs officers carry out checks on goods but cannot (arbitrarily) apply a procedure that differs from that which would be chosen by customs officers in another Member State in a comparable case. For the sake of completeness, Walsh argues that customs control policy is at the discretion of individual Member States. He refers to this power as executive federalism.[25] We believe that so-called executive federalism will cease to exist if the draft new Customs Code is adopted in the form presented by the Commission in May 2023. This is confirmed by the fact that, under Title XII of the draft new Customs Code, as the newly created European Customs Authority will take over the powers of coordination and enforcement of customs controls.

4. Conclusion

EU customs policy is one of the most striking examples of the transfer of sovereignty from Member States to the supranational level, not only in legal terms but also in institutional and practical terms. In the more than sixty years since the Treaty of Rome was signed, customs policy has transformed from a relatively narrow economic agenda into a comprehensive set of legal norms, instruments,

nomenclature and on the Common Customs Tariff.

24 OVÁDEK, M., WILLEMYNS, I. International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice. *European Journal of International Law,* 2019, vol. 30, no. 2, pp. 361–389. DOI: https://doi.org/10.1093/ejil/chz028

25 WALSH, T. The establishment and application of the DNA of customs law and practice. *World Customs Journal,* 2021, vol. 15, no. 2, pp. 3–22. [online]. Available at: https://worldcustomsjournal.org/Archives/Volume%2015%2C%20Number%202%20(Sep%202021)/1922%2001%20WCJ%20v15n2%20Walsh.pdf

and institutional procedures that fundamentally influence the functioning of the internal market, international trade, consumer protection, and the EU's environmental and security interests.

From the perspective of legal developments, it is clear that the basis for the creation of EU customs policy has been a gradual transition from non-binding acts (recommendations and directives) to binding norms, in particular regulations, which are binding and have direct effect in all Member States. This shift was not merely a technical adjustment to the legislative framework but reflects a broader trend towards strengthening integration and deepening the Union's powers in areas that have a fundamental impact on the functioning of the single market. From the adoption of the Common Customs Tariff in 1963 to the Union Customs Code of 2013, there has been a consistent effort to create a uniform, efficient, and transparent customs administration system that eliminates differences between Member States and ensures a level playing field for all participants in trade relations.

In terms of the institutional framework, customs policymaking is based on a system of balance between supranational and national actors. The European Commission plays a key role as the initiator of legislative proposals and as the guarantor of the supervision of the implementation of European customs law. Its role is complemented by DG TAXUD, which provides technical and expert support for the legislative process and ensures the uniform application of customs regulations in the Member States. The co-legislative institutions – the European Parliament and the Council of the European Union – also play an important role, ensuring democratic legitimacy and political balance in the adoption of secondary legislation. This multi-level system, while ensuring legitimacy and expertise, also poses challenges in terms of coordination, efficiency, and legal certainty.

Based on the research conducted, it can be concluded that the answer to the research question: "To what extent and in what way is the Slovak Republic, as a member state, limited in the implementation of customs policy?" The answer can be:

The Slovak Republic has retained a certain degree of autonomy in the area of the organizational structure of customs administration, domestic procedural regulation, and supervision, but in a material sense, the content of customs policy is determined by EU law. This state is a consequence of the inclusion of the customs union among the exclusive competences of the EU under Article 3(1)(a) TFEU. From the perspective of the constitutional framework, such a transfer of powers is in accordance with Article 7(2) of the Constitution of the Slovak Republic, which explicitly allows for the transfer of some sovereign powers to the EU.

From a practical point of view, however, full harmonization of customs policy faces several limitations. In relation to the Slovak Republic, it can be said that the implementation of customs policy is limited mainly by the inability to set its own customs rates, introduce additional duties, independently determine customs quotas, or decide on the customs value of goods. Its role is to ensure the effective implementation and enforcement of customs administration in accordance with European legislation. Other problems include the low level of interconnection between customs authorities and economic operators, insufficient interoperability of information systems, and incomplete participation in joint European projects aimed at digitizing customs operations.

From an application perspective, it is therefore necessary to strengthen the capacities of Slovak customs authorities not only in relation to the performance of national duties, but also in relation to participation in joint European initiatives such as the ICS2 (Import Control System 2)[26] or CCN/CSI (Common Communication Network / Common Systems Interface) systems. These platforms enable more effective exchange of information between Member States, identification of risks, and combating customs fraud, which is a long-standing problem in EU customs policy.

From a legislative point of view, it is desirable that Slovak legislators consistently take into account the principles of legal certainty, proportionality, and effectiveness when transposing or adapting secondary EU acts. These principles are particularly important when implementing delegated and implementing acts of the Commission, which often regulate the technical details of customs procedures. In this context, it is necessary that national legislation does not duplicate legal obligations or impose additional administrative burdens on businesses.

From the perspective of *de lege ferenda* proposals, three main directions for further development can be recommended:

Strengthening of institutional coordination between the Ministry of Finance of the Slovak Republic, the Financial Administration of the Slovak Republic, and the Permanent Representation of the Slovak Republic to the EU in the area of customs policy. More effective coordination would enable timely identification of upcoming changes in European legislation and involvement in the drafting of European legal acts as early as the preparatory consultation stage.

Support for the digitization and automation of customs processes, which is one of the key pillars of the proposed new EU Customs Code (2023). Digitization will reduce the administrative burden, increase transparency, and shorten the time needed to complete customs formalities. The Slovak Republic should adopt

[26] The Import Control System 2 (ICS2) is an advanced cargo information system designed to improve security in international freight transport and the associated supply chain. All economic operators (EOs) that transport goods to or through the EU must declare security and safety data in the system via an Entry Summary Declaration (ENS). ICS2. Based on the ENS, all goods are subject to security and safety risk analysis and better targeted controls.

a national strategy in this area that is harmonized with the European customs data strategy to ensure the interoperability of systems and uniform access to data.

Strengthening professional training and professionalization of customs officials. European customs policy is increasingly intertwined with areas such as environmental standards, protection of intellectual property, sanction regimes, and security policy. The Financial Administration of the Slovak Republic – Customs Administration should therefore pay greater attention to the ongoing professional training of its employees and improve their language and analytical skills.

In conclusion, it can be said that Slovak customs policy, although part of the EU's single legal framework, retains an important role in the implementation, control, and enforcement of customs law. The effective functioning of EU customs policy depends not only on legislative measures at EU level, but also on the quality and capacity of the national authorities that apply these standards. The future success of EU customs policy therefore lies in finding balance between a single legal framework and respect for the specific characteristics of Member States.

For the reasons stated above, we can therefore reject the hypothesis that the customs policy of the European Union is implemented uniformly throughout the Union, for the reasons we have given.

Despite the fact that the legal framework of the customs union is uniform, there are differences in application practices in individual member states, which result from differences in administrative capacities, the level of digitization of customs processes, and the effectiveness of national control mechanisms.

European customs policy is on the threshold of a new era, which will be characterized by the interconnection between digitalization, sustainability, and security. The draft of the new Customs Code of 2023 reflects this vision of a modernized, proactive, and strategically oriented customs policy. The Slovak Republic should therefore actively participate in shaping this new policy and at the same time exploit the potential offered by membership of the customs union – not only as a passive recipient of legal norms, but as a full co-creator of the future of European customs.

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The Mechanism for Declaration of Enforceability in EU Family Law

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Summary: Recognition and enforcement of foreign judgments are the means by which we can enforce our rights. It is an expression of mutual trust between the Member States of the European Union, which facilitates judicial cooperation and contributes to the effectiveness of the area of freedom, security and justice. In order to enforce a decision, some EU regulations still require a declaration of enforceability procedure to serve as a check that all the requirements have been met before the actual enforcement of the decision. However, this mechanism can also cause considerable delays in the proceedings. This paper will focus on the mechanism of the declaration of enforceability in EU family law regulations.

Key words: private international law, European law, family law, declaration of enforceability, exequatur, recognition of decisions.

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1. Introduction

The process of recognition and enforcement of foreign decisions forms part of the European judicial area. With emphasis on mutual trust between Member States, the recognition of decisions is automatic, i.e., without the need for a specific procedure. Recognition of a decision is then necessary for its subsequent enforcement. In the past (and in some cases even today), enforcement required a court decision in the Member State of enforcement establishing that a decision from a foreign Member State was enforceable. This procedure is known as a declaration of enforceability procedure (hereinafter also referred to as exequatur or exequatur procedure). The purpose of this procedure is to provide an opportunity to verify that a decision meets all the requirements for subsequent enforcement.

Although the European Union has aimed to abolish enforcement proceedings between Member States since 1999,[1] the exequatur procedure was enshrined even in later regulations. Only over time did enforceability gradually become automatic without exequatur as a necessary intermediate stage. In the area of family law, the last time such a change occurred was the Brussels II bis Regulation, where the revised version of the Regulation, Brussels II ter, fully abolished declaration of enforceability.

The present paper deals with the mechanism for declaration of enforceability in family law in the European Union. It aims to analyse its (non-)preservation in individual regulations,[2] taking into account the trend of gradually abolishing the exequatur procedure. Attention is first paid to the general process of recognition and enforcement of decisions and the definition of the role of the exequatur procedure. The paper then analyses the approach to exequatur in individual EU family law regulations, including the gradual abolition of this procedure in some

1 LOWE, N., HONORATI C. *Brussels II-ter: Cross border Marriage Dissolution, Parental Responsibility Disputes and Child Abduction in the EU*, Cambridge: Intersentia,2023, p. 333.

2 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

regulations. Finally, some decisions of the Court of Justice of the European Union concerning the issue of decision enforceability are analysed.

2. A brief insight into the recognition and enforcement process

Enforcement and declaration of enforceability are mechanisms of private international law that allow cross-border enforcement. A court's issuing a decision is one of the acts of state sovereignty.[3] As a rule, the effects of the decision are therefore limited to the territory of the State (State of origin) and end at the national border.[4] Foreign decisions have effect in the Czech Republic only if they have been recognised and, where appropriate, subsequently enforced. It is therefore practical not to have to repeat proceedings that have been conducted before competent foreign courts. The result of this process is a legal situation that would have occurred if the same matter had been decided identically by a Czech authority.

By way of recognition, a decision given in another State has the same legal effect as a decision given in the country in which enforcement is sought (for example, in the Czech Republic). This is done in an informal manner, i.e., by the court taking the foreign decision into account.[5] Recognition of the decision is thus a condition for the foreign decision to be enforced in the Czech Republic. However, in some cases, recognition alone may not be sufficient for enforcement. Enforcement of a decision given in another state, i.e., from the point of view of legal theory, the last step of proceedings conducted to compel a person to comply with an obligation imposed on them by that foreign decision and which they voluntarily failed to comply with within the prescribed period,[6] may in general be ordered from the point of view of private and procedural international law if the foreign decision in question has been recognised in the Czech Republic and, in some cases, if the foreign decision has been declared enforceable in the Czech Republic (*exequatur*). This creates a situation where the process of "declaration of enforceability" enters between recognition and enforceability.

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3 KUČERA, Z. *Mezinárodní právo soukromé a procesní*. Brno: Doplněk, 2004, p. 407.

4 MALACKA, M., RYŠAVÝ, L. *Mezinárodní právo soukromé a procesní: Úvod do studia mezinárodního práva soukromého a rozhodčího řízení*. 2nd rev. ed. Praha: Leges, 2021, pp. 293–294.

5 § 16, The Act dated 25th January 2012 governing private international law.

6 KUČERA, Z. *Mezinárodní právo soukromé a procesní*. Brno: Doplněk, 2004, p. 410.

3. Declaration of enforceability in EU family law regulations

Mutual recognition of decisions is one of the objectives of the European Union.[7] In accordance with Art. 288 TFEU, EU regulations take precedence over national law, which of course also applies to the issue of recognition and enforcement. The procedure for the recognition of a decision under European Union law depends on the specific area of legal relations in which the decision was given.

As regards the EU rules on family law, different regulations take different approaches, and there have been changes over the years in the area of the exequatur procedure in the sense that this intermediate step between recognition and enforcement is being abolished.

3.1. The Maintenance Regulation:

The Maintenance Regulation divides decisions into two groups. The first group consists of decisions given in any EU Member State that is also a signatory to the Hague Protocol. The second group consists of decisions of those Member States that are not signatories to the Hague Protocol. Decisions from the first group are enforceable automatically; specifically, Art. 17(1) provides that: "*A decision given in a Member State bound by the 2007 Hague Protocol shall be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition.*"

Currently, all decisions falling under the Maintenance Regulation are automatically enforceable throughout the European Union. This is because the condition of declaration of enforceability applied to the United Kingdom of Great Britain and Northern Ireland, which was not a signatory to the Hague Protocol and which is no longer a member of the European Union.

3.2. The Matrimonial Property Regulation and the Regulation on the Property Consequences of Registered Partnerships:

At present, there are only two regulations in European Union law, specifically in the area of family law, which retain the exequatur procedure. These are the Matrimonial Property Regulation and the Regulation on the Property Consequences of Registered Partnerships referred to as "Twin Regulations". Other

[7] Art. 67(4) Consolidated version of the Treaty on the Functioning of the European Union.

EU regulations with declaration of enforceability closely related to family law issues include the Succession Regulation.

Decisions given and enforceable in one Member State are enforceable in another Member State only after a declaration of enforceability, in accordance with the procedure laid down in the Regulation. To this end, the person concerned must file a petition. The entire exequatur procedure is then regulated by Art. 44 to 57 of the Twin Regulations. The procedure for filing a petition is then governed by the law of the Member State of enforcement, the petitioner being under no obligation to have either a postal address or an authorised representative in the Member State of enforcement. The petition itself then requires the submission of several documents, including an engrossed decision that meets the conditions necessary for recognition of its authenticity.

Once the formalities listed in Art. 45 are met, the decision will be declared enforceable without review under Art. 37. The decision on the petition for a declaration of enforceability is then communicated to the petitioner and served to the party against whom enforcement is sought, together with the decision, unless already served.

An appeal may be lodged against the decision on the petition for a declaration of enforceability and may be made by any party. That party has 30 or 60 days to appeal. For reasons of distance, an extension of the time limit is excluded. The appeal procedure is then conducted in accordance with the rules governing contentious proceedings in the Member State concerned. The same conditions apply to the Regulation on the Property Consequences of Registered Partnerships.

Although the Twin Regulations are among the youngest regulations,[8] they are essentially the only two family law regulations that operate with declaration of enforceability. At the very least, this solution is interesting in terms of the fact that there has been a tendency in the European Union since 2003 to abolish the exequatur procedure[9] and to ensure direct enforceability of decisions in other Member States.

The reasons for preserving declaration of enforceability in those Regulations may have followed from the same reasons for preserving declaration of enforceability in the Succession Regulation. In the context of the Succession Regulation, there are two arguments for preserving declaration of enforceability. The first one is a certain originality of the regulation, which has a wide material scope and offers a choice of law.[10] The second is the lack of unification of substantive

8 Validity 2016, applicable from 2019.

9 VIARENGO, I., FRANZINA, P. *The EU Regulations on the Property Regimes in International Couples: A Commentary*. Northampton: Edward Elgar Publishing, 2020, p. 375.

10 Ibid.

law.[11] In the case of substantive family law, this area cannot be unified either.[12] Compared to the regulations already mentioned, which remain in the intermediate stage on the way to the enforcement of a decision consisting in a declaration of enforceability, another regulation, namely Brussels I bis, went a different way and abolished the exequatur procedure. The Brussels I bis Regulation has a much wider scope than the Succession Regulation and the Twin Regulations and covers areas where substantive law has not been unified.[13]

The aim for enforceability of decisions in the Twin Regulations is to have a quick and simple process. However, commentary literature considers the preservation of the declaration of enforceability to be inefficient and illogical.[14] It takes this view primarily on the ground that, in the light of the current legislation, an authority is in principle obliged to grant the petition for a declaration of enforceability.[15]

In addition to the Brussels I bis Regulation, there has been a change in the approach to declaration of enforceability in another family law regulation, namely the Brussels II bis Regulation, which now exists in the form of the Brussels II ter Regulation.

4. Enforceability of decisions in the Brussels II bis and Brussels II ter Regulations

The Brussels II bis Regulation contained provisions on the recognition and enforcement of decisions given in other Member States of the European Union, including a mechanism for declaration of enforceability. A declaration of enforceability was thus a necessary step to enable a decision from a foreign Member State to be enforced in another Member State. The purpose of declaration of enforceability was to allow for an abbreviated review of foreign decisions.[16] This is necessary because each state still remains responsible for the actions of its officials.

[11] Ibid.

[12] MARTINY, D. European Family Law (PIL). In: BASEDOW, Jürgen a kol. (eds.). *The Max Planck Encyclopedia of European Private Law: Volume I.* 1 ed. Oxford: Oxford University Press, 2012, s. 596.

[13] VIARENGO, I., FRANZINA, P. *The EU Regulations on the Property Regimes in International Couples: A Commentary*. Northampton: Edward Elgar Publishing, 2020, p. 375.

[14] Ibid., p. 406.

[15] Ibid.

[16] GONZÁLES BEILFUSS, C. et al. *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibiliy Matters: A Commentary on Regulation 2019/1111*. Northampton: Edward Elgar Publishing, 2023, p. 345.

The Brussels II ter Regulation went a step further and abolished declaration of enforceability altogether.[17] This puts Member States in a difficult position if their authorities find that the enforcement of a foreign decision infringes the fundamental rights of men, women and children.[18] Although the principle of mutual trust among Member States is crucial, it does not override the fundamental rights of these persons. Enforcement of a foreign decision which infringes fundamental rights constitutes the same international liability as is borne by the State of origin of the decision.[19]

That control, which is (typically) carried out by an enforcement judge during the exequatur procedure, has been moved to a different stage of the procedure under Brussels II ter. This is by virtue of Art. 34 in conjunction with Art. 57.[20] Therefore, the current Brussels II ter Regulation stipulates for the enforceability of a decision: "*A decision in matters of parental responsibility given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required. For the purposes of enforcement in another Member State of a decision granting rights of access, the court of origin may declare the decision provisionally enforceable notwithstanding any appeal.*" The same is also repeated in Art. 45[21] in relation to the enforcement of "privileged decisions".[22]

The phase consisting of a declaration of enforceability therefore ceases to exist, but the possibility of defending oneself against enforcement of course remains. The idea of abandoning exequatur has been around for a long time, along with the intention of creating a single judicial area in Europe. However, political obstacles have led to the current dual track, where decisions in certain cases are subject to accelerated enforcement (without prior exequatur) and decisions in other cases continue to be subject to the traditional regime with an exequatur procedure.[23]

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17 As a first step in Brussels II bis, the exequatur procedure was abolished in two specific instances – the enforcement of access decisions and an order for a child's return made under the override provisions in connection with applications made under the 1980 Hague abduction convention.

18 GONZÁLES BEILFUSS, C. et al. *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibiliy Matters: A Commentary on Regulation 2019/1111*. Northampton: Edward Elgar Publishing, 2023, p. 375.

19 *Pellegrini v. Italy*, no. 30882/96, § 47, 20 July 2001.

20 The grounds for suspension or refusal of enforcement under the law of the Member State of enforcement shall apply in so far as they are not incompatible with the application of Art. 41, 50 and 56.

21 A decision referred to in Art. 42(1) given in a Member State which is enforceable in that Member State shall be enforceable under this Section in the other Member States without any declaration of enforceability being required.

22 Decisions on access to the child and with requests made under the Hague Convention.

23 GONZÁLES BEILFUSS, C. et al. *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibiliy Matters: A Commentary on Regulation 2019/1111*. Northampton: Edward Elgar Publishing, 2023, p. 346.

Experience with the circulation of decisions in civil and commercial matters (Brussels I bis) has shown that the exequatur-free regime is effective.[24] The aim was to reduce the length of enforcement procedure abroad and also to reduce costs.[25] The time to obtain exequatur varied from one Member State to another, however, depending on the Member State and the complexity of the case, it could take anywhere from days to months.[26] If the possibility of appeal was exercised, the proceedings were then extended by up to several years.[27]

In the context of the abolition of exequatur in other regulations, the assumption that the delays were caused by the exequatur procedure has been proven.[28]

It should be recalled that the abolition of exequatur does not prevent petitions for refusal or suspension of enforcement. The difference lies in the fact that the grounds for refusal or suspension of enforcement are not considered by the court as part of the exequatur procedure but by the authority responsible for enforcement.[29]

So what is to be done for enforcement to take place and how can such enforcement possibly be prevented? The party seeking enforcement must submit several documents to the competent authority, namely one copy of the decision which meets the conditions for recognition of its authenticity and a certificate issued under Art. 36.[30] For the enforcement of a decision given in another Member State and ordering an interim measure, Art. 35(1) lays down further conditions, such as the obligation to produce proof of service of the decision if the measure is ordered without summoning the respondent to court.

The Brussels II ter Regulation sets out several grounds for refusing to enforce decisions in matters of parental responsibility. Those are, according to Article 41,[31] identical to the reasons listed in Article 39, i.e., to the grounds for refusing recognition of decisions in matters of parental responsibility. The listed

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24 Ibid., p. 345.

25 LOWE, N., HONORATI C.. *Brussels II-ter : Cross border Marriage Dissolution, Parental Responsibility Disputes and Child Abduction in the EU*, Cambridge: Intersentia,2023, p. 334.

26 Ibid.

27 Ibid.

28 GONZÁLES BEILFUSS, C. et al. *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibiliy Matters: A Commentary on Regulation 2019/1111*. Northampton: Edward Elgar Publishing, 2023, p. 346.

29 LOWE, N., HONORATI, C.. *Brussels II-ter : Cross border Marriage Dissolution, Parental Responsibility Disputes and Child Abduction in the EU*, Cambridge: Intersentia,2023, p. 334

30 According to Art. 36 of the Brussels II ter Regulation, the certificate is issued upon application and using the appropriate form set out in the Annexes to the Regulation. The issuance of the certificate cannot be challenged.

31 Without prejudice to Art. 56(6), enforcement in matters of parental responsibility shall be refused if it has been established that there are any of the grounds for refusal of recognition referred to in Art. 39.

reasons include being manifestly contrary to the public policy,[32] failure to inform the party in sufficient time,[33] alleged infringement of parental responsibility,[34] irreconcilability with later decisions regarding parental responsibility[35], and failure to follow the procedure in Art. 82.[36]

5. Related decisions of the Court of Justice of the European Union

Of course, the Court of Justice of the European Union has not lacked in its decision-making practice the opportunity to enforce a decision together with a declaration of enforceability.

In *Bohez v Wiertz*,[37] the Court of Justice of the European Union addressed the issue of financial penalties arising from a breach of a child access order. The Court held that the issue fell under Brussels II bis and not under Regulation No 44/2001. The Court has specified that the nature of that right to enforcement depends on the nature of the right for the violation of which the enforcement was ordered.[38] In the

[32] The recognition of a decision in matters of parental responsibility shall be refused if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the best interests of the child.

[33] The recognition of a decision in matters of parental responsibility shall be refused if where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the decision unequivocally;

[34] The recognition of a decision in matters of parental responsibility shall be refused upon application by any person claiming that the decision infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

[35] The recognition of a decision in matters of parental responsibility shall be refused if and to the extent that it is irreconcilable with a later decision relating to parental responsibility given in the Member State in which recognition is invoked; if and to the extent that it is irreconcilable with a later decision relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later decision fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked;

[36] Where a court or a competent authority contemplates the placement of a child in another Member State, it shall first obtain the consent of the competent authority in that other Member State. To that effect the Central Authority of the requesting Member State shall transmit to the Central Authority of the requested Member State where the child is to be placed a request for consent which includes a report on the child together with the reasons for the proposed placement or provision of care, information on any contemplated funding and any other information it considers relevant, such as the expected duration of the placement.

[37] Judgment of 9 September 2015, C-4/14*, Bohez v. Wiertz*, ECLI:EU:C:2015:563.

[38] See, to that effect, judgment in Realchemie Nederland, C-406/09, EU:C:2011:668, paragraph 42.

present case, it was then necessary to further clarify whether the enforcement of such a sanction requires a declaration of enforceability (*exequatur*), since decisions relating to the right of access under the Brussels II bis Regulation are enforceable in other Member States under certain conditions without the need for an exequatur procedure.[39] Since the sanction is directly linked to the existence of the main obligation (right of access), the sanction provided for in the decision on the right of access cannot be treated separately as a separate obligation. Enforcement of the sanction or, where applicable, a fine must be subject to the same enforcement regime as the right of access. The Court stated that if that regime had a separate enforcement procedure, it would mean allowing a court of a Member State to verify itself a breach of the right of access, contrary to mutual trust between the Member States of the European Union. Sanctions must then be declared enforceable under the rules in the Brussels II bis Regulation.

The issue of the need to conduct an exequatur procedure has also affected international child abductions, that is, again the Brussels II bis regulation. In the *Rinau*[40] case, after the divorce of the Rinau spouses (husband from Germany, wife from Lithuania), the father was given custody of their daughter. However, Inga Rinau and her daughter left the German territory and went to Lithuania for a two-week holiday. Michale Rinao responded by filing a petition for his daughter's return to Germany with the Lithuanian District Court in Klaipeda, but the court rejected his petition. Then a change took place and the court ordered the return of the daughter to Germany. However, the enforcement was halted several times. Inga Rinau therefore sought disrecognition of the decision to grant custody of her daughter to the father. The application was ruled inadmissible because the Lithuanian court considered that the decision was enforceable automatically under Art. 42 Brussels II bis[41] without the need for an exequatur procedure. Inga Rinau has therefore lodged a cassation appellate remedy seeking the annulment of that order and a issuance of new decision. The Lithuanian court *Lietuvos Aukščiausiasis Teismas* therefore stayed the proceedings and referred several questions to the Court of Justice for a preliminary ruling, including on the exequatur procedure. The Court of Justice of the European Union confirmed that the enforcement of the decision to return the child did not require a further stage of the procedure in

[39] "The rights of access […] granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

[40] Judgment of 11 July 2008, C-195/08 PPU, *Rinau*, ECLI:EU:C:2008:406.

[41] The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

the form of an exequatur procedure, since the condition in Art. 42 Brussels II bis Regulation is met – that is, a certificate was issued in accordance with Brussels II bis Regulation. The Court also referred, quite logically, to the requirement of speed of proceedings in cases of petitions for the return of a child. Therefore, such a decision cannot be appealed and is automatically enforceable.

The problems related to certification, which then relate to the automatic enforceability of the decision, were encountered by the Court in *Aguirre Zarraga v Pelz*.[42] The question referred for a preliminary ruling was whether the court of the Member State of enforcement has an obligation to enforce the decision of the Member State of origin even if it is apparent from the file that the certificate issued under Art. 42 of the Brussels II bis Regulation contains a manifest error of declaration (there had been no questioning of the daughter who was placed in the custody of the father)? The Court concludes that the Brussels II bis Regulation does not require the necessary questioning of the child before the court of the Member State of origin. But the child must be allowed to express themselves freely. The Court concluded that if a court of a Member State issues a certificate under Art. 42 Regulation Brussels II bis, the court of the Member State of enforcement is obliged to enforce the decision even if it does not agree with its recognition or enforceability. Such a conclusion stems mainly from the requirement of speed in these types of proceedings.

The Court of Justice of the European Union therefore deals with the issue of declarations of enforceability, in particular, with cases concerning whether or not to conduct an exequatur procedure. Furthermore, decisions may be encountered that further explain the issue of cross-border enforcement and subsequent annulment of the exequatur procedure, as was the case in Sanders v Verhaegen,[43] where the Court dealt with the enforcement of decisions in a maintenance order.

6. Conclusion

The paper dealt with the mechanism for declaration of enforceability in selected family law regulations, especially with regard to the trend consisting in the gradual abolition of this mechanism in individual (not only) family law regulations.

Automatic enforceability was introduced by the Maintenance Regulation and partly by Brussels II bis, where exequatur was not necessary in right of access proceedings and in return proceedings in cases of international child abduction.

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[42] Judgment of 22 December 2010, C-491/10 PPU, *Zarraga v Pelz*, ECLI:EU:C:2010:828.

[43] Judgment of 18 December 2014, C-400/13, *Sanders v Huber*, ECLI:EU:C:2014:2461.

The reason for the abolition of the declaration of enforceability was mainly the high time-consuming nature of these proceedings and the increased costs. The procedure and therefore the enforcement could thus extend for several years. The aim was to shorten the length of enforcement procedure abroad and also to reduce costs, which was to supposed to happen after abolition of the exequatur procedure. In particular, the Brussels I bis Regulation showed that the circulation of decisions is more efficient without exequatur.

Also, the Brussels II bis Regulation has undergone changes, and a recast in the form of the Brussels II ter Regulation abolished exequatur also in matters of parental responsibility, which makes all decisions enforceable automatically.

The only two regulations not affected by the abolition of the declaration of enforceability are the Twin Regulations. Paradoxically, these are the youngest regulations but they include a declaration of enforceability. The author considers this step to be superfluous and agrees with other experts in that keeping exequatur seems illogical and also inefficient. At the same time, however, it is impossible to ignore the fact that the exequatur procedure provides some protection against potential problematic decisions, especially regarding the assets of spouses or partners. It can also be assumed that the preservation of exequatur in the Twin Regulations may have indicated some caution on the part of the Member States of the European Union, and its abolition will also be considered in the future.

As regards the activities of the Court of Justice of the European Union, it has in the past dealt, as a rule, with questions as to whether or not it was necessary to conduct exequatur procedures in various situations. If it did not directly address the deeper issue of the declaration of enforceability, it devoted its attention to the reasons for the abolition of exequatur.

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Judgment of 18 December 2014, C-400/13, *Sanders v Huber*, ECLI:EU:C:2014:2461.

REVIEWS & NOTES

Integration of Ukraine into the EU: Challenges of Wartime. In memory of Professor Pavlo Zavorotko and Professor Volodymyr Denysov

Leonid Tymchenko*

On 4 November 2024, a three-day International scientific Conference "Integration of Ukraine into the EU: Challenges of Wartime. In memory of Professor Pavlo Zavorotko and Professor Volodymyr Denysov" was held at the V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine within the framework of the EU grant project "EU Law Postgraduate Studies (EULPS)" № 101126964 – EULPS-ERASMUS-JMO-2023-HEI-TCH-RSCH (format: online/offline; Kyiv, 4 – 6 November 2024). The Conference was attended by the Ukrainian and foreign scholars, diplomats, legal practitioners, postgraduate students, as well as representatives of government agencies and non-governmental organisations.

Thematic areas of the international scientific Conference were focused on these topics: "Current issues of European Union law and policy", "Application of European standards: theory and practice", "EU Law and European integration of Ukraine: value dimensions, current challenges, and new approaches", "Political and legal aspects of Ukraine's integration into the EU under martial law", "Ukraine–EU Common values and the realities of martial law", "The Constitution of Ukraine and European integration: challenges of the Present", "Adaptation of Ukrainian legislation to EU law: status, problems and prospects".

This event was accompanied by the scientific presentation of the collective monograph "Zavorotko Pavlo Petrovych: *IUSTITIA in CORDE*. Trends in the Development of Legal Science. In memory of the Professor on the occasion of his 100th birthday"; memories of prominent Ukrainian scientists Professor Pavlo Zavorotko and Professor Volodymyr Denysov.

The Conference was opened by *Liudmyla Falalieieva* (Department of International Law and European Union Law of the V.M. Koretsky Institute of State and Law of the NAS of Ukraine), who welcomed the participants of the event and noted that the Conference is held within the framework of the EU grant project "EU Law Postgraduate Studies (EULPS)".

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Oleksandr Skrypniuk (Director of V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine) stressed that this year the V.M. Koretsky Institute of State and Law of the NAS of Ukraine celebrates its 75th anniversary and for the first time participates in the EU grant project as a research and educational institution. Oleksandr Vasylovych stressed the importance of dedicating the event to the memory of Professor Pavlo Petrovych Zavorotko and Professor Volodymyr Naumovych Denysov.

Nataliya Onishchenko (Deputy Director for Research at the V.M. Koretsky Institute of State and Law of the NAS of Ukraine) focused on the issues of Ukraine's integration into the European Union and the country's accession to the integration association. In addition, she stressed the importance of participating in EU grant projects and properly fulfilling the obligations undertaken by the Institute, as well as the need to honour the memory of prominent Ukrainian scientists, including Professor Volodymyr Denysov and Professor Pavlo Zavorotko.

Naděžda Šišková, Head of the Jean Monnet Centre of Excellence at the Faculty of Law of Palacký University Olomouc (Czech Republic), President of the Czech Association of European Studies, noted the successful choice of the topic of this Conference, which is extremely relevant and important, as Ukraine is preparing to join the EU under such conditions that no other candidate country has ever experienced – martial law. N. Šišková compared the process of preparation of the Czech Republic for EU accession, which took place more than 20 years ago, with Ukraine's, stressing that, unfortunately, this period was marked by a brutal and unprovoked aggression unleashed by the Russian Federation without any reason. In her opinion, Ukraine has long rightfully belonged to the family of European nations. That is why the completion of the integration process and Ukraine's accession to the EU creates in fact the restoration of historical justice. In addition, Jean Monnet Professor Naděžda Šišková sincerely congratulated V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine on its 75th anniversary and noted: "I am pleased that it is in this anniversary year that we managed to sign a Memorandum of Cooperation between the Faculty of Law of Palacký University Olomouc and V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, thus opening the way for future joint projects with reliable scientific partners".

Then *the work in the sections* took place. In *the first section* "ACTUAL ISSUES OF THE EUROPEAN UNION LAW AND POLITICS", moderated by *Naděžda Šišková*, the speakers were: *Lenka Pítrová* (Department of European Law, Faculty of Law, Charles University in Prague, Czech Republic) delivered a presentation on "Actual Issues of the EU Migration Law"; JUDr. *Soňa Matochová*, Ph.D., LL.M., (Czech Office for Personal Data Protection, Czech Republic), delivered a presentation on "GDPR: The Right to Personal Data and

Privacy in a Modern Society"; the topic of Prof. Naděžda Šišková was "The Right to Be Forgotten – Its Peculiarities and Limits in the Light of Fundamental Rights"; Mgr.et.Mgr. *Ondřej Filipec*, Ph.D., (Department of Politics and Social Sciences, Faculty of Law, Palacký University Olomouc, Czech Republic), delivered his speech on the topic "Czech Response to Kremlin Disinformation and Propaganda: Two Steps Forward, One Step Back?".

The second session on "APPLICATION OF EUROPEAN STANDARDS: THEORY AND PRACTICE" was moderated by *Liudmyla Falalieieva*. The first speaker Professor *Nataliya Onishchenko* spoke on the topic "The Right to Peace as a Prognostic Component of the European Union's Security Policy", who noted that the doctrine has made some progress in scientific developments in this area. However, when talking about guarantees of the human right to peace, we need to discuss the constitutional consolidation of this right. Today, it is important to protect ourselves from the actions of terrorist groups, from the use of nuclear, biological, chemical and other weapons of mass destruction. "That is why it is so important to guarantee the human right to peace".

Professor *Mykola Koziubra* (Department of General Theoretical Jurisprudence and Public Law at the National University of Kyiv-Mohyla Academy) former Judge of the Constitutional Court of Ukraine, highlighted the national-state and liberal legal traditions in the history of Ukraine and the challenges to their optimal combination on the path to European integration in the context of Russian aggression.

Nataliia Malysheva (Department of Environmental and Space Law of the V.M. Koretsky Institute of State and Law of the NAS of Ukraine) comprehensively covered the topic "Peculiarities of Adaptation of Ukrainian Environmental Legislation to the Law of the European Union under Martial Law". Professor Malysheva focused on the terminological peculiarities of the European Union law, legislative acts of Ukraine that need to be adapted to the EU law in this area, as well as the difficulties of its implementation under martial law.

"Application of European Standards in Civil Proceedings in Ukraine" was the topic of the report of Prof. *Olena Zakharova* (Department of Civil Procedure of the Educational and Research Institute of Law of Taras Shevchenko National University of Kyiv). She described the current practice of applying European standards in civil proceedings in Ukraine, highlighted the existing problems and suggested ways to overcome them.

The third session of the conference was devoted to MEMORIES OF PROFESSOR Pavlo Petrovych ZAVOROTKO. It was moderated by *Liudmyla Falalieieva*. At the beginning of the third session, *Oleksandr Skrypniuk* (Director of the V. M. Koretsky Institute of State and Law) delivered a speech in which he noted that Pavlo Zavorotko is a scientist and a person who has done a lot for the development of legal science in Ukraine, having achieved the creation of the first Department of Procedural Law in the former USSR, which he headed and guided its development. Without Pavlo Zavorotko's personality, it is impossible to imagine the science of civil procedure in Ukraine.

Memories of Professor Pavlo Zavorotko were also shared by: *Mykola Koziubra*; Professor *Nataliia Malysheva*; *Volodymyr Nahrebelnyi* (Deputy Director of the V. M. Koretsky Institute of State and Law), *Viacheslav Oleshchenko* (V. M. Koretsky Institute of State and Law), Prof. *Naděžda Šišková*; *Yuriy Prytyka*, Head of the Department of Civil Procedure at the Taras Shevchenko National University of Kyiv Law School, who had noted the invaluable, significant contribution of the professor to the development of legal science, and shared their memories of meeting Pavlo Zavorotko, his teaching at the University, interesting stories, and also told about the dedication and support of Pavlo Zavorotko's wife, Olga Radzikhovska.

Presentation of the monograph "*IUSTITIA in CORDE*. Trends in the Development of Legal Science. In memory of the Professor on the occasion of his 100th birthday" was moderated by *Oleksandr Batanov* (Department of Constitutional Law and Local Self-Government of the V. M. Koretsky Institute of State and Law of the NAS of Ukraine).

The sessions were continued by *the fourth* one on the topic: "EU LAW AND UKRAINE'S EUROPEAN INTEGRATION: VALUE DIMENSIONS, CURRENT CHALLENGES, NEW APPROACHES". It was moderated also by Professor *Oleksandr Batanov*. The speakers were Professor *Mykhailo Mykiyevych* (Head of the Department of European Law at Ivan Franko National University of Lviv) presented the "Case law of the Court of Justice of the European Union as a source of law interpretation in Ukraine"; *Dmytro Bezzubov*, (National Defence University of Ukraine) and *Artem Filippov*, with a topic: "Legal Aspects of the European Union's Participation in the International Mechanism of Compensation for Losses and Damage, Military Expenditures and Losses Caused by the Aggression of the Russian Federation"; *Pavlo Kulynych* (Head of the Department of Agrarian, Land, Environmental and Space Law, V. M. Koretsky Institute of State and Law of the NAS of Ukraine) wrote the: "Improvement of the land legislation of Ukraine in accordance with the legal values of the European Union under martial law"; *Anzhelika Krusian* (Department of Constitutional Law and Local Self-Government, V. M. Koretsky Institute of State and Law of the NAS of Ukraine) presented the: "Establishment of common values between Ukraine and the EU and their protection under martial law: constitutional and legal aspect"; *Olena Sviatun* (Department of Comparative and European Law at the Educational and Research Institute of International Relations of Taras Shevchenko National University of Kyiv) wrote the contribution: "Migration

Legislation of the European Union: Recent Approaches"; *Alla Fedorova*, (Taras Shevchenko National University of Kyiv) with the topic: "EU Standards and Ukrainian Legislation on the Balance between Professional and Personal Life of Parents: Key Issues of Inconsistency"; *Viktor Savchenko* (Department of Civil Law Disciplines, V. N. Karazin Kharkiv National University) wrote the: "Free will as one of the fundamental values of the European Union"; *Bohdan Strilets*, (Department of International Law and European Union Law of the V. M. Koretsky Institute of State and Law of the NAS of Ukraine) with the: "Trends in the legal regulation of freedom of capital movement in the European Union"; *Yuliia Kovalenko* (Centre for Strategic Litigation of the Ukrainian Helsinki Human Rights Union) wrote the: "Protection of personal data in the context of Ukraine's European integration: challenges and prospects under martial law".

The fifth session of the conference was devoted to the MEMORIES OF PROFESSOR VOLODYMYR DENYSOV. It was moderated by *Liudmyla Falalieieva*. The speakers who shared their memories of V. N. Denysov as a person, a scientist, and a friend and highlighted his great contribution into the development of International law.

The whole forum was completed by awarding of certificates to the best postgraduate students who have successfully completed the course "European Union Law: Modern Problems of Theory and Practice" as part of the EU Law Postgraduate Studies (EULPS) project.

The Conference, which gathered the academics from almost all faculties of law from Ukraine and from abroad was of great importance just in the time of the preparation of Ukraine for the accession to the EU and on the background of the aggression of Russia against Ukraine.

Participants of the Conference and its nine panels covered a wide range of issues relating to the reform of Ukraine's legal system in the context of our country's prospects for integration into the European Union, viewed through the lens of the academic legacy of Professor P. P. Zavorotko and Professor V. N. Denysov.

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