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TABLE OF CONTENTS

LAW	5
RIGHT TO INFORMATION IN MISDEMEANOUR PROCEEDINGS - ANALYSIS OF PRACTITIONERS' EXPERIENCE IN CROATIA Marija ĐUZEL, Ante NOVOKMET	7
UNTANGLING THE POPULIST KNOT: ADMINISTRATIVE LAW AND THE STRUGGLE FOR RULE OF LAW RESTORATION IN POLAND Jowanka JAKUBEK-LALIK	31
INTERPRETATIVE DECISIONS OF THE CONSTITUTIONAL COURT OF NORTH MACEDONIA IN THE FUNCTION OF PROTECTING HUMAN RIGHTS AND FREEDOMS Darko KOSTADINOVSKI	53
SPECIFIC TOOLS FOR THE INTERGENERATIONAL PRESERVATION OF FAMILY COMPANIES AND WEALTH IN SLOVENIA AND HUNGARY Gregor DUGAR, Kinga ILYÉS	71
ACCOUNTING BOOKS AS EVIDENCE IN TAX AND CRIMINAL PROCEEDINGS OF THE REPUBLIC OF SERBIA Suzana DIMIĆ, Mirjana DJUKIĆ	99
DO VARIOUS FORMS OF CORRUPTION EXERT DIFFERENT EFFECTS ON ENTREPRENEURSHIP: EVIDENCE FROM CEE (POST)TRANSITION COUNTRIES Valentina VUČKOVIĆ, Abel POLESE, Ružica ŠIMIĆ BANOVIĆ	119
LEGAL CHARACTERISTICS OF A MAXIMUM MORTGAGE WITH AN ANALYSIS OF THE LATEST CASE LAW Renato VRENČUR, Matej MAKOTER ROŽMARIN	139
ON A CONSTITUTIONAL AND NATIONAL IDENTITY OF THE EU MEMBER STATES: SAME BUT DIFFERENT? Sára KIŠŠOVÁ	157
THE EVOLUTION OF CORPORATE MANAGEMENT - A MIXED SYSTEM? Jaroslav TURLUKOWSKI	183

THE RIGHT TO DEFENSE IN THE CONTEXT OF PENAL ENFORCEMENT: INTERNATIONAL AND EUROPEAN HUMAN RIGHTS STANDARDS András GYÖRGY PAYRICH, András CZEBE	205
SMART INFERENCE-DRIVEN RISKS: LEGAL CHALLENGES UNDER THE GDPR AND THE EGYPTIAN PDPL Esraa HASHISH	227
POLITICS AND SOCIETY	253
KOSOVAN STATEHOOD AS A PRETEXT FOR CATALAN INDEPENDENCE? BETWEEN DOMESTIC PREFERENCES AND EXTERNAL CONSIDERATIONS Branislav RADELJIĆ, Carlos GONZÁLEZ-VILLA	255
THE RUSSIAN - UKRAINIAN WAR AND THE STRENGTHENING OF IRREDENTIST NARRATIVE IN THE CENTRAL AND EASTERN EUROPEAN COUNTRIES AT THE BEGINNING OF THE XXI Natalia HORLO, Olena VAHINA	283
MEDIA AND COMMUNICATIONS	305
MEDIA ETHICS AND AI-GENERATED IMAGERY Gazmend ABRASHI	307
THE PHENOMENON OF GHOSTING IN DIGITAL COMMUNICATION Ivana STAMENKOVIĆ, Marta MITROVIĆ	323

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RIGHT TO INFORMATION IN MISDEMEANOUR PROCEEDINGS - ANALYSIS OF PRACTITIONERS' EXPERIENCE IN CROATIA¹

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Abstract

The paper presents the results of a study on the experiences of practitioners with the right to information in misdemeanour proceedings in the Republic of Croatia. The research was conducted in the form of semi-structured interviews with three groups of practitioners: prosecutors, adjudicators and defence attorneys. The research focused on three groups of rights that substantively constitute the right to information in accordance with the Directive on the right to information in criminal proceedings and the practice of the ECtHR: the right to information concerning procedural rights, the right to information concerning accusations and the right of access to the case file. Following the previously conducted theoretical-normative research, which pointed out certain inconsistencies in the current legislation on misdemeanours, the empirical research aimed to verify the results of the theoretical research and to determine the compliance of the legal framework and practice with the Directive on the right to information in criminal proceedings. The study of practitioners' experiences in misdemeanour proceedings revealed the weaknesses of the current

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legislation and paved the way for future research and the creation of a comprehensive and coherent legal framework.

Keywords: *right to information, access to the case file, misdemeanour proceedings, Directive on the right to information in criminal proceedings, Republic of Croatia*

1 INTRODUCTION

The right to be informed of the charge and the procedural rights of the defence, as well as the right to access the case file, are fundamental rights of the defence guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Perelló Doménech, 2012, p. 297). These are three interrelated and mutually dependent rights of defence. Although they are indisputable legal norms, their frequent violation in domestic legal systems has been highlighted in numerous cases before the ECtHR (Weigend, 2019, pp. 167-170, Mahoney, 2004, pp. 124-125). They have received particular attention in European Union law through Directive 2012/13/EU on the right to information in criminal proceedings, as one of the legislative activities at EU level as part of the package of directives to strengthen the procedural position of the defendant in criminal proceedings (Klimek, 2013, p.166).

Although Directive 2012/13/EU primarily refers to criminal proceedings, it nevertheless recognises in its introductory statement that certain minor offences, in particular minor traffic offences, minor offences relating to general local regulations and minor public order offences, are considered to be criminal offences (Recital 17). Similarly, in some Member States, in addition to the court having jurisdiction in criminal matters, another body may have jurisdiction to impose sanctions other than deprivation of liberty for relatively minor offences (Recital 17), such as misdemeanours, so that the Directive should also apply to such proceedings. However, where the law of a Member State provides for the imposition of sanctions for minor offences by such an authority and there is either a right of appeal or the possibility of otherwise referring the case to a court having jurisdiction in criminal matters, the Directive should only apply to proceedings before that court following such an appeal or such a referral of the case to the court. In the Republic of Croatia, the Misdemeanour Act is in force, which regulates the conduct of misdemeanour proceedings for numerous infractions, such as minor punishable offences which are essentially considered to be criminal offences, whereby in some situations the decision is not taken by the court but by another body at first instance. In 2013, the Croatian legislature amended the Misdemeanour Act and included the provision of Article 109a in the normative structure, which prescribes the obligation of the authorised state attorney to provide the defendant with a written legal letter concerning the charges against him and his rights in the proceedings, in a language he understands, before sending the indictment to the court or other body

conducting the proceedings (Rašo & Korotaj, 2013, pp.786-787). The aforementioned provision became the linchpin of the legislature's expectation that in this way the minimum standards for compliance of the Misdemeanour Act with Directive 2012/13/EU would be met.

Although the reform in question basically proclaimed the compliance of the Misdemeanour Act with Directive 2012/13/EU, numerous problematic issues are raised in theory and practice. One problem is the excessive insistence on the formal concept of accusation as the moment from which a person acquires the status of a defendant and the right to be informed of his rights, whereas today the autonomous concept of accusation from Article 6 of the ECHR has prevailed in Council of Europe and EU law (Novokmet, 2024, pp. 353-354). The second problem concerns the actual possibilities for the defendant to be informed of the accusation against him and to actively exercise his rights of defence, where it is questionable whether they can be effectively exercised due to the relatively late time at which the defendant is informed of the accusation and the rights of defence, as the information about the rights is linked to the strictly formal time of filing the indictment (Novokmet, 2024, pp. 355-359). The third problem relates to the defendant's ability to gain access to the case file and successfully prepare his defence (Novokmet, 2024, pp. 360-362). While the aforementioned right is relatively easy to achieve for persons defending themselves at liberty, a defendant who has been deprived of liberty cannot exercise this right because the law explicitly excludes this possibility, as the right of access to the case file is only guaranteed before the formal submission of the indictment to the court. The above-mentioned shortcomings and inconsistencies of the current normative framework were identified through an initial theoretical and normative study, which revealed the structural shortcomings of certain legal provisions and identified the substantive inconsistency of the Misdemeanour Act with Directive 2012/13/EU. This study was the impetus for the second, empirical study presented in this paper.

In order to examine the above questions in detail, an empirical study was conducted using semi-structured interviews with Croatian practitioners working as prosecutors, adjudicators and defence attorneys. The aim of this research was to verify the results of the theoretical and normative analysis and to determine the impact of the current legal solutions on legal practice. The results of the conducted research could be useful for the Croatian legislature when considering further reforms of the Misdemeanour Act in terms of possible additional harmonisation with Directive 2012/13/EU. However, it is necessary to take into account the nature of misdemeanours as minor violations of the legal order and to find a balanced model at which point the Directive should be applied, taking into account the nature of the misdemeanour, the decision-making body and whether or not the defendant is deprived of liberty.

2 METHODOLOGY

This study is the result of work on the scientific project Croatian Misdemeanour Law in the European Context – Challenges and Perspectives. The main objective of the project is to determine whether and to what extent the Croatian misdemeanour procedure is aligned with the standards of the European Court of Human Rights and a number of European Union directives on procedural safeguards for suspects and accused persons and the rights of other persons in criminal proceedings. This paper presents the results of the second part of the empirical study aimed at determining the extent of transposition of Directive 2012/13/EU in the Croatian Misdemeanour Law, taking into account the theoretical and normative research previously conducted as part of the project.

The first part of the research included a theoretical analysis of the relevant literature and a normative analysis of the Misdemeanour Act on the right to information in misdemeanour proceedings, based on the standards of the right to a fair trial developed in the practice of the European Court of Human Rights and Directive 2012/13/EU (Novokmet, 2024, pp. 337-366). The research was conducted taking into account three main aspects: a) the right to be notified of the accusation, b) the right to be informed of the rights and c) the right to access the case file. The results of the conducted research revealed numerous problematic questions about the actual scope of application of the analysed provisions of the Misdemeanour Act in the practice of the Croatian judicial authorities, which served as a basis for the preparation of the second part of the research, which was conducted in two phases.

The first phase consisted of an empirical study based on semi-structured interviews with 54 experts, 24 of whom were from Zagreb, 10 from Osijek, 10 from Rijeka and 10 from Split. Twenty-one interviews were conducted with authorised prosecutors (12 police officers, 6 state attorneys, 3 administrative officers), fifteen interviews with adjudicators (12 judges and 3 customs administration officers) and 18 interviews with defence attorneys. The questionnaire for each group of respondents was based on the results of the first part of the theoretical and normative research that was conducted, in which contentious issues of the legal regulation and the actual possibilities of its implementation in practice were identified.

In the second phase of the empirical study, in order to better understand the responses received and discuss the concerns identified, the research was conducted through four focus groups, three of which were homogeneous (prosecutors, adjudicators and defence attorneys) and one mixed focus group. The focus group with prosecutors had four participants (2 police officers and 2 state attorneys), the focus group with defence attorneys had five participants, while the mixed focus group had 4 participants (1 police officer, 1 judge, 1 state attorney and 1 defence attorney). A separate protocol was prepared for each focus group. The topics discussed were based on the results of the first part of the research, which was conducted through semi-structured interviews.

3 ANALYSIS OF PRACTITIONERS' EXPERIENCES WITH THE RIGHT TO INFORMATION IN MISDEMEANOUR PROCEEDINGS

3.1 Information about rights

The first group of questions asked to prosecutors, defence attorneys and adjudicators related to information on the rights of suspects, accused persons and arrestees. This is a right guaranteed in Article 3 of Directive 2012/13/EU and enshrined in the Misdemeanour Act (hereinafter: MA) as an obligation to provide written information about the accusation and procedural rights in accordance with Article 109a. Although the legislature has attempted to implement the requirements of the Directive on detailed and timely information on procedural rights and charges with this provision, it has linked this obligation to the time of the formal submission of the indictment, ignoring the concept of accusation in the substantive sense as interpreted by the ECtHR in its case law (Novokmet, 2024, p. 354). In addition to Article 3, Article 4 of the Directive lays down additional requirements regarding the time and form of informing the arrestee of his rights, which the legislature has not properly transposed into the Misdemeanour Act. The regulation of these rights and the real possibility of exercising them are crucial for the realisation of the right to an effective defence (Allegreza & Covollo, 2016, p. 42).

3.1.1 Procedural timing of information about rights

The first question asked to prosecutors and defence attorneys on the right to information related to the procedural moment at which suspects, accused persons and arrestees are informed of their rights. The responses from the prosecutors show that the moment of informing a person about his rights depends on which body is authorised to prosecute and whether the person is arrested or not. The defence attorneys' responses also show that the information given to suspects, accused persons and arrestees about their rights in misdemeanour proceedings varies and depends on the stage of the proceedings they are in and the procedural context.

The state attorneys were agreed in their responses that they should provide the defendant with information about the committed misdemeanour before submitting the indictment to the court, together with a letter about his rights under Art. 109a of the MA. It is clear from the responses that this is the only action they take, namely sending a notification and filing an indictment after the notification has been duly served. When asked whether there are differences in the timing of notification depending on the category of the person concerned, some emphasised that arrestees are not under their jurisdiction but under the

jurisdiction of the police and the police inform them of some rights, and two said that there is no difference.

The responses of police officers in the role of authorised prosecutors reveal differences in the timing of information depending on whether or not the person is arrested. Almost all police officers inform arrestees of their rights immediately after arrest. Two of them cited cases where the arrestees were intoxicated as an exception, where notification of their rights is delayed until they were sober. Police officers generally link the timing of the notification of the rights of a person who has not been deprived of liberty to the determination of the offence committed and the decision to initiate misdemeanour proceedings. If a person is found at the scene of the offence, a misdemeanour order is issued and they are informed of their rights. Some police officers stated that they provide information about rights when questioning a suspect. One police officer explained that a person is informed of his rights for each part of the process; if an indictment is filed, an Article 109a notice is issued, and if a person is arrested, some further rights arise and are communicated at the time of arrest. The customs officers stated that they inform the person immediately, at the beginning of the investigation procedure or in the case of measures preceding the issuance of a misdemeanour order.

Most defence attorneys stated that people are informed of their rights when they are arrested. At that moment, the police or competent authorities immediately hand out a written letter about the rights and explain the rights. For people who have not been arrested, the letter of rights is usually served together with a summons for questioning or a hearing. This is typically for situations where people are already in proceedings but have not been in contact with the police or other authorities up to that point. Some defence attorneys state that people are notified in the summons to a court hearing or a misdemeanour order if they have already been informed of the offence committed and the resulting proceedings. Cases involving customs surveillance or mobile teams are highlighted as specific as there can be confusion when informing suspects because people are only informed of their rights after they have been taken to the police station or other competent authority. All defence attorneys who responded agree on one point: information about rights must be clear, timely and in accordance with the law.

The adjudicators were asked whether or not they thought that defendants were informed of their rights at the time of their appearance before the court or the state authority conducting the proceedings. All but one of the judges surveyed agreed that defendants are informed of their rights when they appear before the body conducting the proceedings. Most judges stated that defendants receive a letter of rights from the prosecutor informing them of their rights under Art. 109a., in which they are informed of the factual and legal aspects of the offence with which they are charged and of their rights and obligations. If the proceedings are initiated on the basis of an objection to a mandatory misdemeanour order or a misdemeanour order, they are also informed of their

rights under this order. One judge also emphasised that the defendants are informed of their rights in the summons to the hearing, and another that defendants are advised before the hearing begins that they have the right to a defence attorney, and this is noted in the minutes. However, one judge was more cautious, stating that although defendants' rights are mentioned in the summons they receive, they do not read it. For example, when defendants are told that they have the right to a defence attorney, they often assume that they also have the right to free legal representation, which is not the case.

When asked whether it had ever happened that a defendant was not informed of his rights and the charges after the initiation of misdemeanour proceedings, most defence attorneys replied that they had never encountered such a situation and that the court always informs the defendant of the charges and his rights.

3.1.2 Form of information about rights

Article 3(2) of Directive 2012/13/EU requires that information on procedural rights be provided to suspects and accused persons verbally or in writing in plain and intelligible language. Flexibility in the form of information about rights is reserved for suspects and accused persons who are at liberty, while in the case of arrest, a written letter of rights in a language they understand and which they are entitled to keep in their possession throughout the period of deprivation of liberty is required (Article 4). With the latter requirement, the Directive has raised the bar set in ECtHR case law by prescribing a right that is neither provided for in the European Convention on Human Rights nor developed in the case law of the European Court of Human Rights (Cras & De Mateis, 2013, p. 27).

In order to determine whether there is a clear and standardised form of information about rights in practice, respondents were asked how people are informed of their rights, verbally or in writing, and whether there are differences depending on the category of person. Following the apparently standardised pattern of procedures in misdemeanour cases, all interviewed state attorneys inform people of their rights exclusively in writing by sending a notice of the initiation of misdemeanour proceedings. However, most police officers responded that people are first informed of their rights verbally and then in writing. Some respondents stated that people who are apprehended are first informed verbally and then, when they come to the police station, they are informed in writing. One respondent stated that a person who is not arrested is informed of their rights under Art. 109a of the MA by handing them a written letter, and two stated that they only inform them in writing. Customs officers' responses also indicate that information about rights is first given verbally and then in writing, through standard forms that the person signs and receives a copy thereof.

From the responses of the prosecutors analysed, it can be concluded that, with the exception of state attorneys, it is common practice to inform suspects, accused persons and arrestees of their rights both verbally and in writing, using pre-printed standard forms. This is also confirmed by the responses of the defence attorneys interviewed, according to which there is a clear practice of oral information, especially at the beginning of the proceedings, as well as written information, especially by means of pre-printed forms and forms. Arrestees are more frequently informed in a more formalised written form, while suspects and accused persons can also be informed verbally, with the written information being provided subsequently.

3.1.2 Provision of information about rights to arrestee

Another question asked of practitioners was aimed at the shortcomings of the current legislation in relation to the obligation to inform the arrestee of his rights in writing. In fact, contrary to Directive 2012/13/EU, the Misdemeanours Act excluded the obligation to provide written information on the rights to detainees (Novokmet, 2024, p. 360), and the wording of the statutory provision leaves no room for the subsidiary application of the relevant provisions of the Criminal Procedure Act (CPA), as it was obviously the intention of the legislature not to ensure this right to the extent prescribed by the CPA (Đuzel, 2024, p. 97). However, in such cases of inadequate transposition of the provisions of the Directive into national law, the possibility of direct application of the Directive remains. The application of the Directive is not questionable in this situation, as the scope of the Directive refers to suspects who are deprived of liberty within the meaning of Article 5(1)(c) ECHR (Đuzel, 2024, p. 97).

Most of respondents are of the opinion that the arrestee should also receive a written letter of rights. Some of the prosecutors explicitly supported such a position, while half of the respondents stated that they already provide the detainee with written information about his rights, regardless of the legislative decision. The responses of some judges confirm that the arrestees are informed of their rights. However, this good practice is qualified by the statement that although arrestees sign a form confirming that they are aware of their rights, this form does not remain with them, so it would be good if they also received a copy of the form. Most defence attorneys agree that providing a written letter of rights at all stages of the process would be useful and in the best interest of the arrestees. Although most believe that the delivery of a letter of rights should be mandatory at the time of arrest, some question the actual effectiveness of the letter, as defendants are reluctant to read it.

3.1.3 *Letter of rights*

Directive 2012/13/EU establishes in Article 3(1), as a minimum standard, a catalogue of rights of which suspects and accused persons should be promptly informed in order to enable them to exercise them effectively: (a) the right of access to a lawyer; (b) any entitlement to free legal advice and the conditions for obtaining such advice; (c) the right to be informed of the accusation, in accordance with Article 6; (d) the right to interpretation and translation; (e) the right to remain silent. It should be noted that the rights listed in Article 3 of Directive 2012/13 do not create a new set of rights under national law, but explicitly guarantee the right to be informed of these specific rights to be applied in accordance with the provisions of national law (Klip, 2016, p. 279). The Croatian legislature sought to formulate the requirement for timely and detailed information on the procedural rights of the defence in Article 109a of the MA.⁴

However, in terms of the rights of an arrestee, the provisions of the MA are fragmented, and the rights of arrestees are regulated in different places, in Art. 86 and Art. 134 (Novokmet, 2024, p. 360). Contrary to Directive 2012/13/EU, but also contrary to Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, the Misdemeanour Act does not provide for an obligation to inform every arrestee about the right to remain silent and the right to a defence attorney, but only those who are questioned as suspects or accused persons (Đuzel, 2024, p. 95). Furthermore, the legislature has failed to enshrine the right to access to urgent medical assistance in the catalogue of rights for arrestees.

In order to determine the extent of the factual and legal substrate about which suspects, accused persons and arrestees are informed in practice, practitioners were asked about which rights a person is informed of. Two approaches can be observed in their responses; the predominant one is more detailed, while the other is more minimalist. State attorneys mentioned the rights from Art. 109a of the MA and referred to the fact that persons are informed of their rights by being given the information in accordance with this provision. One customs officer also cited the content of the rights under Art. 109a. Although some of the police officers' answers were short, almost all of them mentioned the right to a defence attorney and the right to remain silent, and some of them mentioned the right to notify family members upon arrest and the right to an interpreter. Only one police officer mentioned the right to access files, and two emphasised

⁴ Art. 109a prescribes the obligation to submit a written statement of rights containing information about the offence charged and the following rights: to defend oneself or submit a written defence, to remain silent or refuse to answer a specific question, the right to access the file, the right to defend oneself during the proceedings alone or with the assistance of a defence attorney of one's choice, the right to submit proposals for the presentation of evidence in one's defence, the right to use one's own language or the right to obtain an interpreter, the right to negotiate.

the right of foreigners to inform the embassy of their arrest. One emphasised that they always seek medical assistance if the defendant needs it. In addition to the rights listed, most prosecutors emphasised that they also provide information about the offence the person is charged with.

Defence attorneys claim that suspects, accused persons and arrestees must be informed of their procedural rights, including the right to a defence attorney, the right to an interpreter and the right to be informed of the charge. In practice, however, the details of this information are perceived differently. While some believe that the information is clear and consistent, others point to problems such as the formalisation of rights without actual application, the lack of interpreters and the lack of complete information for suspects.

3.1.4 Understanding of rights

One of the basic prerequisites for the effective exercise of the guaranteed procedural rights is their understanding. Recital (38) of Directive 2012/13/EU instructs Member States, with a view to the practical and effective implementation of the obligation to provide suspects or accused persons with information about their rights in simple and accessible language, to train the competent authorities accordingly and to draft the letter of rights in plain and non-technical language so that it can be easily understood by a layperson with no knowledge of criminal procedural law.

Prosecutors and defence attorneys were asked if it is customary to verify whether a person understands their rights and whether and how it is ensured that they actually understand their rights. In addition, adjudicators and defence attorneys were asked whether defendants know and understand their rights when misdemeanour proceedings are initiated, i.e. when they appear before a court or other body conducting the proceedings, and whether this body ensures that a person understands their rights.

Most state attorneys, in line with the previously explained procedure that excludes direct contact with defendants in misdemeanour proceedings, responded that they do not check whether a person has understood their rights. Police officers, on the other hand, generally responded that they do check whether a person has understood their rights, and almost all stated that they ask the person whether they have understood their rights. However, the answers of some prosecutors (four) show that they do not check or explicitly ask the person whether they have understood their rights, but draw this conclusion from the fact that they receive a form with a letter of rights, which the person signs, confirming that they have received the letter of rights.

The defence attorneys' responses show that there are different interpretations and practices on this issue. While some are of the opinion that the understanding of rights is seriously checked, others warn that this check is often only formal,

without any real certainty that the person really understands their rights. On the other hand, some defence attorneys believe that understanding rights is not a major problem, as it is simple enough for the average person to understand and usually does not require additional explanation.

When asked whether defendants understand their rights when they appear before the court, i.e. the state body that conducts the proceedings, the adjudicators were not as unanimous as when answering the previous question. For the most part, they believe that defendants understand their rights, but some still responded that it depends; that there are parties who understand everything, especially when they hire a defence attorney, and there are also ignorant parties who do not understand why they are summoned because they do not read it properly. One judge explained that this was related to the personal characteristics of the defendant, not the statutory provision. They tried to explain it to them in layman's terms in a way that the average person without legal training could understand. By and large, all of the judges additionally stated that the defendant's rights would be additionally reiterated or explained at the appearance before the court.

One judge pointed out that there are significant differences depending on the type of offence, i.e. that legal persons are familiar with their rights, while natural persons and minor offenders do not express any interest. Furthermore, one judge said that defendants often say that the police did not inform them of their rights when they were arrested, which poses a problem.

Defence attorneys were also asked whether the body conducting the proceedings checks whether or not the person has understood their rights once the proceedings have begun. Although most defence attorneys confirm that there is a formal check on the understanding of rights, many emphasise that this is often superficial and formalistic. Some defence attorneys have serious concerns, claiming that in practice the minutes sometimes do not reflect what actually happens in the courtroom. Also, the presence of an attorney can reduce the need for additional checks, but this does not solve the problem of insufficient information for defendants without legal representation.

3.2 Information about the accusation

The right of a person accused of a criminal offence to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him is one of the minimum guarantees of the defence and is a specific element of the principle of a fair trial under Article 6(3)(a) of the ECHR as a precondition for the effective exercise of the defence. The European legislature has postulated this right in detail in Article 6 of Directive 2012/13/EU by setting out the requirement of prompt action when informing a person of the accusation and, in particular, emphasising the requirements for

informing arrestees and detainees about the reasons for their arrest or detention. In doing so, the point at which a person can be considered an accused person has been defined in line with the established case law of the ECtHR, which recognises that the term ‘accusation’ describes the same concept as the term ‘charge’ in Article 6(1) ECHR (Recital 14). This concept has long been established in ECtHR practice through the understanding that a “criminal charge” exists from the moment a person is officially informed by the competent authority of the allegation that he has committed a criminal offence or from the moment his situation has been substantially affected by action taken by the authorities as a result of a suspicion against him (see *Deweer v. Belgium*, 27 February 1980, §§ 42-46, *Simeonovi v. Bulgaria*, 12 May 2017, §§ 110).

In order to determine when in practice a person is informed of the charge at the earliest and what information such notification contains, i.e. whether the actions of authorised prosecutors in misdemeanour proceedings meet the requirements of European standards, prosecutors and defence attorneys were asked when a person is informed of the charges against them, in what form (written or oral) and about what they are informed, i.e. how detailed is the information about the charge they receive.

3.2.1 Timing of the notification about the accusation

The timing of the notification of the accusation and thus the actual opportunity to prepare the defence is inextricably linked to the substantive concept of charge as interpreted by the case law of the ECtHR. In criminal cases, this is of particular importance, since the provision of full and detailed information about the accusation against the accused and, consequently, about how the court might legally qualify the offence, is a basic requirement for ensuring a fair trial (*Pélissier & Sassi v. France*, 25 March 1999, §§ 52.). In contrast to the Criminal Procedure Act, which is consistent with the substantive concept of the defendant and the charge, the legislature in the Misdemeanour Act has maintained a formalistic approach to the definition of the initiation and commencement of misdemeanour proceedings, i.e. the constitution of the charge, which is also reflected in the procedural status of the defendant (Novokmet, 2024, p. 354).

State attorneys inform the persons about the charges in a notice of the committed misdemeanour pursuant to Art. 109a of the MA, which is sent out before the indictment is filed. Some respondents additionally emphasised that the notification is sent after the conclusion of the evidence collection proceedings in criminal procedure, i.e. a trial in misdemeanour proceedings usually follows the inquires and the dismissal of the criminal complaint in a criminal case. The police officers' responses were more varied, indicating that the timing of notification of the charge depends on the procedural situation in which the person finds themselves. Arrestees are notified at the time of arrest and persons caught committing a misdemeanour are also notified of the charge.

In other cases, the person is notified with a summons for questioning. The responses also indicate that defendants who are not arrested are notified by service of the notice under Art. 109a when the indictment is filed or at the time a mandatory misdemeanour order or misdemeanour order is issued.

Defence attorneys' answers to the question of when the indictment is served are somewhat contradictory, which is due to the fact that attorneys are generally not involved at the earliest stages of the proceedings, but are usually only instructed by the defendants when they receive an official document (misdemeanour order or court summons). Therefore, they do not have full information about the proceedings before they take on the case. Some attorneys claim that a person learns of the charge immediately, while others say that this can also happen later, through a misdemeanour order or after the arrest or after the investigation report has been drawn up. Some attorneys are of the opinion that it makes no difference whether a suspect, an accused person or an arrestee learns of the charge. Some responses suggest that the time of notification of the charge is not clearly defined. For example, one suggests that the treatment may depend on the "legal culture of the person" making the notification, which likely indicates discretion, while another attorney points out that he does not know how prosecutors choose this timing, so it is all a matter of their judgement.

3.2.2 Form of notification about the accusation

The responses to the questions about the form in which a person is notified of the accusation indicate that there is a standardised form of notification. State attorneys stated that individuals are notified of the accusation in writing, in a letter of rights. Almost all other prosecutors responded that individuals are notified of the charge both verbally and in writing, usually first verbally and then in writing, and that there is no difference in terms of the category of person involved. Most attorneys maintain that notice of the charge is given exclusively in writing. Some attorneys are of the opinion that notification can be both verbal and written, depending on the situation.

3.2.3 Content of information about the accusation

Directive 2012/13/EU sets out requirements for the quality and quantity of information about the accusation that must be provided to a person depending on the stage and situation of the proceedings. The main requirement is to promptly provide information about the offence of which they are suspected or accused and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence (Art. 6(1)). A specific requirement aims to ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention,

including the offence of which they are suspected or accused. Finally, the last moment at which persons must be given detailed information about the accusation, including the nature and legal classification of the offence and the nature of the accused person's involvement, is when the merits of the accusation are presented to a court. Although the amount of "detailed" information varies according to the particular circumstances of each case, the accused must be given sufficient information to fully understand the scope of the accusation against him and to prepare an adequate defence (*Matoccia v. Italy*, 25 July 2000, §§ 60).

When asked about the content of information about the accusation, whether individuals receive only the reference to the offence or some more detailed information, state attorneys agreed in their response that individuals receive both a factual description of the offence and a legal description. Most other prosecutors also indicated that individuals receive a description of the facts in addition to the offence name. The responses indicate that this description of the facts is usually shorter and not as extensive as in the indictment and that this also depends on the type of offence. Some prosecutors stated that the information they provide includes the time and place of commission, the manner of commission and the legal grounds. They also stated that they try to explain orally in a plain language what the offence is about. One prosecutor pointed out that in the notice itself, only the name of the offence is given without a description, but later, if something is unclear to the individual, the offence is explained to them. Another prosecutor explained that it used to be common practice to include only the article of the misdemeanour in the notice, but they received an instruction from the court to include more information. The defence attorneys' responses vary in terms of the amount of information they receive about the charge, particularly in terms of the description of the offence and the legal provisions. Some attorneys point out that the individual receives basic information such as the name of the offence and the legal provision. It is often mentioned that the information can be very brief, that the description of the facts is often very concise and does not contain much information, in some cases it is even almost non-existent. Others state that this description may be brief or non-existent in the first stages, e.g. at the summons for questioning, while the persons receive a detailed description of the facts in the indictment or in later stages of the proceedings. Some attorneys pointed out that verbal notification often contains only basic information, while additional substantiation, including evidence or a full description of facts, may be provided in writing. Finally, some attorneys emphasised the importance of the indictment containing more detailed information, as this allows for timely preparation of the defence.

As a control group, the attorneys were also asked whether, misdemeanour court, after the initiation of misdemeanour proceedings, checks whether the defendant has understood the accusation made against him. The answers show that this check is generally carried out in misdemeanour proceedings, but often only formally. Some attorneys point out that the court asks the defendant whether he

has understood the charge, and in some cases the content of the indictment is also explained. However, other attorneys emphasise that the check is limited to asking questions without any real analysis of understanding. To summarise, it can be said that although the charges are formally checked, the defendant's actual understanding is not always thoroughly examined.

3.3 Access to the case files

Although the right of the defence to access the case files is not explicitly listed among the minimum rights of the defence in Article 6 ECHR, it has been accepted in ECtHR practice as part of the right to adequate time and facilities for the preparation of the defence under Article 6(3)(b) ECHR. This right is also interpreted as an aspect of the adversarial principle and an element of the principle of equality of arms (Trechsel, 2005, p. 222). In Directive 2012/13/EU, the right of access to the file is set out in more detail in Article 7. The focus here is on the need to ensure that arrestees and detained persons have access to documents that are essential for effectively challenging the lawfulness of their arrest or detention.

It is important to grant access to all documents contained in the case file that may be relevant for the successful preparation of the defence. This applies to both incriminating and exculpatory evidence (Klip, 2016, 269). However, neither the Directive in Art. 7(3) has defined the earliest possible time nor has the European Court of Justice in its case law clarified the earliest possible time at which access to the materials of the case should be granted (Pivaty & Soo, 2019, p. 133), but only the latest possible time, and the specific circumstances of the case may require that access be granted long before (Cras & De Mateis, p. 31).

Although the Misdemeanour Act postulates this right as one of the fundamental rights of the defence through several provisions, in particular in Art. 109a through a catalogue of rights about which the defendant is informed before the filing of the indictment, the way it is regulated is not entirely in line with European standards (Novokmet, 2024, p. 360). Article 150 defines the point in time at which the defence acquires the right to access the file. The legislature links this point in time to the formal laying of the charge, i.e. the point in time at which the proceedings are initiated by issuing a misdemeanour order or filing the indictment (Art. 157 of the MA). Although the Directive does not stipulate that the rights contained in the Directive must be guaranteed before the non-judicial bodies responsible for conducting proceedings and imposing sanctions for minor offences when there is a possibility to appeal or refer the case to a court, this always applies when it comes to deprivation of liberty under Art. 5 of the ECHR. However, by providing for the provision of a letter of rights to an arrestee (Art. 134 of the Act) and for a defendant who does not have a permanent or temporary residence in the Republic of Croatia and does not pay

bail in the amount of the non-final sentence imposed (Art. 136), the legislature has failed to ensure access to documents that are essential for challenging the lawfulness of detention, although Article 7(4) of Directive 2012/13/EU, contrary to the case law of the ECtHR, excludes any possibility of restricting this right (Allegrezza & Covolo, 2018, p. 59).

3.3.1 The time at which the right of access to the case file is exercised

When asked whether they grant the accused or his defence attorney the right to access the case file and from what point in time, state attorneys replied that they had no experience with such requests in misdemeanour proceedings, but if they did, they would grant access to the case file. Most of the other prosecutors (police and customs officers) also stated that they had never or only very rarely encountered a situation in which the defendant or his defence attorney requested access to the case file. However, most of them agree that they would not grant access to their case file, but that the defendant and his defence attorney should request this from the court and the state attorney's office. Two stated that they would read the minutes to the defendant before he signed so that he would be familiar with the content, but they would not give him the file. Only one police officer explicitly said that he would grant this right, although he had not encountered such a situation in his practice, but that the defendant has a guaranteed right to access the file based on Art. 109a. In contrast to the police officers, the interviewed customs officers (3) affirmed the possibility of granting access to the case file, with one stating that they grant access to the file after they have completed the investigative measures and formalised the procedure.

All judges indicated that they grant the defendant and his defence attorney the right to inspect the file, and most grant this right from the moment they receive the case file in court, before sending the summons to the hearing. However, some judges stated that they grant access to the file from the time they receive the indictment and send the summons.

When asked whether they have access to the materials collected by the police or another prosecutor, most defence attorneys replied that access to the materials is not possible at the initial stage of the proceedings, or that in practice they do not have access to the materials before the case comes to court. Only a few defence attorneys consider that they have the right to access the materials immediately, partly due to their experience in practice that they are granted access to the files without major obstacles when they request it. Some defence attorneys pointed out problems with access to the materials, such as the fact that the electronic communication system is not implemented everywhere, that attorneys have to request copies of the materials from the court, which can be delayed or even prevented, and that some evidence is not delivered at all.

3.3.2 Access to the arrestee's case file

In line with the introductory considerations and the doubts expressed about compliance with the applicable legislation, the respondents were asked questions about the possibilities and necessity of exercising the right of access to the case file of an arrestee. The interviewed state attorneys have not encountered a situation in their practice where an arrestee would request access to the case file. However, two stated that they would not grant access to the case file at the time of arrest until the arrestee was questioned. The police officers' responses show that they also generally had no experience with requesting access to an arrestee's case file. One explained that they allow access to some recordings, depending on the case. For example, if it is necessary to verify if a person is the suspect himself or someone else, they allow access to the recording, but this happens very rarely. Two said that they would grant this right if the arrestee requested it. Two stated that the arrestee is given papers to sign and one stated that the person is taken to court and has the right to inspect the file immediately in court.

When asked whether there is a difference in the time of access to the case file depending on whether the person is a suspect, an accused person, an arrestee or a detainee, most defence attorneys replied that there is no difference. However, some attorneys mentioned technical circumstances or specific cases where access is difficult or delayed. Similarly, the earlier the stage of the proceedings, the less likely it is that the right of access to the file will be exercised. You may get more information when a person is arrested, but the question is what they are hiding. Some of the attorneys' responses suggest that they do not have experience or information to indicate the existence of differences between the status of suspects, accused and arrestees or detainees).

Most of the judges interviewed grant an arrestee or a detainee the right to access the case file from their first appearance in court, i.e. when the police bring them to court. Some of the judges stated that they have never experienced a situation where arrestees or detainees have requested access to the case file. One emphasised that most arrestees are familiar with the right to access the case file and that this right is also granted by the police. Regarding possible differences in the manner or timing of granting access to the case file depending on the procedural status of an accused person, a suspect, an arrestee or a detainee, the judges explain that they do not have a suspect in court; once the case file is formed in court, the person becomes a defendant. However, there is no difference in the manner or timing of granting access to the case file. One explained that they only check whether there is information in the file that should be protected.

Following on from the shortcomings identified in the legislation, the respondents were also asked about the need to prescribe the right to access the case file for arrestees. The state attorneys surveyed are of the opinion that an arrestee should be granted the right to access the case file by law. However, their responses differ as to how or when this right should be granted. One believes that they should have the right from the moment of arrest, while the other believes that this right should only be granted after the interrogation. Police officers, on the other hand, were more reluctant to grant the right of access to the file of arrestees and responded that there is no reason to prescribe this right in the MA. Among the responses, the arguments that investigations are secret and that not every investigation ends with an indictment were emphasised. Furthermore, this is not necessary if all documentation is sent to the court beforehand.

When asked whether an arrested and detained person should be explicitly granted the right to access the case file, the judges' responses were divided; some were of the opinion that this right need not be explicitly provided for. The arguments were that the Misdemeanour Act contains a general provision on the defendant's right of access to the file, which also includes the arrestee, so that this could lead to over-regulation. In general, even those judges who believe that this right does not need to be explicitly provided for are of the opinion that the arrestee already has the right to access the file or should be granted this right. Other respondents were of the opinion that it would be good to provide for this right, as it would not delay the proceedings and, in view of all European directives and judgements, it is always better to give the defendant more rights than to deny him rights.

Most defence attorneys support the idea that an arrestee and a detainee should be explicitly granted the right to access the file because they consider this to be a fundamental right that allows a person to be informed about the charges against them. Only a few attorneys point to procedural differences, but their answers do not indicate an absolute contradiction, but rather different approaches or practices in the exercise of this right. It is worth emphasising the view that it is not realistic to expect this right to be exercised at the time of arrest due to the short time limits for action.

3.3.3 How the right to access case files is exercised and possible limitations to this right

When asked how the right to access case files is exercised in practice, state attorneys stated that they had no experience, but that they would proceed in the same way as in criminal proceedings. Some police officers stated that they also had no experience with requests for access to the case file. One said that they give the person the file number and instruct them to examine the file, and three

explained that this right is exercised in court. One explained that a request can be made orally to ask for a specific part or clarification of an issue. In this case, the request is granted. This right is exercised at the police station and is only at the time when the person is summoned for questioning, so they are bound by time limits.

According to the judge's answers, the right to access the case file is exercised either in the courtroom with the judge or in the court registry, depending on where the file is located. The inspection takes place under the supervision of a judge or the head of the registry. In most cases, the defendant or his defence attorney takes photos of parts of the file with a mobile phone and can request a photocopy for a fee if necessary. There are usually no time limits as it usually only takes a short time, but some judges state that it might need to be limited if it took longer. As for when this right is exercised, the answers highlight before the hearing, after the defendant has received a summons to appear at the hearing. Before the main hearing is scheduled, the defence attorney can call and request the right to inspect the case file, then a date for the inspection of the file is set. An official note is also made in the file – that the inspection of the file has taken place. One judge explained that there is a specific day and hour of the week when the file can be inspected.

According to the previous answers, state attorneys have no experience with the possible application of restrictions on the right to access the case file. Police officers generally have no experience with this either, and one said that there are restrictions in police stations that a person can only see the forms they have to sign, but not the entire documentation of the investigation.

The judges mostly replied that they did not restrict the right of access to case files for the defendants and their defence attorneys, and that they denied this right to witnesses and injured parties if they had not been interviewed beforehand. Two mentioned that the right to access files in domestic violence cases is restricted if the victim requests that their residence or whereabouts data be protected. Two judges also emphasised that they exclude unlawfully obtained evidence before granting access to the case file.

4 REVIEW OF THE RESULTS OF THE RESEARCH ON PRACTITIONERS' EXPERIENCES WITH THE RIGHT TO INFORMATION AND THE DE LEGE FERENDA PROPOSAL

The empirical study of the actual possibilities and ways of exercising the procedural rights of suspects and accused persons in misdemeanour proceedings shed new light on the doubts and issues of (non-)compliance of misdemeanour legislation with the requirements of the Convention and EU law regarding the right to information in criminal proceedings identified in the previously conducted theoretical and normative analysis.

The prosecutors' responses identified differences in approach depending on which body is the competent prosecutor. State attorneys have no contact with the arrestees and the procedure in misdemeanour proceedings is exclusively in written form and usually follows on from the previously conducted investigations in criminal cases in which the criminal charges were dropped due to the absence of a criminal offence. If the state attorney's office establishes that misdemeanour has been committed, it sends the defendant a written letter about procedural rights and the charge in accordance with Art. 109a, files an indictment and nevertheless has no direct contact with the defendant or the court and consequently does not check whether the defendant has understood his rights. The state attorney's office may have had direct contact with the suspect/defendant during the preliminary investigation or investigation of a criminal offence. However, it should be noted that the state attorney's office rarely acts in the capacity of an authorised prosecutor. In this sense, the responses of other prosecutors, especially police and customs officers, more clearly reflect the reality of the treatment of suspects, accused persons and arrestees.

As regards information on procedural rights as a precondition for the effective exercise of the right of defence, although there is a legal framework for information on rights in misdemeanour proceedings, there are differences in the way it is implemented, especially in cases where persons are not directly arrested or detained. The responses analysed suggest that defendants are informed of their rights before they appear before the court or the state authority conducting the proceedings, as required by Art. 109a of the Misdemeanour Act. However, the earliest point in time at which a person should be informed of their rights depends on the procedural situation in which they find themselves and is not clearly defined in practice. Practical studies show that arrestees are informed of their rights upon arrest, while there are still differences in the time and manner in which persons who have not been arrested are informed. The legislature has linked the timing of the notification of rights to the formal act of filing an indictment or issuing a misdemeanour warrant. While in the case of minor offences, especially traffic offences, where the misdemeanour order is usually issued at the time of arrest, the time of notification of rights and accusations is uncontroversial under current law, in the case of more serious offences it should be linked to the laying of the charge in the substantive sense, in accordance with the requirements of the Convention.

As regards the form of information on rights, the fundamental problem with the current legal framework is that there is no written information on the rights of the arrestee. However, the research carried out shows that there is a reasonably established practice of providing written information on the rights of arrestees, even though the Misdemeanour Act expressly excludes this right. However, the doubts about the manner and content of informing the arrestee of his rights in practice support the proposal for legislative amendments towards a correct transposition of this procedural right guaranteed by the Directive in the part

where the Directive undoubtedly applies to misdemeanour proceedings (Novokmet, 2024, p. 360, Đuzel, 2024, p. 97).

Understanding the guaranteed procedural rights and the charges and ensuring that a person truly understands their rights seems to be an indispensable element for the effective exercise of the fundamental rights of the defence. The responses of the competent prosecutors show that in some cases, however, it is not verified and ensured that a person has understood their rights. State attorneys do not do this because they do not have direct contact with the defendant, and some police officers assume that reading and signing forms with instructions on rights also means that they have understood the rights listed.

According to the respondents, notification of the charge is given at the time of arrest or when caught committing a misdemeanour, and in other cases in a summons for questioning or in a notification of the initiation of misdemeanour proceedings. As a rule, notification of the charge is first given verbally and then in writing, except in the case of proceedings initiated by state attorneys, where everything is done in writing. In addition to the name of the offence, the persons receive a description of the facts of the case, which is not detailed, can be brief and is sometimes lacking. In the indictment, the defendants receive a more detailed description. In view of the observed problems that in some cases a detailed while in other cases high-quality factual basis for the accusation is missing, it seems necessary to sensitise the prosecutors to the importance of a clear, precise and detailed description of the offence, which constitutes an information basis for the refutation of the accusations and for a high-quality and effective preparation of the defence.

The responses on the right to access the case file show that the prosecutors interviewed have no experience with such requests from the defence and consequently no experience with the application of restrictions on this right, which leads to the conclusion that defendants and their defence attorneys do not usually request access to the files of the competent prosecutor before the initiation of misdemeanour proceedings. This conclusion follows from the responses of the attorneys surveyed, who point out that in practice they do not have access to the materials before the case is presented to court and is in line with the formalistic approach of the legislature, which links the right to inspect files to the formal initiation of proceedings. The prevailing view among prosecutors is that access to the case file prior to the formal initiation of criminal proceedings would give the defendant extensive opportunities to defend himself and "manipulate" the information obtained. After the initiation of proceedings, on the other hand, judges generally grant defendants and their defence attorneys access to the case file as soon as it is received by the judge, and there are no difficulties in exercising this right. The right of access to the file is not denied unless it concerns data on a victim of domestic violence. In addition, unlawfully obtained evidence is excluded before access to the file is granted. In terms of the right to access the records of the arrestee, most prosecutors, especially police officers, are reluctant to grant the right to access

the file of the arrestee and responded that there is no reason to prescribe this right in the Misdemeanour Act. Defence attorneys, state attorneys and most judges are still more inclined to grant this right to the arrestee at the legislative level.

Since the Misdemeanour Act provides the possibility of subsidiary application of the provisions of the Criminal Procedure Act (Art. 82, para. 3 of the MA) and the respondents themselves occasionally expressed the view in their answers that a certain procedural right does not need to be regulated in the Misdemeanour Act because the Criminal Procedure Act applies, it should also be noted that the provisions of the CPA are only usefully applied in misdemeanour proceedings if this is appropriate to the purpose of the misdemeanour proceedings. Legal solutions and procedural rights guaranteed by the CPA cannot always be adopted verbatim in misdemeanour proceedings, especially when the Misdemeanour Act itself excludes the application of this right, as is the case with the service of a written letter of rights of the arrestee. Of course, in such cases a direct reference to the procedural directives and their direct application is possible, but in practice this depends solely on the awareness, experience and knowledge of EU law of those involved in the misdemeanour proceedings. The research carried out confirms that, in practice, respondents do not usually refer to the provisions of the Criminal Procedure Act on the defendant's procedural rights.

5 CONCLUSION

The results of the research conducted reveal numerous inconsistencies and challenges in the practical implementation of the right to information in misdemeanour proceedings, in particular with regard to the right to be informed of the accusation, the right to be informed of procedural rights and the right to access the case file. While these rights are formally regulated, their actual implementation varies considerably depending on the type of competent authority, the stage of the proceedings and the level of knowledge and understanding of EU legal standards among those involved in misdemeanour proceedings.

The findings suggest that informing suspects and accused persons of their rights often takes the form of a formal act – usually by handing out a written letter of rights – without actually checking whether the person understands these rights. Furthermore, the lack of a detailed and clear presentation of the charges in some cases undermines the ability of defendants to prepare their defence effectively. Access to the case file is usually restricted until the formal initiation of proceedings and, despite some practices to the contrary, there is no written information for arrestees. This underlines the need for legislative changes to ensure proper transposition of EU procedural safeguards, taking into account the gravity of the offence, the decision-making body and whether or not the

defendant is deprived of liberty. The tendency to apply the provisions of the Criminal Procedure Act in a formalistic or selective manner in misdemeanour proceedings – often without considering their appropriateness or compatibility – further complicates the exercise of the rights of the defence.

Future research should focus on a qualitative analysis of how well suspects and defendants actually understand their procedural rights possibly through interviews or surveys of people involved in misdemeanour proceedings. A comparative analysis with the practices of other EU Member States could also help to identify best practices for implementing the right to information in summary criminal proceedings. Particular attention should be paid to the role of police officers, who in most cases act as the first point of contact, and the need for their training to ensure that suspects not only receive but also understand their procedural rights.

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**UNTANGLING THE POPULIST KNOT: ADMINISTRATIVE LAW
AND THE STRUGGLE FOR RULE OF LAW RESTORATION IN
POLAND**

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Abstract

This article explores the significant challenges of restoring the rule of law in Poland following a period of democratic backsliding in 2015-2023. It also analyzes how administrative law was distinctively well suited for instrumentalization by the populist government, facilitated by its standard features like enforcement privileges and policy discretion when constitutional checks were weakened. This strategic use of administrative tools, alongside attacks on judicial independence, created a deeply interwoven "populist knot" of legal and political changes.

Rule of law restoration in Poland is not just legal reversal, but a profound political struggle within a polarized society. It is constrained by institutional factors such as cohabitation with two consecutive Presidents, who are aligned with the previous ruling party, and the control of key bodies like the Constitutional Tribunal and the National Council of the Judiciary (KRS) by political appointees. While some progress is being made through actions not requiring legislation, reforming the administrative state and its legal framework to prevent future instrumentalization remains a huge challenge, especially in the light of the 2025 presidential elections, surprisingly won by a populist candidate opposing the government.

An important problem is also confronting the administrative law's own potential for authoritarian use and to ensure it serves its protective function for all. The article argues that understanding how administrative law is being instrumentalized and addressing its

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structural vulnerabilities is crucial for building a resilient rule of law system against future populist pressures.

Keywords: *rule of law restoration, Poland, democratic backsliding, administrative law, populism*

1. Introduction

In recent years, growing dissatisfaction with democratic institutions—accompanied by authoritarian trends and the rise of so-called “illiberal democracies”—has elevated populism into a central force of social and political transformation. This shift is deeply connected to administrative law, traditionally seen as a mechanism for protecting individuals from state overreach and thus serving the “populus”. Yet paradoxically, it has also become a valuable instrument for populist governments—what Schotel (2021) and Jakubek-Lalik (2023) refer to as “regimes in decaying democracies.”

Between 2015 and 2023, Poland experienced a deep erosion of the rule of law under the rule of the Law and Justice (PiS) party. Rather than pursuing formal constitutional change, PiS engaged in democratic backsliding by strategically weakening institutions and reshaping them for political purposes (Wójcik, 2025; Bignami, 2020; Canovan, 2002; Müller, 2016; Jakubek-Lalik, 2023). This incremental, often informal approach circumvented constitutional norms through ordinary legislation and administrative practices, gradually dismantling the checks and balances essential to a consolidated democracy.

Recent academic analyses have closely examined the constitutional crisis in Poland during and after the rule of the PiS party, with particular attention to developments between 2023 and 2025. Włoch and Serowaniec (2025) interpret the transformations of this period not as efforts to establish a new constitutional framework, but as a deliberate “deconstruction of the Constitution,” amounting to an “extra-systemic dissensus” that destabilized the legal order and significantly intensified Poland’s conflict with the European Union. Rather than replacing liberal-democratic institutions with an alternative model, this process gradually eroded their foundations. Central to this dynamic was the Constitutional Tribunal, once a key guardian of constitutional oversight, which was repurposed into an instrument of political power—particularly through its role in challenging the primacy of EU law.

This broader dismantling of democratic checks and balances was driven above all by the systematic capture of the judiciary. The Constitutional Tribunal was paralyzed and politicized through the appointment of loyal judges, effectively eliminating its capacity for independent review. Similar pressures were exerted

on the Supreme Court and the National Council of the Judiciary, consolidating political influence over the judicial branch. At the same time, civil society space was severely restricted: public consultations were abandoned, funding for NGOs was centralized through institutions like the National Freedom Institute, and independent media faced both legal harassment and delegitimization. State-controlled outlets portrayed opposition voices as “enemies of the nation,” contributing to a broader narrative of polarization and fear (Grabowska-Moroz & Śniadach, 2021).

Furthermore, a “creeping” sectoral recentralization shifted powers and resources from local self-governments to the central administration, aligning with an illiberal agenda that views local autonomy as a limitation on central power (Sześciło, 2019; J. Jakubek-Lalik, 2019). These actions contributed to the emergence of a situation where administrative law, typically designed to protect citizens, was instrumentalized to serve the ruling party's political and ideological agenda and suppress opposition, leading to a “swift deterioration of Poland's democracy” in international rankings (Freedom House 2022).

Following the outcome of the 2023 elections, Poland has been facing the complex challenge of restoring the rule of law, and particularly judicial independence. This is both a complex legal and a political challenge, given Poland's deeply divided political landscape and society, and the strong resistance from those who benefited from the previous system, who seek to block or delay reforms through legal and extralegal means. The ongoing situation, where institutions may not recognize each other's authority, has prompted discussions about the actual existence of a dual legal system.

This article aims to thoroughly examine this “populist knot” by analyzing:

- How administrative law has been instrumentally used in the process of rule of law backsliding in Poland since 2015.
- The challenges and mechanisms associated with the restoration of the rule of law, with an emphasis on the role and resilience of public administration in this process.
- The lessons to be drawn from the Polish case for preventing democratic backsliding and addressing the challenges to the rule of law.

2. The "Dual State" and Instrumentalization of Administrative Law

A useful lens for analyzing the role of administrative law in decaying democracies is the concept of the "dual state." Originally developed by Ernst Fraenkel in his seminal 1941 work *The Dual State: A Contribution to the Theory of Dictatorship*, the concept was devised to examine the legal order of Nazi Germany between 1933 and 1938. Fraenkel's framework distinguishes between two parallel and coexisting spheres of governance within authoritarian regimes: the "normative state", governed by law and legal procedures, and the "prerogative state", in which discretionary power is exercised without constraint.

The "normative state" is headed by the (non-political) bureaucratic administration and is bound by positive law. Its function is to guarantee the proper functioning of the normal tasks of the state, such as criminal justice for non-political crimes, private law matters, and economic regulation. It aims to protect citizens from the abuse of power by ensuring proper standards of law-making and judicial review. Actions within the normative state are generally subject to judicial review by normal courts. The normative state is intended to govern and protect the lives of "true deserving citizens". It provides a veneer of legality and offers minimal procedural and output legitimacy, helping to keep an authoritarian regime in place, especially in contemporary contexts where outright repression might be less common.

On the contrary, the "prerogative state" is directly controlled by the political government and is aimed at realizing the ideology and political agenda of the ruling party. It is characterized by its unlimited arbitrariness and violence, meaning it is not bound by positive law. Actions taken under the prerogative state in Nazi Germany, such as arrests and detentions by the Gestapo, were generally not subject to review by ordinary courts. Its core purpose is the consolidation of power, the marginalization of opposition, and the strengthening of authoritarian tendencies. It operates outside of established legal norms, driven by the "pure - political or arbitrary - will of those in power".

The paradoxical nature of the dual state lies in the simultaneous coexistence and parallel functioning of these two contradictory legal orders. While distinct, they are deeply interconnected. Fraenkel's original analysis suggested an absolute hierarchy, where the prerogative state could intervene and take over any matter governed by the normative state. Although the normative state might offer temporary resistance, it ultimately serves the prerogative state's underlying ideological and political aims. This creates a "dual, even schizophrenic character of the state", where administrative law can be used to protect compliant citizens while at the same time being instrumentalized against opponents of the regime.

As already observed, Fraenkel's conceptual framework emerged from his analysis of the legal and political dynamics of Nazi Germany's totalitarian rule. However, some of its elements are valid for modern, neo-authoritarian countries. In contemporary regimes of democratic decay, as adapted by Jens Meierhenrich (2018), the normative and prerogative states are viewed as more "coeval regimes," where legality becomes a crucial instrument of authoritarian rule, allowing the regime to claim adherence to the rule of law while effectively marginalizing opposition. In this version, unlike Fraenkel's original analysis of Nazi Germany, there is no absolute hierarchy between the prerogative and normative states. For Meierhenrich, the normative state is an essential component for any successful authoritarian regime, as it helps to maintain the regime's stability. It achieves this by providing minimal legitimacy to the majority of the population, ensuring a basic effectiveness of normal administrative tasks (output legitimacy), and upholding legality as a minimal form of the rule of law (procedural legitimacy). Thus, in contemporary regimes characterized by democratic backsliding, where they are neither totalitarian nor overtly repressive, legality serves as a crucial instrument of authoritarian rule.

This theoretical lens has recently been applied to Poland's judiciary under populist rule. Drawing on Fraenkel's dual state framework, Karolewski and Sata (2025) analyze how illiberal regimes produce a "dynamic of capture and resistance" between politically subordinated and independent segments of the judicial system. Within this configuration, a "normative state" — in which courts adhere to legal standards and resist political interference — coexists with a "prerogative state," where law is instrumentalized to serve the regime's objectives. According to the authors, this dual structure took root in both Hungary and Poland, described as the "infamous leaders of democratic backsliding in the European Union."

In Poland, by the end of the PiS government's tenure (2015–2023), the judiciary had become deeply divided: some judges aligned with the normative tradition and upheld the rule of law, while others operated within the prerogative logic, advancing the ruling party's political agenda. Crucially, Karolewski and Sata contrast this with Hungary, where the independent judiciary had become "almost extinct" after more than a decade of Fidesz rule. In Poland, however, the change of government in 2023 opened a fragile window of opportunity: while "the new government has embarked on dismantling the prerogative state of the judiciary," this remains "a complex process that might take longer than expected."

The concept of the "dual state" is particularly applicable to administrative law, whose structural features — including the universal availability of judicial review (however burdensome in practice), the presumption of legality, and the administration's privileged power of enforcement — make it uniquely

conducive to sustaining dual legal orders. These mechanisms, designed to uphold legality and protect individual rights, can paradoxically enable the coexistence of a normative legal framework alongside a prerogative sphere shaped by political discretion.

This means that while administrative law in a democratic country is structurally designed to protect citizens, it can be very well used instrumentally by populist and authoritarian regimes if they succeed in undermining rule of law principles. The instrumentalization of administrative law as a tool for marginalizing opposition and political adversaries has become increasingly widespread, often proving more effective than more formalized mechanisms of criminal or civil law (Schotel, 2021; Jakubek-Lalik, 2023). This dynamic will be examined in greater detail in the following sections.

3. Democratic Backsliding and Institutional Instrumentalization (2015-2023)

Democratic backsliding is defined as the "incremental degradation of the structures and substance of liberal constitutional democracy" (Daly, 2019). This degradation impacts democratic institutions, political parties, media, and non-governmental organizations (NGOs). This phenomenon is closely linked to the concept of "illiberal democracy", a term first used by Fareed Zakaria in the 1990s, which describes political systems that retain elements of democratic governance, such as free elections, but actively curb civil liberties and undermine limitations on central government power (Zakaria, 1997). In Hungary, "illiberal democracy" has even become an official state doctrine, with Prime Minister Viktor Orbán famously stating that "a democracy is not necessarily liberal" (Orban, 2014; Antoszewski, 2018).

In the scholarly discourse, political developments in Poland under the PiS government (2015–2023) have increasingly been examined through the lens of democratic backsliding (Bill & Stanley, 2025). As Włoch and Serowaniec (2025) observe, scholars have described these dynamics using terms such as "populist authoritarianism" and "illiberal constitutionalism", both of which describe regimes that operate within formal constitutional frameworks while systematically undermining liberal-democratic principles. This conceptual approach is useful for understanding how elected governments can consolidate power without overtly breaking constitutional rules.

Poland has often been compared with Hungary as twin cases of democratic backsliding in the EU. Petrov (2024) provides a concrete example from Hungary's recent past. He examines a 2018 plan to overhaul Hungary's administrative courts, noting that "Hungary was chosen as a backsliding regime" to illustrate the subtleties of "abusive constitutionalism". The

Hungarian government justified its court reform with technical and historical arguments, but critics warned it was essentially a court-packing scheme to tighten the regime’s grip on power. The legalistic and incremental tactics used by the Hungarian government – changes packaged as ordinary reforms – are the key challenges in detecting such authoritarian legal moves early on. Hungary’s example shows that Poland’s populist tactics are not unique: they align with a broader pattern in which incumbents in the region systematically undermine judicial independence under the guise of reform.

In Poland, unlike Fidesz in Hungary, the “illiberal” PiS government did not possess the supermajority required to formally amend the 1997 Constitution. Instead, it pursued its agenda by violating and circumventing the Constitution through ordinary legislation and both formal and informal practices, effectively steering the country away from consolidated democracy (Wójcik, 2025; Jakubek-Lalik 2023). This transition has been characterized by a concerted effort to consolidate power and undermine independent institutions through not only legislative, but predominantly administrative measures. This approach aligns with the concept that administrative law, despite its design to protect individuals from state abuse, can become a particularly useful tool for use by populist governments or 'regimes in decaying democracies', as described above.

The table below details the administrative and legislative measures employed by the PiS government and their observed impacts:

Area of Control / Institution Targeted	Administrative / Legislative Measures Employed	Impact Consequences
Judicial Independence	<ul style="list-style-type: none"> • Paralyzing and controlling the Constitutional Tribunal: the government took steps to paralyze the tribunal's operations and gain political control through appointing loyalists from 2015. • Taking over of higher courts: Systematically filled constitutional and higher courts with regime-loyal judges to endorse government platforms. • Arbitrary dismissals and appointments: Ministry of Justice implemented reforms involving arbitrary dismissals and appointments 	<ul style="list-style-type: none"> • Effectively turned the Constitutional Tribunal into a body that legitimizes the ruling majority's legislative amendments, rather than independently verifying their constitutionality. • Created incentives that facilitated judicial activism supportive of the government's agenda. • Undermined the independence of the judiciary through political interference in

	<p>of court presidents and used disciplinary systems against judges upholding the rule of law.</p> <ul style="list-style-type: none"> • Challenging EU/ECHR standards: The partisan Constitutional Tribunal ruled that EU and ECHR interpretations of judicial independence were incompatible with the Polish Constitution. 	<p>appointments and disciplinary actions against judges critical of the government.</p> <ul style="list-style-type: none"> • Challenged the supremacy of EU law and international human rights standards, attempting to isolate the Polish legal system from European norms. • Populist dismissal of judicial independence as "judiciocracy" ("sędziokracja") enabled public attacks on judges and their decisions.
Media Control	<ul style="list-style-type: none"> • Using administrative acts to control and marginalize independent media, including threats to revoke the license of a TV station critical of the government. • Turning public media into party tools: Public media was used to disseminate biased political messages, conduct smear campaigns against civil society organizations, and limit opposition parties' media access. • Restricting journalistic work: New regulations were introduced to impose restrictions on journalists. i.a. restricting access to the Parliament. 	<ul style="list-style-type: none"> • Deteriorated media pluralism and freedom, also by creating a "chilling effect". • Ensured public media served as a propaganda arm for the ruling party, shaping public discourse and suppressing dissenting voices.
Civil Society & Public Participation	<ul style="list-style-type: none"> • Marginalizing social organizations: Administrative decisions were used to marginalize CSOs, including restricting or withdrawing funding and 	<ul style="list-style-type: none"> • Weakened the independence and operational capacity of civil society organizations.

	<p>refusing to register assemblies and demonstrations.</p> <ul style="list-style-type: none"> • Centralizing CSO funding: The government aimed to create a "new civil society" by centralizing funding decisions for CSOs through institutions like the National Freedom Institute – Centre for Civil Society Development, seen as a move towards stronger political supervision of the voluntary sector. • Limiting public consultations: Public consultations on draft legislation were frequently limited or bypassed by submitting bills as private MP bills (exempt from consultation), leading to hasty law-making without proper public input. • Denying access to parliamentary committees: CSOs were often denied access to parliamentary committees, deviating from previous good practice. 	<ul style="list-style-type: none"> • Reduced public scrutiny and input in the legislative process, leading to less transparent and hastily passed laws. • Shifted control over civil society towards government-aligned entities, impacting the diversity and independence of the third sector.
<p>State Economic Influence</p>	<ul style="list-style-type: none"> • Expanding state ownership: Engaged in increasing state ownership in selected markets, particularly the banking sector, in the process of so-called "repolonization". This included efforts to compel private banks to sell to the state. • Creating new government agencies: Established numerous new state agencies and institutions to manage state property, water 	<ul style="list-style-type: none"> • Increased direct state control over key economic sectors and assets, potentially reducing market competition and private sector autonomy. • Enabled the ruling party to leverage state resources for political gain, creating an uneven playing field in elections.

	<p>infrastructure, or act as investment funds, expanding the state's direct economic presence.</p> <ul style="list-style-type: none"> • Instrumentalizing state apparatus: The state apparatus, including public media and state-owned companies, was used instrumentally to favour the ruling party during election campaigns. 	
<p>Local Government & Decentralisation</p>	<ul style="list-style-type: none"> • Creeping recentralization: Gradually shifted powers and resources from autonomous local and regional governments to central government agencies. • De-communisation Law: Obligated local governments to change street names and public utility names under threat of a substitute order from the voivode, establishing new names without local government input or effective challenge. • Education system reform: Implemented a comprehensive restructuring of the local government education system without genuine consultations or consideration of local government's critical opinions. • Metropolitan Unions Law repeal: Replaced a nationwide law on metropolitan unions (which provided local governments with increased PIT revenue for metropolitan tasks) with a specific law only for Silesia. • Marginalizing regional environmental funds: 	<ul style="list-style-type: none"> • Challenged the independence of local government, a fundamental democratic feature. • Reduced local autonomy and increased central government's influence over local affairs, bypassing local democratic processes. • Limited the financial and operational independence of local and regional authorities, making them more dependent on central government decisions.

	<p>Formally maintained the status of provincial environmental protection and water management funds as local government legal entities, but significantly reduced local government participation in their governing bodies.</p> <ul style="list-style-type: none"> • Attempted expansion of control over local finances: Proposed expanding the supervisory powers of regional audit chambers over local government's own tasks, introducing criteria of reliability and economy for loans and debt instruments (vetoed by the President). 	
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Through this series of administrative and legislative actions, the PiS government constructed what Schotel (2021) describes as a “legality bonus”: a façade of legal compliance that enabled the regime to claim adherence to the rule of law while systematically marginalizing political opponents. Administrative law, in particular, proved to be a crucial tool in this process. Unlike criminal or civil law—which often involves complex procedures or triggers public scrutiny—administrative measures were perceived as less severe, yet they proved equally, if not more, effective in subordinating individuals and controlling dissent (Schotel, 2021).

The cumulative effect of these policies contributed to a rapid deterioration of democratic standards. Poland experienced significant setbacks in areas such as media freedom, electoral integrity, and institutional checks on executive power. This decline was reflected in international rankings; for instance, Freedom House (2022) noted a marked regression in Poland’s democratic performance. Scholars have also drawn attention to the economic repercussions of populist governance. Democratic erosion, institutional instability, and legal uncertainty can weaken investor confidence and slow down innovation-driven growth.

Poland’s internal democratic backsliding also triggered external consequences, notably escalating tensions with the European Union. Włoch and Serowaniec (2025) describe the PiS-era constitutional dismantling as an “extra-systemic dissensus” that fundamentally disrupted Poland’s relationship with the EU. The Constitutional Tribunal—reengineered as a political instrument—played a

central role by asserting the primacy of the Polish Constitution over EU law, directly challenging the EU's legal order. Moreover, judicial reforms and disciplinary actions against independent judges cast serious doubt on Poland's compliance with EU principles regarding judicial independence. As in Hungary under Viktor Orbán, Poland's confrontational stance prompted the European Union to respond with legal proceedings and financial measures, including the suspension—and eventual conditional release—of EU funds tied to rule-of-law benchmarks.

The challenges posed by the abuse of administrative law, the emergence of “dual states,” and the erosion of democratic checks are not limited to Poland or even Central and Eastern Europe. These phenomena are part of a broader global pattern of democratic backsliding, visible across political and legal cultures. In Turkey, Erdoğan's regime strategically exploited administrative and emergency legal frameworks to dismantle oversight institutions and punish dissent. Special courts designed ostensibly to democratize the judiciary were reconfigured into tools of repression, legitimizing purges and silencing opposition actors under a formal veneer of legality (Över et al., 2025). In India, Modi's government has retained democratic appearance while relying on colonial-era sedition laws and administrative restrictions to marginalize NGOs and persecute critics — what scholars call the “fully legal harassment” of the opposition (Tudor, 2023; Över et al., 2025). Comparable dynamics have also emerged in Serbia, where executive authorities routinely override judicial oversight, and in the United States, where recent waves of executive overreach and politicization of administrative agencies have raised concerns about the fragility of legal-institutional norms. Together, these examples point to a transnational pattern in which populist or illiberal leaders weaponize the machinery of administrative law to erode democratic guardrails without formally dismantling the rule of law.

4. Consequences and the 2023 Elections

The 2023 Polish parliamentary elections, which resulted in the defeat of the illiberal PiS government by a coalition of opposition parties, renewed hopes for rebuilding the rule of law in Poland. The outcome marked a clear victory for the former opposition, which succeeded in forming a new governing coalition. A record-high voter turnout of 74.4% played a crucial role in ending the rule of the right-wing bloc. Although PiS formally received the highest vote share as a single party, the combined support for opposition forces translated into a decisive parliamentary majority—enough to build a stable government and initiate democratic restoration.

This new government, led by Donald Tusk, has identified the restoration of the rule of law—particularly the reestablishment of judicial independence—as a central electoral commitment and policy priority. Nevertheless, from the outset, it has faced a highly constrained institutional environment, shaped by the continued influence of officials appointed during the previous administration. As Bendyk, Czapliński, and Kosiewski (2024) note, this configuration ‘hinders the liberal-democratic transition by forcing the new majority to play on the edge of the law, and sometimes beyond it.’ Several key state institutions—including the Constitutional Tribunal, the Supreme Court, and the National Council of the Judiciary (KRS)—remain under the control of PiS-affiliated appointees occupying long-term positions. This has resulted in persistent institutional resistance and competing claims to legal legitimacy, giving rise to concerns about the emergence of a ‘dual legal system’ in which state organs no longer uniformly acknowledge each other’s authority.

The Constitutional Tribunal, whose members were appointed during PiS's parliamentary majority, has continued to advance PiS's agenda and to act as an obstacle to introduce judicial reforms. It has even issued interim measures (which it had no legal basis for) to block the Minister of Justice's actions, such as dismissing politically appointed court presidents. Notably, the authorities ignored this ruling from the Constitutional Tribunal in at least one instance. This act of ignoring a ruling from a politicized court could be seen as non-compliant with the existing, albeit contested, legal framework, but is arguably done in pursuit of restoring a true rule of law and judicial independence.

The PiS-aligned President Andrzej Duda retained the power to veto new laws, which hindered reforms related to the KRS and Constitutional Tribunal by referring them to the politicized Constitutional Tribunal. This forced the new government to seek alternative solutions without waiting for the presidential election to set the course; however, they were limited in their effectiveness. Also, the challenge of regulating the status of over 3,000 judges appointed or promoted through flawed procedures since 2018 remained significant. While the Minister of Justice has established a Rule of Law Restoration Team to discuss various models for this, the magnitude of the issue suggests that any comprehensive solution might require navigating legal ambiguities or pushing the boundaries of existing norms to rectify the systemic defects.

The EU's own mechanisms for addressing rule of law backsliding, such as Article 7 TEU, have been described as hard to satisfy and primarily political rather than judicial instruments. Their futile implementation in Hungary and slow progress in Poland highlight the difficulties of relying solely on external, conventional legal processes to compel a return to the rule of law when an illiberal government has deeply entrenched its influence. The "radical deterioration of constitutionalism on the ground in the backsliding states"

suggests that conventional, slow, and purely legalistic responses may not be sufficient to address the scale of the problem.

Poland's post-2023 trajectory illustrates the complexity and fragility of rule-of-law restoration in the aftermath of illiberal governance. Bill and Stanley (2025) characterize the dilemma faced by the new government as a 'post-illiberal trilemma.' The coalition led by Donald Tusk committed itself to restoring democratic institutions in a manner that would be rapid, effective, and fully compliant with legal norms. However, as the authors point out, in practice the government often found it possible to satisfy only two of these objectives at a time. It thus faced a persistent tension between inaction—risking the entrenchment of systemic damage and alienation of its electoral base—and assertive interventions that occasionally tested the limits of legal orthodoxy. Some reforms proved too incremental to reverse the legacy of the previous administration, while others—pursued through exceptional or contested procedures—risked echoing the *modus operandi* of the illiberal regime. As Bill and Stanley observe, the institutional architecture left by PiS included 'traps' that are difficult to neutralize without, paradoxically, adopting some of the very methods characteristic of populist rule. In this context, efforts at democratic restoration were at times criticized for reproducing rather than merely dismantling illiberal practices.

Despite the Tusk government's consistent declarations to restore the rule of law 'within the bounds of the law,' the enduring presence of illiberal institutional structures and the intensity of political opposition have created pressures that complicate strict adherence to this principle. For example, the decision to disregard rulings issued by a politically captured Constitutional Tribunal may be viewed as a legally contentious yet strategically necessary measure aimed at dismantling the remnants of what has been termed 'abusive constitutionalism' and re-establishing democratic constitutional order. Such actions raise a fundamental normative dilemma: whether the restoration of the rule of law can justify departures from the contested legal framework inherited from the illiberal regime. In effect, the government is often forced to navigate between legal formalism and democratic renewal, illustrating the ethical and constitutional paradox faced by reformist administrations in post-authoritarian settings. Nearly two years after the 2023 elections, it remains clear that the restoration of liberal democracy has progressed more in rhetorical terms than through substantive institutional transformation. As such, the Polish case reinforces the broader observation that rebuilding the rule of law is not an event, but a protracted and uncertain process.

5. Deepening The Challenges After 2025 Presidential Elections

Contrary to expectations, the 2025 presidential election was narrowly won by Karol Nawrocki, the PiS-backed candidate, defeating the liberal contender Rafał Trzaskowski. Nawrocki, viewed as even more conservative and illiberal than his predecessor Andrzej Duda, presents an additional obstacle to the government's efforts to restore the rule of law. As discussed earlier, the administration formed after the 2023 parliamentary elections was already navigating a difficult and protracted process of institutional recovery, following eight years of governance marked by the erosion of judicial independence and the circumvention of constitutional norms. The government has adopted a strategy of delaying some crucial reforms, like the "reset" of the Constitutional Tribunal, until after the presidential election, hoping for a more favorable presidential alignment. After the election, this strategy has been severely undermined, prolonging the period of institutional paralysis and potentially deepening the crisis of democracy by preventing the restoration of public trust in institutions.

The new President—judging by his public declarations and early use of the veto power—is highly unlikely to support the government's proposed reforms aimed at restoring the rule of law, particularly in the area of judicial independence. His veto authority enables him to block or significantly delay key legislative initiatives, thereby forcing the government to either compromise or seek alternative, and potentially legally contentious, pathways. The Constitutional Tribunal, already heavily politicized, played a central role in legitimizing the agenda of the previous PiS government, including rulings that challenged the compatibility of EU and ECHR standards on judicial independence with the Polish Constitution. The new President is expected to continue referring government bills to this Tribunal for prior constitutional review, thereby employing it as a mechanism to obstruct reform efforts. As a result, the Tribunal is likely to remain a substantial institutional barrier to judicial reconstruction, further prolonging Poland's constitutional crisis.

Many key state institutions remain under the control of PiS-affiliated loyalists. Nomination of new judges continues, and the functioning of the Constitutional Tribunal remains effectively blocked due to internal divisions and questions over the status of its members. Meanwhile, opposition-led efforts to restore legal order are constrained by these structural entrenchments, which complicate the reversal of prior abuses. As a result, Poland finds itself in a legal limbo: the government has changed, but the institutional architecture built under illiberal rule still shapes the boundaries of lawful governance.

The process of holding the previous government accountable for alleged legal violations and corruption has been progressing slowly. In July 2025, a

government reshuffle brought a notable shift in the Ministry of Justice, with judge Waldemar Żurek assuming the ministerial portfolio. Żurek, himself a prominent victim of politically motivated reprisals under the previous administration, quickly emerged as a key figure in the government's strategy to confront and reverse the legacy of rule-of-law dismantling. His appointment signaled a more assertive stance toward accountability and transitional justice, with initial steps focused on exposing and addressing abuses committed by the prior regime within the judiciary.

In order to counter the challenges posed by the election of a new illiberal president, the government needs to employ not only defensive legal and institutional safeguards, but also proactive political, social, and economic strategies. These should aim to rebuild public trust, enhance transparency, strengthen civic participation, and address the underlying drivers of populist support by demonstrating effective governance and a sustained commitment to democratic principles. Achieving these objectives, however, is likely to prove exceptionally difficult.

6. Some Lessons for Preventing Authoritarian Tendencies and Addressing Challenges to The Rule of Law

The Polish case offers several important insights and lessons for preventing authoritarian tendencies and addressing challenges to the rule of law. The populist regimes tend to reject the established understanding of the rule of law, which limits political power through law, especially the constitution, and seek to restrict individual rights and freedoms, particularly those of minorities. "Illiberal democracy" also reinterprets core democratic principles like representation and separation of powers and may replace the "rule of law" with "rule by law". This concept often undermines institutional pluralism, where local governments, the private and voluntary sectors, the judiciary, and independent oversight bodies would otherwise restrict central government power and prevent consolidation.

Efforts to restore the rule of law following a period of illiberal governance must contend not only with institutional resistance, but also with the urgency and expectations of democratic renewal. As Bill and Stanley (2025) argue, the new Polish government confronted what they describe as a "post-illiberal trilemma," in which "Tusk's government was committed to delivering quick, effective, and unimpeachably legal solutions to illiberalism." This formulation reflects the immense difficulty of satisfying all three imperatives simultaneously. If reforms are too slow, they risk prolonging the crisis and eroding public trust; if they are rushed or legally dubious, they may replicate the very abuses they aim

to undo. Thus, the authors suggest that achieving restoration that is both legitimate and sustainable requires navigating this trilemma without sacrificing democratic principles.

At the heart of this struggle lies administrative law—a legal domain traditionally intended to safeguard individuals against state overreach. However, as the Polish experience demonstrates, once liberal-democratic principles are eroded, administrative law can be repurposed to serve authoritarian objectives. Yet, this same legal framework, if reanchored in constitutional values and democratic oversight, may also offer tools for resisting backsliding and restoring the rule of law. Thus, the Polish case illuminates not only the risks of administrative law’s misuse but also its potential as a vehicle for democratic renewal.

The Polish case also illustrates that administrative law, though vulnerable to abuse, can be harnessed as a pragmatic tool for rule-of-law restoration when legislative avenues are blocked or politically fraught. Facing structural constraints—most notably a hostile president and a politicized Constitutional Tribunal—the post-2023 government increasingly turned to administrative instruments to pursue incremental reform. The Minister of Justice, for instance, refrained from exercising expansive appointment powers inherited from the previous regime, instead allowing court presidents to be selected by assemblies of their judicial peers, thus reinforcing internal judicial autonomy. Similarly, the replacement of the National Prosecutor was achieved not through sweeping statutory reform but via administrative procedures grounded in existing legal provisions. These measures, while limited in scope, reveal how administrative discretion and restraint can serve as stopgap strategies in contexts where constitutional change is stalled. By leveraging administrative tools within the bounds of legality, the government was able to initiate a partial reconstitution of judicial independence and institutional integrity—an example of how law, even under strain, can be used not only to constrain but also to reconstruct democratic governance.

Building on this, the experience of Poland also demonstrates that local self-government plays a crucial role in defending democratic norms and institutional pluralism in the face of illiberal centralization. During the country’s post-authoritarian transition, the reestablishment of robust, autonomous local authorities not only modernized the state and improved administrative efficiency but also deepened democratic control and citizen engagement (Jakubek-Lalik, 2020). In this way, local government served as a structural counterweight to centralized executive power, helping to insulate the political system from full authoritarian capture. In illiberal democracies, where populist regimes often seek to concentrate authority and undermine independent institutions, local self-government can act as a site of resistance and democratic

resilience. Yet this role is far from guaranteed. As Poland's recent trajectory has shown, even well-established local institutions remain vulnerable to "creeping recentralization"—a gradual erosion of autonomy through financial dependency, regulatory overreach, and selective political targeting. Safeguarding the competences of local authorities is therefore essential not only for democratic functionality, but for preventing the monopolization of power characteristic of populist rule.

To prevent the abuse of administrative law under future governments, an additional multilayered reform strategy is essential. First, insulating the civil service from political capture through merit-based recruitment, tenure protections, and restrictions on arbitrary dismissal can help safeguard impartial administration. Second, reinforcing the independence of administrative courts—by removing executive control over judicial appointments and ensuring security of tenure—ensures that legal oversight remains credible. Third, democratizing administrative procedures through enhanced transparency and participation—such as public input on agency guidance, open hearings, and digital publication of draft decisions—can foster accountability. Fourth, protecting both citizens and civil servants from administrative retaliation is crucial: whistleblower protection laws and anti-reprisal safeguards deter arbitrary or politically motivated enforcement. Finally, robust mechanisms for judicial and societal oversight—through accessible court review, empowered ombudsman institutions, and strong freedom-of-information regimes—ensure that administrative acts are subject to continuous scrutiny. Together, these institutional and procedural safeguards fortify the rule of law by ensuring that administrative power is exercised not arbitrarily, but in the service of legal norms and democratic accountability.

7. Conclusions

The restoration of the rule of law in Poland, particularly after the 2023 parliamentary elections, underscores the complex and at times paradoxical role of administrative law. While populist regimes—such as the PiS government—effectively leveraged administrative mechanisms to centralize power and marginalize dissent, these same tools can also serve as foundations for democratic recovery. By relying on regulatory and procedural instruments, the previous government managed to maintain a formal compliance while eroding core democratic standards. Preventing such instrumentalization in the future requires dismantling remnants of the "prerogative state" and ensuring that all state actions are grounded in positive law, aligned with constitutional principles and international standards, and subject to effective judicial review.

The political transition initiated in October 2023 marked a significant turning point, launching efforts to rebuild rule of law and restore judicial independence. These efforts, however, quickly encountered serious legal and institutional hurdles. Resistance has come not only from entrenched beneficiaries of the previous system, but also from the President, who remains aligned with the former ruling party and holds key veto powers. Reforming the judiciary remains an urgent priority—particularly the depoliticization of the Constitutional Tribunal and the National Council of the Judiciary (KRS), both of which had been co-opted through loyalist appointments. The Tribunal's continued obstruction of reform, including rulings against the Minister of Justice's initiatives, illustrates its role in prolonging the constitutional impasse. Moreover, with the likelihood of the new PiS-backed President using his powers to veto or refer laws for review, the legislative pathway remains fraught. Addressing the status of judges appointed or promoted through flawed procedures since 2018 also presents a legally complex challenge, requiring nuanced responses that may test the boundaries of current legal norms. Central to these reforms is the effort to reinstate judicial self-governance in appointments and disciplinary matters, replacing political influence with peer-based processes. Meanwhile, the push to hold the previous administration accountable for legal abuses and corruption faces continued institutional resistance.

Against this backdrop, the Polish experience offers important lessons on the dual nature of administrative law: while susceptible to abuse, it also holds potential as a vehicle for democratic renewal. The 2025 presidential election underscored the fragility of societal consensus around rule-of-law restoration and revealed the limits of relying solely on legislation. With institutional veto players still in place, comprehensive statutory reform is often unfeasible. This necessitates alternative approaches—including the use of internal administrative regulations and regulatory discretion that can advance reform while remaining within constitutional bounds. Equally vital is the cultural dimension of rule-of-law restoration: cultivating a governance culture of legality, transparency, and institutional restraint so that the rule of law becomes a deeply embedded, everyday practice rather than a mere legal ideal.

To achieve this, legal safeguards must be complemented by resilient democratic infrastructure. An independent judiciary protected from political interference is essential. Likewise, local self-government must be fortified against the “creeping recentralization” seen in previous years—manifested in fiscal control, regulatory overreach, and erosion of autonomy. Strengthening civil society and media freedom is also critical. This includes restoring public consultations, reestablishing CSO access to legislative processes, and decentralizing funding to protect their independence. Countering the legacies

of illiberalism requires more than defensive measures; it demands a forward-looking agenda that rebuilds public trust, enhances civic participation, and upholds democratic accountability.

In conclusion, although often exploited by regimes in democratic decline, administrative law's orientation toward accountability and legal restraint—if coupled with judicial independence, empowered local governance, and active civic participation—makes it a powerful tool for democratic repair. The Polish case stands as a sobering but instructive example of the ongoing necessity to defend these structural and cultural foundations against erosion.

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**INTERPRETATIVE DECISIONS OF THE CONSTITUTIONAL
COURT OF NORTH MACEDONIA IN THE FUNCTION OF
PROTECTING HUMAN RIGHTS AND FREEDOMS**

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Abstract

The paper examines the “tense” relationship between the Constitutional Court and the Assembly through the prism of two significant innovations in constitutional judiciary in the Republic of North Macedonia. The first concerns the introduction of what, in European constitutional judiciary, is called an “interpretative decision”. Pursuant to Article 36 of the Act of the Court, the Court can conduct an initial review of constitutionality, can express doubts and instituted proceedings, and in the resolution can set out its legal positions, but defers the final decisions and prescribes a time-limit for the adopter to bring the regulation into conformity, under the repressive “threat” of a repealing or annulling decision. The purpose of this innovation is for the Court to preserve the integrity of the legal order while granting the body that adopted the contested regulation one further (time-limited) opportunity to correct itself and return to the sphere of constitutionality, thereby preventing legal vacuums that could have serious implications for the order.

The paper will analyze the objectives, the legal nature and the effect of this type of “repressive interpretative decisions”, the grounds for their introduction, and their impact on the “tense” and complex interaction between the Constitutional Court (as a negative) and the Assembly (as a positive legislator).

The second innovation consists of the introduction of the possibility for the Court to monitor the implementation of constitutionality, legality, and the rights and freedoms of individuals and citizens as guaranteed by the Constitution, and, at its own discretion, to adopt a special report indicating the need for measures to be undertaken for their realization and protection, which shall be submitted to the competent authority.

Keywords: *Constitution, Constitutional Court, positive - negative legislator, constitutionality and legality, repressive interpretative*

decisions, implementation of constitutionality, special report, judicial activism.

1. Introduction

The complex relations between the negative (the Constitutional Court) (Brewer-Carias, 2017), and the positive legislator (the Assembly) will, in this paper, be analyzed through the prism of two innovations in Macedonian constitutional adjudication: the introduction of so-called “repressive interpretative decisions”, and the adoption of special reports on constitutionality, which are, as expected, and will continue to be, a source of their “tense” interaction.

The Constitutional Court, in addition to its task of being the guardian and protector of the Constitution, in order to be able to fulfil that task, also has the clear duty to interpret the Constitution in its entirety, dynamically and evolutionarily. In this context, the Constitutional Court is faced with a complex set of multidimensional challenges.

The first of these challenges is the necessity for the Court to interpret the fundamental values in a manner that provides them with meaning and content in their manifestations in reality, both in general and in specific cases. In order to arrive at such answers, the Court, in interpreting the Constitution, must actively apply, in addition to all known theories and methods, the evolutionary principle, the theory of living constitutionalism.

The next challenge relates to the guarantees and protection of rights and freedoms of the individual and citizen. The ideal character of human rights and freedoms does not disappear once they are transformed into positive rights. Human rights, on the contrary, remain inseparably linked to constitutional rights, to universal documents, as well as to the changes brought about by the spirit of the times. Hence, the ideal dimension of human rights continues to exist even after their politicization. The very search for the ideal dimension, through requirements for optimization “to the greatest possible extent”, or through alternatives such as a “guarantee of a minimum position” or a “prohibition of excessive disproportionality”, requires constitutional judges to comprehend seriously both the ideal and the real dimension of law (Kostadinovski, 2024). The pursuit of such answers in specific cases is impossible without constitutional judicial interpretation, which is why interpretation constitutes the most significant segment, and at the same time the greatest challenge, in the work of constitutional judges. The Constitution does not say “read me broadly” - expansively, nor “read me narrowly” - restrictively. The decision to do either must be made as a matter of self-awareness on the part of the constitutional judge (Posner, 1995, pp. 59-79). If we add to this truth the well-known words of Chief Justice Hughes that “the Constitution is what the judge says it is” (Hughes, Charles Evans Hughes), it becomes clear how great a burden and responsibility constitutional judges must bear. The definition

of a “living Constitution” or a “real Constitution” (Kostadinovski, 2024, pp.43-44), is that of a Constitution which changes as times change. The proponents of this theory argue that global and societal changes demand adaptation, an adjustment of the written constitutional values, principles and norms to the transformations that have occurred in society and the world, without any formal amendment of the constitutional text (Fallon, 2001, p. 112). The discrepancy between the written Constitutions and what both theory and practice call the “living or real Constitution” inevitably requires creativity, innovation and vision in the interpretative mission of judges.

The introduction of the two substantive innovations in Macedonian constitutional judiciary is precisely the result of the creativity, innovation and vision within the interpretative mission of the Constitutional Court, which strives to discover and construe the “will of the constitution-makers”; to identify and harmonize the “letter and the spirit of the Constitution” and to “adapt constitutional fundamental values and norms to the changed realities and needs”; prepared and adopted the new Act of the Court, which regulates these innovations. They are result of judicial activism, an implicit competence derived from the interpretation of the fundamental values through the prism of living constitutionalism, since these innovations were necessary, socially justified, and indispensable for the rule of law. This paper, by analyzing the objectives, the legal nature and the effect of the “repressive interpretative decisions” and the “special reports on constitutionality”, will develop a justification of the grounds for their introduction and application.

Before proceeding, however, it is important to emphasize that interpretative decisions (Pajich, 2014) are gaining ever-greater importance, and are a useful and frequently employed constitutional judicial mechanism, particularly in countries such as Italy, Germany, Spain, as well as others (Marinco, 2004). The reasons for their popularity lie in the fact that, through their legal effect, they achieve a balance between the imperativeness of the Constitution, the democratic legitimacy of the legislative branch, and legal stability. They prevent unnecessary and harmful legislative vacuums, provide flexibility in constitutional judiciary, promote constitutional dialogue, give clear guidance to the legislator as to how legislation should be harmonized with constitutional norms (Tushnet, 1999, p.45), and foster a constitutional culture of cooperation.

What is common to all forms of interpretative decisions is that they are based on, and support, the concept of a “living Constitution”, thereby significantly influencing the development of human rights and fundamental freedoms, as well as the harmonization of national constitutional systems with international standards (Jackson, 2010). In Macedonian constitutional tradition dedication to a concept of a living constitutionalism depends of a believe of any judge individually, and depend particularly, of its interpretation in a specific case.

2. The Objectives, Legal Nature and Effect of “Repressive Interpretative Decisions” and “Special Reports on Constitutionality”

The innovation in Macedonian constitutional judiciary can be seen through Paragraph 2 of Article 36¹, which enables the Court, by formalizing the transition from an initial review of constitutionality and/or legality (reasonable doubt - as the first phase), to proceed to an intermediate phase of a temporary nature (deferred repeal or annulment, or a decision on “provisional constitutionality”), which means granting the competent authority a specific time-limit - up to six months - to amend the contested legal act in accordance with the Court’s initial constitutional findings, that is, the Court’s legal positions. Depending on the outcome of this intermediate phase, the second phase follows: full and final constitutional review and decision (repealing, annulling, or a decision to suspend the proceedings).

This represents a substantive, significant and necessary innovation, which contains elements of what, in European continental constitutional judiciary, is termed an “interpretative decision”, albeit with its own specific features.

3. The Purpose and Legal Nature of Interpretative Decisions

Despite the fact that Article 36 contains no explicit regulation regarding the key questions - why, when, in which cases, under what circumstances, and according to which criteria the Court, at its discretion, may determine a period not exceeding six months for the adopters of the acts to amend an act in accordance with the views of the Court expressed in the resolution, the advantages of introducing interpretative decisions are incomparably greater than the criticisms concerning its insufficient regulation. The primary reason and incentive for the Court to introduce this constitutional instrument is to avoid the creation of a legal vacuum by deferring the repeal or annulment, a normative gap that could affect the realization of the rights and freedoms of individuals and citizens, that is, to avoid a situation in which a higher societal interest would

¹ In the Act of the Court, under the heading “Initiation of Proceedings”, Article 36 provides:

(1) Proceedings for the review of the conformity of laws with the Constitution, of the conformity of other regulations and collective agreements with the Constitution and the laws, and of the conformity of the programmes and statutes of political parties and associations of citizens with the Constitution, shall be initiated by a resolution of the Constitutional Court.

(2) In the cases referred to in Paragraph 1 of this Article, the Court, at its discretion, may determine for the adopters of the acts a period not exceeding six months to amend the act in accordance with the views of the Court expressed in the resolution.

(3) If the adopters fail to act within the time-limit determined by the Court, the proceedings shall continue.

be endangered, for example, national security, political or ethnic and religious tensions, or the prevention of serious forms of crime.

The Court's experience has shown that, in many instances, while safeguarding and preserving the Constitution, its decisions have conditionally created a situation of "impossibility" for certain constitutionally guaranteed rights to be effectuated.² Within this interaction between the decision of the negative legislator and the expectations and duties of the positive legislator, there emerges a temporal gap, and at times tensions that may lead to antagonism. In order to bridge such a vacuum and potential tension, the Court, at its discretion, may adopt a special type of decision, whereby, notwithstanding its initial finding of unconstitutionality, it does not immediately continue the proceedings nor conclude them with a repealing or annulling decision, instead, it interprets the contested provisions in such a way as to indicate its doubts concerning the constitutionality of the legal act, while, in its reasoning, it provides legal arguments and precise interpretative guidance as to how these provisions might be compatible and aligned with the Constitution. To prevent harmful consequences for individuals and citizens, or for some other overriding public interest, it grants the adopters of those norms a period not exceeding six months to amend the contested legal act in accordance with the Court's legal stance. In this way, the Court creates a situation of "provisional constitutionality", it leaves the contested provisions in force, strikes a form of compromise with the positive legislator, demonstrates a willingness to cooperate, and encourages an institutional dialogue of a preventive nature by allowing legislative self-correction prior to the adoption of a final decision. However, this "offered hand" from the negative legislator is not unconditional. The legislator must comply with three conditions, and faces consequences should it fail to do so:

- First, to respect the time-limit determined by the Court.
- Second, to ensure that the amendments are in accordance with the legal reasoning set out in the Court's resolution.
- Third, all this takes place under the "threat" that, if the first two conditions are not respected, the repressive nature of the negative legislator will prevail, resulting in a repealing or annulling decision, and
- Fourth, responsibility for any harmful consequences arising from such a repealing or annulling decision, transfers to the legislator.

It is precisely these conditions attached to such interpretative decisions, as a special type within constitutional judiciary, that provide them with a

² Such an example can be found in the case of the Law on Banks, where the Constitutional Court, by decision, repealed Article 163, paragraph 3, and after 5 years, the legal gap has not been filled. Such a legal situation can and will produce legal uncertainty in the event of a bank bankruptcy, in a way that the rights of citizens as creditors are not ensured because the law does not regulate who has priority in request from the bankruptcy estate. See more <https://ustavensud.mk/archives/21026>.

distinctive specificity. The threat, or rather the repressive element inherent in them, together with the accountability in cases of non-compliance, is the reason why I personally refer to them as “repressive interpretative decisions”.

In addition to the already mentioned advantages, this type of decision will likely lead towards the promotion of constitutional culture and constitutional cooperation.

The benefit of this type of decision of the Court has already been confirmed in two specific cases, one of which has been successfully concluded, while the other is still ongoing. After the entry into force of the new Act of the Court, on 1 September 2024, on 25 September the Court adopted its first interpretative decision. By Decision U.no.137/2017, the Court initiated proceedings for the review of the constitutionality of Articles 176, 177 and 178 of the Law on Electronic Communications and determined a period of six months for the Assembly to amend the Law in accordance with the Court’s views set out in the reasoning of this resolution.

In its reasoning, the Court stated the following: “... the Court expressed doubt that the retention of electronic communications data of citizens constitutes a serious intrusion into the constitutionally guaranteed rights to respect for private life, the inviolability of communications, and the right to the protection of the security and confidentiality of personal data, thereby affecting a large number of citizens, indeed, practically the entire population using telephone devices or the internet.” In its reasoning, the Court also set out the reason why it opted for an interpretative decision: “...The Court is aware that the retention of data relating to telephone and internet communications constitutes a necessary tool for the prosecuting authorities in detecting and prosecuting criminal offenders, and in safeguarding the security of the State and of its citizens. Precisely for these reasons, so that, on the one hand, the prosecuting authorities are not deprived of this tool in the fight against crime, and, on the other, so that citizens are protected against excessive, disproportionate, and indiscriminate intrusions into their constitutionally protected rights to privacy and freedom of communications, the Constitutional Court decided to apply Article 36 Paragraph 2 of the Act...”

As can be seen, this decision contains all the essential elements that an interpretative decision ought to contain - a review, interpretation and clear guidance, reasons for the “provisional constitutionality”, and a time-limit. What is significant is that intensive communication and dialogue followed between the negative and the positive legislator, leading to the successful conclusion of the case by termination of the proceedings by the Constitutional Court in July 2025, on the grounds that the legislator had adopted a new law which, in the Court’s view, was fully aligned with the legal positions set out in the interpretative decision (Constitutional Court of the Republic of North Macedonia, 2017, <https://ustavensud.mk/archives/30896>).

Following this decision, on 12 February 2025, in cases U.no.162/2023 and U.no.163/2023, owing to their societal importance and the exceptionally high public interest, the Court for the second time adopted an interpretative decision, this time concerning the amendments and supplements to the Criminal

Code (Constitutional Court of the Republic of North Macedonia, 2023, <https://ustavensud.mk/archives/32824>).

Notwithstanding its advantages, Article 36 nevertheless reveals certain regulatory gaps which may jeopardize legal certainty and procedural fairness.³

First, I have already emphasized the intention and motives of the judges who voted for and introduced interpretative decisions. The fact that they are not explicitly stated is due to the impossibility of foreseeing in advance all possible legal situations, which is why, in this case, the Court relies on the possibility provided by the Act of the Court, in Article 74, entitled “Circumstances for Decision-Making”. Hence, the abstractness of Article 36 and the so-called discretionary power of the Court in applying an interpretative decision are not without criteria. Even when deciding whether an interpretative decision will be applied, the Court must take into account the criteria set out in Article 74:

- all circumstances of relevance for the protection of constitutionality and legality,
- in particular, the seriousness of the violation and its nature and significance for the realization of citizens’ freedoms and rights, or for the relations established on the basis of such acts,
- legal certainty,
- and other circumstances relevant to decision-making.

The concern arising from the fact that the contested provision remains in force and produces potentially irreversible legal consequences during the interim period is taken into account by the judges and the Court, and may be objectivised through the application of Article 74 of the Act, as in the case of the importance of preserving metadata for national security.

Second, in relation to the criticisms regarding the absence of precise regulation as to whether the parties concerned are notified or consulted in connection with the decision to postpone, as one of the elements of transparency of the process, the interaction between the negative legislator, the Court, as bearer of the so-called fourth power, the constitutional judiciary, and the positive legislator, the Assembly, as holder of legislative power, is not an interaction in the sense of the principle of separation of powers. Rather, in this interaction, entirely different constitutional rules are relevant, which should not be perceived as rules of power and supremacy, dominance or superiority, but as mutual engagement aimed at ensuring constitutionality, harmony and coherence in the legal order. In this sense, mutually respectful interaction between the negative and the positive legislator is an integral part of institutional and constitutional culture.

Third, in respect of the criticism that Article 36 does not consider the relationship between this postponement mechanism and the application of interim measures provided for in Article 37, it is important to stress that these

³ Some of these remarks come from the expert team that, within the framework of the EU project ‘Strengthening the Capacities of the Constitutional Court,’ prepared a report containing an analysis of the Act of the Court.

two constitutional-legal institutes, interpretative decisions and interim measures, are incompatible and mutually exclusive. The essence of interpretative decisions lies in postponing the merits decision and granting the adopter of the contested act the opportunity for self-correction, while leaving in the legal order the norms over which doubts have been expressed.

As regards the effect and legal nature of interpretative decisions, pursuant to Article 71 of the Act, the Constitutional Court adopts two types of acts, decisions and resolutions. Article 72 regulates the cases in which the Court delivers a decision, namely, the importance of the substance of the matter. Pursuant to Article 73, the Court issues resolutions in cases when it does not decide on the substance of the matter. The legal nature of interpretative decisions, in addition to Article 36, is also determined by Article 71 (the resolution on an interpretative decision is a Decision of the Court), Article 73 Indents 1 or 5 (by the Resolution on an interpretative decision the Court does not decide on the substance of the matter), Article 74 (which establishes the criteria and circumstances for decision-making, as already discussed), Article 79 (according to which the Court may decide that separate resolutions be published in the “Official Gazette”, which is to be understood when it comes to interpretative decisions). In that regard novelties in the new Act of the Court can be seen in Article 81 (according to which the decisions of the Court are final, enforceable and legally binding upon all legal entities). In Article 85 (according to which the obligation to enforce the decisions of the Court commences on the day of their publication in the “Official Gazette”, and the decisions of the Court are to be enforced without any delay), Article 86 (according to which the Court, *ex officio*, monitors the enforcement of its decisions and may request from anyone data and information regarding the measures taken to ensure the execution of its decision), and Article 90 (according to which the Court, if necessary, shall request public authorities to secure the enforcement of the decision). This novelties are not yet implemented in a concrete case, although a couple of cases are been followed by the Court – *ex officio*!

4. Basis for the Introduction of “Repressive Interpretative Decisions” and “Special Reports on Constitutionality”

The competence of the Constitutional Court to decide on the conformity of laws with the Constitution, on the conformity of other regulations and of collective agreements with the Constitution and with the laws, as well as its competence to repeal or annul a law if it determines that it is not in conformity with the Constitution, are explicitly regulated in the Constitution, in Articles 110 and 112. In contrast, the competence of the Court to adopt interpretative decisions is regulated in Article 36 of the Act of the Court. As I have already emphasized, this competence is the result of judicial activism and represents an implicit competence of the Constitutional Court (self-assigned by the Court). Such judicial activism derives from and is a result of living constitutionalism and the necessity of adapting the constitutional text to

changing realities, without its formal amendment. In this sense, the introduction of interpretative decisions through their regulation in the Act of the Court also has its justification and foundation in the fact that constitutional judiciary in Macedonia represents a *sui generis* case. To clarify, the constitutional framework regulating the status, composition and competences of the Court comprises only six articles of the Constitution, Articles 108 - 113. The question arises: what was the intention of the Constitution in providing such a “modest” legal framework, in which the first thing that “strikes the eye” is the absence of a constitutional basis for a special law on the Constitutional Court, by which the constitutional provisions would have been further regulated and specified? The dilemma prevailing among both practitioners and scholars is whether, having already conferred upon the Court the status of a fourth power, thus placing it above all state authorities⁴ and not subject to the principle of separation of powers, binding it solely to the Constitution, was in essence to exclude the Court from political influence, that is, from additional regulation by the legislator? Was the intention that, through an Act of the Court (if it is treated as a sub-constitutional act), as provided in Article 113 of the Constitution, the Constitutional Court should in fact be self-regulatory, itself specifying and further regulating the constitutional provisions? Was this a matter of omission or intention? Might time itself provide an answer to these questions? There are arguments which may support and defend all of these assumed intentions.

Let us proceed from the assumption that the intention⁵ was for the Constitutional Court to be self-regulatory and to operationalize the constitutional provisions through its Act of the Court. In the past 34 years, the constituent body has undertaken numerous amendments to the Constitution itself, yet at no point has it decided to further regulate the constitutional

⁴ Recommendations for the adoption of a Law on the Constitutional Court have been provided by the Venice Commission, the European Union through the Report of the TAIEX Expert Mission (an instrument of the European Commission) concerning the protection of human rights by the Constitutional Court, as well as by the German Foundation for International Legal Cooperation (IRZ)., however, all these recommendations point to the need to establish a constitutional basis in Article 113 of the Constitution.

⁵ In its Opinion on the seven proposed amendments to the Constitution of the Republic of Macedonia (CDL-AD(2014)026), the Venice Commission emphasizes: "In most European countries, constitutional provisions concerning constitutional courts are further developed through specific laws or constitutional laws. In contrast, there is no specific law on the Constitutional Court in the Republic. The only legal act currently regulating the activities and competences of the Court is the Rules of Procedure from 1992 (now referred to as the Act of the Court). The Venice Commission finds this situation entirely inadequate. In the Commission's view, it would be beneficial to adopt a specific law on the Constitutional Court that would regulate matters such as the status of judges, the basic conditions for initiating proceedings before the Court, the effect of the decisions of the Court, etc. It is necessary to add a new paragraph to Article 113 of the Constitution referring to such a specific law on the Constitutional Court."

provisions by providing a constitutional basis for a special law on the Constitutional Court to be adopted by a two-thirds majority, or by constitutional law, nor has it attempted to adopt a Law on the Constitutional Court without a qualified majority. From this, it follows that the constituent body, the Assembly, has recognized the intention that the Constitutional Court should be self-regulatory, itself specifying and further regulating the constitutional provisions through its Act of the Court⁶, as its uncontested competence not only judicial but also normative.

Within such a constitutional reality, the extension of its competence, through the introduction of competences for interpretative decisions and special reports for the protection of constitutionality, has its legal basis. The basis lies not only in regulation in the Act of the Court, no one should be surprised by the expansion of the competencies of the Court once again in an implicit manner, through the interpretation of the fundamental values of the Constitution. One such novelty, without being normatively regulated, but as a result of judicial activism and as a break with the old and the establishment of a new judicial practice, is the competence of the Court to decide in cases of conflict of laws. The Court has already adopted decisions in which it has abandoned its long-standing practice of declaring itself incompetent in cases of conflict between laws (Constitutional Court of the Republic of North Macedonia, 2022, <https://ustavensud.mk/archives/23879>). This new practice is not general, applicable to every conflict of laws, but depends on a case-by-case basis, only when, assessing the circumstances, the Court establishes that the conflict of laws seriously undermines legal certainty and when it leads to arbitrariness that may have serious consequences for the exercise of citizens' rights.

In this way, judicial activism and the change in judicial practice determine the real appearance of the Constitution and of the order established by it, perhaps even more effectively than the explicit norms contained in the Constitution.

⁶ I personally believe that the presumed intention of the constitutional legislator was to allow time to provide appropriate answers as to whether a legal refinement of the constitutional provisions concerning the Court is necessary, and in my view, this is more than necessary, as the current *sui generis* position is unsustainable and continues to produce challenges of various kinds. More on my views on this matter, see my address at the roundtable organized within the framework of the EU project "Is a Law on the Constitutional Court Necessary?", available at www.ustavensud.mk. In truth, this constitutional precedent could become an "open door" to another negative extreme, the establishment of a "constitutional courtocracy", in which the Constitutional Court assumes the role of constitutional legislator, as well as both negative and positive legislator.

5. The Impact of Constitutional Novelties and the Imbalance between the “Positive and Negative Legislator”

The introduction of interpretative decisions and of special reports on constitutionality, as a result of judicial activism and of a creative, innovative and visionary interpretation of constitutional values and norms in accordance with the spirit of the times, thereby expanding the competences of the Constitutional Court, represents a form of “soft” revision of the text of the Constitution (Kostadinovski, 2022; Kostadinovski, 2023).

In reality, both the explicit and the implicit competence of the Constitutional Court lead to a greater or lesser step beyond the role of the Constitutional Court as a negative legislator and to an “intrusion” into the sphere of activity of the positive legislator. Reactions to such “intrusions” on the part of the positive legislator vary from case to case. The discussion concerning the relationship between the positive and negative legislators is very interesting, but by no means simple or easy. There are several important arguments in support of this statement.

First, within the relations between the positive and negative legislator there are often present not only constitutional-legal but also political-legal elements. Parliament is a representative body of the citizens who, by electing their representatives, exercise power, since sovereignty derives from and belongs to the citizens. On the other hand, in modern constitutional states, the so-called fourth power, the constitutional judiciary, acts as the sole controller and corrector of democratically established powers. In such a legal state, everyone is subordinate to and obliged to respect and implement the Constitution. Yet from this constitutional position and from the competences vested in the Constitutional Courts (whether explicit or implicit), implications and consequences of the decisions of the negative legislator upon the positive legislator are inevitable.

Jasna Omejec rightfully concluded that: “the defensive role of the Constitutional Court in protecting the Constitution is no longer its sole role today, and in many countries with stable democracies it is no longer its most important role.... In many cases, Constitutional Courts established the constitutional legitimacy of the laws they examined, and their decisions in these cases had significant consequences. This was the result of the fact that in the second half of the 20th century Constitutional Courts not only defended, but also began to interpret the Constitution. The interpretative role of the Constitutional Courts, as opposed to their original defensive function, had a positive impact on the promotion of general standards and guidelines for the conduct of public authorities. In this way, by interpreting the Constitution, Constitutional Courts began to provide state bodies with conceptual tools and standards for action.⁷ Therefore, today, Constitutional Courts no longer have

⁷ This is, in fact, the essence of interpretative decisions. In striving to create a comprehensive legal order, the Court, in its exercise of abstract constitutional review, has also begun to apply so-called meta-legal criteria - standards developed by the

only the defensive task of safeguarding the Constitution, but also an important role in the creation of a comprehensive legal order.” (Omejec, 2009, pp.31-33; Kostadinovski, 2021).

This “new” role of the Constitutional Court “represents a significant limitation” of the power of the legislative body. The very existence, alongside the positive legislator, of a negative legislator means that antagonism between the two is almost inevitable. However, this antagonism can nonetheless be mitigated.

Like other Constitutional Courts in Europe, the Macedonian Constitutional Court, within the framework of modern or so-called “new constitutionalism”, departing from formalism and inclining towards judicial activism, has adopted and refined mechanisms such as interpretative decisions and special reports on the protection of constitutionality, which, aiming to avoid and/or mitigate antagonism (Constitutional Court of the Republic of North Macedonia, 2022, У.бр.137/2017 – Уставен суд на Република Северна Македонија) between the positive and the negative legislator, initiate constitutional culture, dialogue, cooperation and respect between institutions.

Within this interaction, at first sight, the decisions of the Court, as a negative legislator, seem to be equated with the laws adopted by the positive legislator. They possess a universal binding force, operate *erga omnes*, and everyone is obliged to respect them. Nevertheless, alongside these similarities, there are also differences that affect the relationship between the negative and the positive legislator. Unlike laws, the decisions of the Court cannot be amended, supplemented or annulled by anyone except by itself. If the Constitutional Court establishes that certain provisions are unconstitutional, it will repeal or annul them, or it will proceed to interpretative decisions. These decisions are final, enforceable and generally binding, binding also upon the positive legislator. With such decisions, the Court, as a negative legislator, directly intervenes in the legislative process and thereby influences the implementation of legislative policy, generating not only constitutional-legal but also political implications. In such cases there is a direct influence of the decision of the negative legislator upon the positive legislator. In these cases, the negative legislator leaves no right of choice to the positive legislator!

Unlike direct influence, the indirect influence of the negative legislator on the positive legislator occurs in the following cases.

First, it is a generally known and accepted fact that the legal characteristics of finality, enforceability and general binding effect apply equally not only to the operative part but also to the legal positions of the Court

ECHR (these include examining the legitimate aim of the legislator, the social justification, and the necessity of certain legislative solutions in a democratic society - a significant novelty). Such a example can be seen in Resolution <https://ustavensud.mk/archives/32824> where the Court examine the legitimate goal for the changes in the Criminal Code, examine whether the changes are socially justified and necessary, and examine the proportionality between the old and the new legal norms.

expressed in the reasoning of its decisions (Scholler, 2000, p.246). These reasonings embody the interpretative process that has led to the decision. In them, the Constitutional Court specifies, gives meaning, content, scope and limits not only to the fundamental values, which are the most abstract in the constitutional text, but also to the principles and postulates derived from them, to the provisions of the Constitution. Such interpretations serve as an exceptionally important guide and framework for the actions of the positive legislator. It is precisely through these positions expressed in the reasoning of its decisions that the Constitutional Court indirectly influences the positive legislator.

Second, there is indirect influence on the positive legislator in cases where the Court, monitoring the implementation of constitutionality, legality and the freedoms and rights of individual and citizen guaranteed by the Constitution, at its own discretion adopts a special report pointing out to the positive legislator the need to undertake measures for their implementation and protection. The introduction of the institute of monitoring the implementation of constitutionality is likewise an important novelty in constitutional judiciary. I have already emphasized that this institute has been applied, and two new special reports are currently under preparation.⁸ The first such Report, adopted by the Constitutional Court, concerned the interpretation of Article 52 paragraph 2 of the Constitution, which refers to the institute of *vacatio legis*. The conclusion of that special report stated: "... The Constitutional Court, in accordance with Article 13 of the Act and established case-law, concludes that there is a need to adopt a report in order to draw the attention of the competent state bodies to the fact that the formal aspect of regulations is of equal importance as their substantive aspect, and in their actions they must respect the obligation deriving from the Constitution relating to the time limit for publication of laws and other regulations in the 'Official Gazette of the Republic of North Macedonia'."

These reports serve as a guide for the positive legislator on how it should and how it is "desirable" to act, thereby once again creating purview for the Constitutional Court to intervene, indirectly, through a form of institutional dialogue and cooperation (not repressively), in the sphere of activity of the positive legislator. In this way, the Constitutional Court contributes to the observance and strengthening of constitutionality and legality without acting as a negative legislator.

A mixed model of so-called "repressive indirect influence" of the negative on the positive legislator occurs in the case of interpretative decisions. The specific feature of this model is its temporal and transitional character.

⁸ The two special reports currently in preparation relate to identified technic and nomotechnic errors and omissions, which have been challenged in numerous cases before the Constitutional Court on the grounds that they violate legal certainty and, by extension, the rule of law, as well as to address observed instances of unconstitutionality and illegality in the actions of local self-government bodies, particularly concerning the types of acts they are authorized to adopt.

Namely, the indirect influence may be within a period of up to six months, after which the indirect influence turns into direct influence, because if the positive legislator fails to observe the time-limit and/or the legal positions of the negative legislator, the latter will resort to the repressive method and adopt either a repealing or an annulling decision. Such decisions of the Constitutional Court are characterized by its simultaneous action and decision-making as a negative and, indirectly, as a positive legislator. What is important to emphasize is that even in such cases, these decisions cannot and must not be treated as the Court assuming the legislative functions (Arlović, 2015, p.23).

From the foregoing it follows that in all these models, the Court makes smaller or greater “intrusions” into the sphere of the positive legislator, which provoke dissatisfaction, and sometimes even hostility, especially when decisions are burdened with political premises. For this author, the “most elegant” way of reducing antagonism and overcoming potential tension is represented by the interpretative decisions of the Court. By the very fact that a law initially found unconstitutional by the Constitutional Court remains in force for a certain time and is recognized with “provisional constitutionality”, the legislator is enabled to bridge the situation calmly and, with as little damage as possible, to remove/correct a regulation or certain provisions from the constitutional legal order. I consider that the legislator should regard the Constitutional Court as a “close friend and collaborator”. The legislator knows that “entrusting part of its legislative power” to the constitutional judges is the safest way to ensure the adoption of a constitutionally based law. And in practice, this is the most common reaction of the positive legislator. There are cases, less frequent, where the legislator attempts creatively to re-formulate the law in such a way as to “circumvent” the decision of the Court, including its legal positions (Dissenting opinion, Decision, 2022, Издвоено мислење по предметот У.бр.4/2022 – Уставен суд на Република Северна Македонија). In this option the legislator risks renewed intervention and “influence” by the Constitutional Court. Likewise, there are rare cases where the reaction of the positive legislator is complete disregard of the decisions (Constitutional Court of the Republic of North Macedonia, 2020, <https://ustavensud.mk/archives/21026>), as well as cases of open non-compliance with the decisions of the Court (Constitutional Court of the Republic of North Macedonia, 2023, <http://ustavensud.mk/archives/25252>).

Conclusion

1. Interpretative decisions represent the so-called decisions with deferred repeal or annulment, or decisions on “provisional constitutionality”. The deferral effect is incorporated into the period assessed and determined by the Constitutional Court, which may not exceed six months. The preventive effect is incorporated in the fact that the adopter of the act is left to carry out amendments itself, which must imperatively be aligned with the legal positions of the Court, thereby preventing, within a certain time-limit, the occurrence of harmful consequences of higher public and societal interest. However, in the

legal nature of interpretative decisions there is also a so-called “repressive” element, namely, conditionally speaking, a “threat” that if the decision of the Court is not respected in terms of observing the time-limit for the necessary amendments, then in accordance with the legal positions set out in the reasoning of the Resolution, the Constitutional Court shall continue the proceedings and adopt a decision based on the merits. Responsibility for any potential harmful consequences that might arise from a repealing or annulling decision, in case the order and the time-limit determined by the Court are not respected, passes onto the legislator.

2. Deferred restoration of the state of constitutionality is carried out with the aim of avoiding legal gaps that might affect the rights of legal subjects, or other higher public and societal interests and objectives, such as state security, political or ethnic or religious tensions, or prevention of serious forms of criminal offences.

3. These decisions aim to clarify how certain provisions of the Constitution are to be understood. By their legal nature, constitutional norms are abstract and broad, representing a framework open to multiple and diverse interpretations and as such, they are sometimes insufficiently clear, ambiguous, or contradictory. Interpretative decisions help to ensure that such norms are properly applied, or if misapplied, allow for the possibility of self-correction by their author(s). The aim thereby is to ensure that the Constitution is applied consistently, in accordance with its original intent but also in line with the principles of living constitutionalism.

4. These decisions have the effect of binding legal precedent. In cases where the interpretative decision achieves its purpose, which would mean that the positive legislator, within the prescribed time-limit, has made the amendments in accordance with the legal positions of the Court, the Court will suspend the proceedings. However, the interpretations of the Court, translated into constitutional-legal positions in the Resolution for the interpretative decision, retain their characteristics of being final, enforceable and generally binding for everyone, including the Constitutional Court itself. Until the moment they achieve their purpose, they have a specific *inter partes* effect since this type of decision represents a relationship between the Court and the legislator, leading to an institutional culture of mutual respect and the easing of relations.

5. Influence on the political process. As we have already seen, constitutional courts may use interpretative decisions to influence or guide the political process, but in a different spirit of cooperation, in contrast to the repressive one.

6. Development of constitutional doctrine and constitutional culture. Over time, interpretative decisions may help the positive legislator itself (through one of its bodies - the Constitutional Law Commission) to develop constitutional doctrine, based on the legal interpretations of the Constitutional Court in its decisions, as a framework for a better understanding of the fundamental constitutional values, principles and their application in different legal contexts.

7. Interpretative decisions also possess the power of the so-called “soft revision” of the Constitution. In essence, this concerns the application of the theory of living constitutionalism. In some cases, interpretative decisions may effectively lead to a change in the meaning of constitutional provisions without a formal amendment of the Constitution. Courts may interpret a provision in a way that expands or reduces its definition, scope and reach (Fallon, 2001, p. 112).

8. Mutual interaction with international law. Fundamental values of the constitutional order among others, include: the basic freedoms and rights of the individual and citizen recognized in international law and established by the Constitution, and the respect for generally accepted norms of international law. They also represent a tool for the interpretation of the normative text. In practice, the case-law developed by international courts, such as the ECtHR in Strasbourg, whereby certain standards are introduced through which the definitions, scope and boundaries of the freedoms and rights under the European Convention on Human Rights are altered, becomes an inevitable and necessary criterion also for our Constitutional Court when interpreting domestic constitutional provisions, with the aim of harmonizing national with international standards (ECHR, Decision, 5856/72, 1978).

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**SPECIFIC TOOLS FOR THE INTERGENERATIONAL
PRESERVATION OF FAMILY COMPANIES AND WEALTH IN
SLOVENIA AND HUNGARY¹**

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Abstract

Family companies constitute an essential type of company in national and global economies, yet their long-term survival depends on effective succession planning. If the intergenerational transfer is not arranged in advance, the company faces the risk of fragmentation and even dissolution. Rather than comparing an identical legal tool in both jurisdictions, the article investigates two different instruments: one for advance and timely planning, and the other for the prevention of fragmentation through succession when no prior planning exists. Each tool is analyzed within its national framework, with the aim of demonstrating how such instruments may serve as role models not only for Slovenia and Hungary, but also for other jurisdictions. From the perspective of Slovenian law, the article considers whether special protective succession rules, similar to those preventing the fragmentation of protected farms, could be introduced to preserve family companies in cases where no prior transfer arrangements exist. From the perspective of Hungarian law, the paper analyses the asset management foundation, a private-law mechanism that allows founders to determine conditions for the governance and transfer of family wealth across multiple

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generations. The comparison reveals two contrasting approaches: a statutory framework aimed at preventing fragmentation of family companies, and a flexible private-law tool reserved primarily for families with substantial assets. Despite their differences in scope and accessibility, both instruments may coexist within a national framework: one facilitating advance succession planning, the other preventing fragmentation in its absence.

Keywords: *family companies, family wealth, intergenerational transfer, succession, asset management foundation*

1. Introduction

Family companies play a pivotal role in the global economic landscape, contributing substantially to both local and international economies.² They range from small, locally owned enterprises to multinational corporations. These companies are estimated to generate an annual turnover of USD 60–70 trillion and to account for approximately 60% of global employment.³ In many national economies, their impact is even more pronounced: in the United States, family-owned companies represent around 54% of GDP (approximately USD 7.7 trillion) and employ 59% of the workforce, or about 83 million individuals.⁴ Similarly, in Germany, family companies contribute more than two-thirds of the country's GDP and form the backbone of its Mittelstand firms.⁵ In Slovenia, according to some estimates, as many as 83% of enterprises are family-owned.⁶

These figures underscore the economic prevalence and resilience of family companies, highlighting their central role in fostering growth, employment, and social stability. Yet their long-term survival depends on one critical factor: effective succession planning. A growing body of evidence indicates that nearly USD 18.3 trillion in collective family wealth is expected to transfer to the next generation by 2030, presenting both an extraordinary opportunity and a

² <https://www.familybusinessunited.com/post/the-global-importance-of-family-firms> (14. 8. 2025).

³ <https://www.mckinsey.com/industries/private-capital/our-insights/the-secrets-of-outperforming-family-owned-businesses-how-they-create-value-and-how-you-can-become-one> (14. 8. 2025).

⁴ <https://www.familybusinesscenter.com/resources/family-business-facts/> (14. 8. 2025).

⁵ <https://www.familybusinessunited.com/post/the-global-importance-of-family-firms> (14. 8. 2025).

⁶ <https://www.ozs.si/novice/dve-tretjini-druzinskih-podjetij-pri-prenosu-na-potomce-propadeta-5c94ea44c2a08224104174b6> (14. 8. 2025).

substantial risk.⁷ Many family companies face challenges in governance, the preparedness of successors, and reconciling evolving family dynamics with the imperative of business continuity. In Germany, for example, the Mittelstand confronts an impending succession crisis: 231,000 SME owners plan to close their companies by the end of 2025, primarily due to advancing age and the absence of suitable successors—placing more than 50% of national output and 60% of the workforce at considerable risk.⁸ Without timely and strategic planning, such transfers can result in underperformance and, in the worst-case scenario, company failures. Particularly alarming is the estimate that in Slovenia, as many as two-thirds of family companies fail during the transition to the next generation.⁹

With the generational change and the retirement of business owners, the question arises of how to legally regulate the transfer of family companies to younger generations, with the aim of keeping the enterprise within the family circle and avoiding its fragmentation due to a larger number of potential heirs (Dugar, 2021, p. 27-28.). Timely and proactive succession planning is advised not only in anticipation of retirement but also to address the possibility of an unexpected death (Lorz, Kirchdörfer, 2011, p. 5). This article examines two distinct legal instruments for the preservation of family companies and associated wealth. From the perspective of Slovenian law, it considers whether it would be both sensible and feasible to introduce special protective measures for family companies (for more about the Intergenerational Transfer of Family-Run Enterprises in Slovenia see Dugar, 2021, pp. 27-37), comparable to those currently applicable to the inheritance of protected farms in Slovenia. From the perspective of Hungarian law, it analyses the Asset Management Foundation and its role in facilitating the intergenerational transfer of family wealth. Although these measures operate in different contexts, both pursue the same objective: safeguarding the preservation and successful transition of family companies to the next generation. Rather than comparing an identical legal tool in both jurisdictions, the article investigates two markedly different legal tools, each situated within its respective national framework, with the aim of demonstrating how such instruments may serve as role models not only for Slovenia and Hungary, but also for other jurisdictions.

⁷ <https://www.ft.com/content/8480fb49-5e13-4912-9087-b07f2da698c0> (14. 8. 2025).

⁸ <https://www.reuters.com/business/finance/germanys-retiring-mittelstand-owners-struggle-find-successors-2025-06-10/> (14. 8. 2025).

⁹ <https://www.ozs.si/novice/dve-tretjini-druzinskih-podjetij-pri-prenosu-na-potomce-propadeta-5c94ea44c2a08224104174b6> (14. 8. 2025).

2. Special Rules on the Inheritance of Protected Farms in Slovenian Law and the Feasibility of Similar Measures for Preserving Family Companies¹⁰

2.1. An Overview of Special Inheritance Measures for the Preservation of Protected Farms under Slovenian Law

The Constitution of the Republic of Slovenia (Uradni list RS (Official Journal of the Republic of Slovenia), no. 33/91-I, 42/97, 66/00, 24/03, 47, 68, 69/04, 69/04, 69/04, 68/06,140,143, 47/13, 47/13, 75/16, 92/21; *hereinafter Constitution RS*) stipulates that legislation may determine the manner of acquisition and enjoyment of property in such a way as to ensure its economic, social, and ecological functions (Para. 1 Art. 67 of the Constitution RS). It further provides that the law shall prescribe the manner and conditions of inheritance (Para. 2 Art. 67 of the Constitution RS). An example of such a special legal arrangement in Slovenian legislation is the inheritance of protected farms, regulated by the Act on the Inheritance of Agricultural Holdings (Uradni list RS (Official Journal of the Republic of Slovenia), no. 70/95, 54/99, 30/13, 44/22; *hereinafter ZDKG*). The ZDKG implements the social function of property by safeguarding the livelihood of the heirs of protected farms. This is achieved by prohibiting the division of protected farms and enabling the heir to take over the farm under conditions that do not impose an excessive financial burden (Zupančič and Žnidaršič Skubic, 2009, p. 293). The economic function of property, as provided by the ZDKG, is ensured by preventing the fragmentation of medium-sized farms. In this way, the agricultural and forestry unit is preserved as an economic whole, enabling efficient management and maintaining the owner's competitiveness in the agricultural products market (Zupančič and Žnidaršič Skubic, 2009, p. 293). The ecological function of property is realized by ensuring that the heir who takes over the farm remains on the property, thereby enabling the continuation of agricultural, forestry, and supplementary activities on the farm to the extent necessary for subsistence. This provides the basis for an eco-social type of farming and supports the maintenance of low population density in rural areas (Zupančič and Žnidaršič Skubic, 2009, p. 294). Legal scholarship also emphasizes that such a special arrangement for the inheritance of protected farms is not inconsistent with the constitutional principle of equality before the law, according to which all persons are equal before the law (Para. 2 Art. 14 of the Constitution RS). The law takes into account the specificities of the different factual circumstances, thereby also implementing the principle of fairness by reducing the risk to the livelihood of the heir who takes over the farm (Zupančič and Žnidaršič Skubic, 2009, p. 294).

¹⁰ All translations from Slovenian were prepared by the author, Gregor Dugar.

The ZDKG constitutes a *lex specialis* that narrows and modifies the general inheritance regime for agricultural property, with the objective of preserving economically viable farms intact across generations. The ZDKG regulates the specific rules governing the inheritance of protected farms, prevents their fragmentation as agricultural or agricultural-forestry economic units, enables their transfer under conditions that do not impose an excessive burden on the heir, and creates the conditions for maintaining and strengthening the economic, social, and ecological functions of protected farms (Para. 1 Art. 1 of the ZDKG). Two fundamental principles underpin the regulation of the inheritance of protected farms: the principle of indivisibility of farms upon inheritance and the principle that the heir of a protected farm should be able to take it over under conditions that do not place an excessive burden upon them. The first principle means that a protected farm is, as a rule, inherited by only one heir; only under the conditions explicitly provided for by the ZDKG may a protected farm be inherited by multiple heirs (Art. 5 of the ZDKG) (Zupančič and Žnidaršič Skubic, 2009, p. 295). The second principle is reflected in the fact that the rights of other entitled persons are generally pecuniary in nature and subject to deadlines adapted to the farm's economic capacity (Zupančič and Žnidaršič Skubic, 2009, p. 302-306).

The subject of this special inheritance regime is solely the protected farm, defined as an agricultural or agricultural-forestry economic unit that meets two fundamental conditions. The first condition concerns the size of the farm: it must comprise no less than 5 hectares and no more than 100 hectares of comparable agricultural land (Para. 1 Art. 2 of the ZDKG; for the definition of comparable agricultural land, see Paras. 2 and 3 of the Art. 2 of the ZDKG). The second condition concerns ownership: the farm must be owned by a single natural person, or be in the ownership, co-ownership, or joint ownership of a married couple or partners in an extramarital union, or in the co-ownership of one parent and a child or adopted child, or their descendant (Para. 1, 4, and 5 Art. 2 of the ZDKG).

A protected farm comprises all elements that form an economic whole and serve for regular agricultural or forestry production and related activities (Para. 1 Art. 3 of the ZDKG). A farm, therefore, encompasses more than merely agricultural or forest land. It also includes other immovable property, buildings, and movable property. In this way, the legislature followed the common (general, popular) understanding of a farm, which has never been perceived solely as another term for agricultural or forest land, but rather as a whole comprising arable or forest land, farm buildings, and a dwelling house (Judgment of the Administrative Court, no. I U 189/2016, 17 October 2018).

A farm that meets the above conditions acquires the status of a protected farm on the basis of a decision issued by the competent administrative unit. The

administrative unit in whose territory the majority of the land comprising the farm is located issues such a decision at the request of the court or the tax authority (para. 1, art. 4, ZDKG).

The ZDKG lays down specific rules for inheritance both in cases of intestate succession and in cases of testamentary succession. In intestate succession, the ZDKG regulates various scenarios depending on the ownership status of the deceased in relation to the farm.

The single-heir principle is codified in Article 7 of the ZDKG. If the farm was owned solely by the decedent and there is more than one co-heir of the same order, the heir who intends to cultivate the agricultural land and is unanimously designated by all heirs shall inherit the farm. If no agreement is reached, priority is given to the heir who has already demonstrated such intent (for example, through qualifications or education in agriculture). If there is more than one such person, preference is given to those who grew up or are growing up on the farm and who have contributed through their work or earnings to the preservation or development of the farm. Where conditions are otherwise equal, the decedent's spouse has priority in inheriting a protected farm. If the protected farm originates entirely or predominantly from the side of the decedent's surviving spouse, that spouse and any descendants shared with them have priority over the decedent's other descendants. If the protected farm originates entirely or predominantly from the side of a former spouse of the decedent, the descendants shared with that former spouse have priority over other co-heirs. If the decedent has neither a spouse nor descendants and the protected farm originates entirely or predominantly from the side of the father or the mother, heirs from that respective side take precedence. If, after applying these criteria, there is still more than one co-heir, Paragraph 2 of Article 7 of the ZDKG sets out additional rules to determine succession.

The ZDKG further regulates two additional ownership situations arising upon the death of the decedent. If the protected farm is owned, co-owned, or jointly owned by a married couple, the heir to the farm is the surviving spouse. In the event of the spouses' simultaneous death, the heir is determined in accordance with the rules applicable to the first ownership situation, taking into account the origin of the farm (Art. 8 of the ZDKG). If the protected farm is co-owned by one of the parents and a child or adopted child, or their descendant, the heir to the protected farm is the surviving co-owner, provided that they have a legal right to inherit. If the surviving co-owner does not have a legal right to inherit, the heir to the free share is determined in accordance with Article 7 of the ZDKG from among the legal heirs of the deceased co-owner (Para. 1 Art. 9 of the ZDKG).

If, under the general rules of inheritance, the protected farm would also be inherited by minor children or adopted children of the decedent, the determination of the heir to the agricultural holding may be postponed until all such children and adopted children reach the age of majority. A request for the postponement of the determination of the heir to the agricultural holding may be submitted by the decedent's spouse, their child or adopted child, or the competent guardianship authority (Para. 1 Art. 10 of the ZDKG).

The ZDKG provides specific grounds for excluding an heir—who would otherwise qualify under the above criteria—from taking over a protected farm. These are circumstances rendering the heir incapable of managing the protected farm, such as mental illness, psychological disorders, prodigality, alcoholism, and similar conditions. The probate court may apply the criteria from the preceding paragraph only if there are multiple co-heirs in the same order of succession and at least one of them is not excluded. Among the non-excluded heirs, the heir to the protected farm shall be the person who would inherit if the excluded heir were not considered. A motion for the exclusion of an heir under this provision may be filed by co-heirs, who must in such cases prove the grounds for exclusion (Art. 11 of the ZDKG).

If, under the above-described criteria, there is no heir who meets the conditions for inheriting a protected farm, the protected farm shall be inherited by all heirs in accordance with the general provisions on inheritance. In such a case, the protected farm may, by way of exception, be physically divided (Art. 13 of the ZDKG).

Among those who, in addition to the farm's heir, would be called to inherit under the general rules of inheritance, only the decedent's spouse, parents, children and adopted children, and their descendants have certain rights to an estate consisting of a protected farm. These persons are entitled to inheritance shares corresponding in value to the compulsory portions under the general provisions of inheritance law. The ZDKG refers to these as "compulsory" shares, although this terminology is not entirely consistent with the concept of the compulsory portion under the general inheritance regime (Arts. 14–16 of the ZDKG) (Zupančič and Žnidaršič Skubic, 2009, p. 302, 303). Under special conditions, the decedent's surviving spouse who did not inherit the protected farm is entitled to a usufruct over the protected farm (Art. 17 of the ZDKG). By means of these special provisions on the rights of other persons—namely, limiting the circle of entitled persons, reducing their inheritance share to the compulsory portion (and only to its monetary value), linking the payment of such share to extended deadlines, allowing for the reduction of the share, and requiring the mandatory imputation of gifts and legacies—the law enables the heir of the protected farm to take it over under conditions that do not impose an excessive burden (Zupančič and Žnidaršič Skubic, 2009, p. 306).

Among the special provisions of the ZDKG governing intestate succession, it is worth noting the special right of the decedent's spouse to exclude from the estate an amount corresponding to their contribution to the increase in the value of the protected farm. This value is not awarded in kind, except in respect of items that are not essential to the protected farm. If the excluded portion is not returned in kind, the heir who inherited the protected farm must pay its value within a period determined by the court, which may not exceed two years (Para. 1 Art. 20 of the ZDKG). At the request of the entitled person referred to in the previous paragraph or the heir who inherited the protected farm, the court may, for health, social, or other reasons (e.g., the farm's economic capacity), convert this right into a right to lifetime maintenance to be provided by the heir of the protected farm (Para. 2 Art. 20 of the ZDKG).

In addition to the special measures and restrictions aimed at preserving protected farms in cases of intestate succession, the ZDKG also prescribes special measures and restrictions for testamentary succession. A testator may bequeath a protected farm by will to only one heir, who must be a natural person (Para. 1 Art. 21 of the ZDKG). By way of exception, the testator may bequeath a protected farm to multiple heirs if it is left to spouses, or to one parent and a child or adopted child, or their descendant; however, in such cases, the protected farm may not be physically divided (Para. 2 Art. 21 of the ZDKG). If the testator disposes of the protected farm in contravention of these provisions, the estate is inherited according to the rules of intestate succession (Para. 3 Art. 21 of the ZDKG).

The principle of indivisibility of a protected farm in testamentary succession is further implemented in the ZDKG through specific restrictions on legacies. A testator may grant a legacy concerning a part of the protected farm only if doing so does not significantly impair the economic viability of the protected farm (Para. 1 Art. 22 of the ZDKG). Monetary or other legacies that would place an excessive burden on the heir of the protected farm may, upon the heir's request, be reduced by the court (Para. 2 Art. 22 of the ZDKG).

A decedent could potentially circumvent the mandatory provisions of the ZDKG through legal transactions conducted during their lifetime. The ZDKG therefore provides that contracts for the transfer and division of property during the lifetime of the owner, as well as lifetime maintenance contracts (gift agreements in contemplation of death), may not be used to dispose of a protected farm in a manner contrary to the ZDKG (Art. 24 of the ZDKG).

2.2. Possibilities for the Protection of Family Companies through the Statutory Introduction of Measures Similar to those Governing the Protection of Protected Farms under the ZDKG

Slovenian legislation does not provide for the protection of family companies upon inheritance measures equivalent to those laid down in the ZDKG for the protection of protected farms. This raises the question of whether similar statutory measures could be applied to safeguard family companies. The reasons for protecting family companies upon the death of the owner are, in essence, analogous to those underlying the protection of protected farms. Upon the death of an owner who managed (and possibly founded) the business, the application of the general rules of inheritance creates the risk that the enterprise will be divided among several heirs, which may result in its dissolution if all heirs are not simultaneously interested in continuing its operations. The interest in preventing the collapse of family companies due to division in inheritance goes beyond private concerns and constitutes a broader public interest. Family companies form an important part of the global economy, employing a substantial number of people and generating significant added value.¹¹

Whenever statutory restrictions are imposed on property rights, the question of their constitutional compatibility inevitably arises. The Constitution RS guarantees the right to private property and inheritance (Art. 33 of the Constitution RS). Although Article 33 refers explicitly to property rights, it protects all rights that constitute the exercise of individual freedom in the economic sphere. This means that the Constitution RS safeguards not only property rights as defined in civil law but also offers protection against interference with other existing legal positions that, in a manner similar to ownership, have economic value for the individual and thereby enable them to exercise freedom of action in the economic sphere (Judgment of the Constitutional Court of the Republic of Slovenia, no. U-I-199/02, 21 October 2004). The Constitutional Court of the Republic of Slovenia adopted this position in relation to the proprietary status of a shareholder in a joint-stock company. However, this position may be generalised to apply to the proprietary status of holders of shares in other forms of companies as well. Accordingly, the Constitution RS protects all rights representing the exercise of individual freedom in the economic sphere, including managerial and proprietary rights arising from a share in a company (Judgment of the Constitutional Court of the Republic of Slovenia, no. U-I-165/08, Up-1772/08, Up-379/09, 1 October 2009). Property rights, however, are not unlimited: the law may determine the manner of acquisition and enjoyment of property so as to ensure its economic,

¹¹ https://www.ey.com/en_gl/newsroom/2025/03/largest-500-family-businesses-amount-to-world-s-third-largest-economy (9. 8. 2025).

social, and ecological functions (Para. 1 Art. 67 of the Constitution RS). In the case of statutory restrictions on the inheritance of a share in a company, it is therefore necessary to assess whether such restrictions are consistent with Para. 1 Art. 67 of the Constitution RS. Limitations on the inheritance of family companies would serve to ensure the economic function of property, as they would prevent the fragmentation of such businesses through inheritance and reduce the risk of their dissolution. This would preserve the companies as an economic whole, enabling the continuation of efficient management and competitive operations in the market. At the same time, the social function of property would be safeguarded, as such measures would ensure the livelihood of the heirs of family companies. This could be achieved by prohibiting the division of family companies and allowing the heir to take over the company under conditions that do not impose an excessive burden. Undoubtedly, the preservation of the numerous jobs created by family companies in the economy also falls within the scope of ensuring both the economic and the social functions of property.

The ZDKG provides special measures only for those farms that meet two conditions—farm size and ownership status. Similarly, in the context of protecting family companies, it would first be necessary to define which enterprises qualify as family companies and are therefore to be safeguarded. As with protected farms, it would be sensible to employ the criteria of size and ownership structure; however, this definition is more complex for companies because they are typically legal persons. A size criterion would be appropriate, since it would not be sensible to afford special protection to either very small or very large family companies. The Slovenian Companies Act (Uradni list RS (Official Journal of the Republic of Slovenia), no. 65/09, 33/11, 91/11, 32/12, 57/12, 44/13, 82/13, 55/15, 15/17, 22/19, 158/20, 18/21, 18/23, 75/23, 102/24; *hereinafter ZGD-1*) classifies commercial companies as micro, small, medium-sized, and large (Para. 1 Art. 55 of the ZGD-1). For a company to fall into one of these categories, at least two of three thresholds must be met on the balance-sheet date of the annual financial statements: the average number of employees in the financial year, net sales revenue, and the value of assets (Paras. 2–5 Art. 55 of the ZGD-1). A similar approach—using analogous criteria—could be adopted to prescribe the size of an undertaking that would qualify as a family company. With respect to the second criterion—ownership structure—the law should require that family members hold equity interests in the company and that such family members are employed in it. Criteria analogous to those for protected farms could be envisaged: immediately prior to death, the equity participation could be held by a single natural person, by spouses or partners in a non-marital union, or by one parent together with a child or adopted child (or their descendant). In defining a family company, however, it would be necessary to account for the specific features of participation in a legal person

and, in some situations, to introduce additional criteria. If the decedent were the sole shareholder, an additional criterion should be stipulated—namely, that other family members are also employed in the company. Otherwise, one would arrive at an absurd outcome in which special measures apply to all companies of a given size where the sole shareholder has died, even if the enterprise has no substantive connection to other family members. Unlike the protection of a protected farm, where the object of protection is the farm itself, the protection of companies—without tying it to a particular legal form or specific activity—would therefore require an additional criterion that renders the enterprise a family company in substance. If spouses or partners, or parents and descendants, hold interests in the company, situations in which non-family persons also hold equity should be treated separately. In such cases, the company should be considered a family company only if an additional criterion is met: family members must exercise a controlling or decisive influence, i.e., an influence sufficient to determine the company's most important decisions. Given the aim of protecting family companies, it would be unsound to classify as family companies enterprises in which, for example, spouses hold only a minor equity stake that merely constitutes a financial investment, without their active involvement in the undertaking.

In regulating the specific rules on the inheritance of family companies, the same fundamental principles should apply as in the inheritance of protected farms, the principle of indivisibility of the family company upon succession and the principle that the successor should take over the family company under conditions that do not place an excessive burden upon them. The first principle would mean that, as a rule, the family company would be inherited by only one heir. Solutions analogous to those set out in Art. 7 to 9 of the ZDKG could be envisaged. In particular, it would be reasonable to apply criteria similar to those in the first indent of the first paragraph of Art. 7 of the ZDKG, whereby the heir should be the person intending to carry on the relevant business activity, and those in the second indent of the same provision, giving priority to persons who have contributed through their work or earnings to the preservation or development of the family company. The second principle, that the successor should take over the family company under conditions that do not place an excessive burden upon them, could be implemented, analogously to the regime for protected farms, through special provisions that limit the circle of persons entitled to inherit, reduce their inheritance share to the compulsory portion and only to its monetary value, link the payment of such shares to extended deadlines, allow for the reduction of such shares, and require the mandatory imputation of gifts and legacies. In the special succession regime for family companies, it would be essential to ensure that the financial burden of paying other heirs does not fall on the company itself but on the heir who has taken over the family company. The family company should not finance its own

acquisition, as this could, in the worst case, lead to insolvency and jeopardize both the position of its creditors and the preservation of jobs. So, a similar rule to the rule prohibiting financial assistance in corporate law should be adopted (Prelič, Kocbek, 2018, p. 1533).

It would be reasonable for a special succession regime for family companies, modelled on the special regime for protected farms, to also provide grounds for excluding from inheritance an heir who would otherwise be eligible to inherit the family company. Such grounds would include circumstances rendering the heir incapable or unsuitable to take over the family company, such as mental illness, psychological disorders, prodigality, alcoholism, and similar conditions. The possibility of excluding an heir on such grounds is important, as without it the primary objective of a special succession regime for family companies, the survival of the business despite the succession process, would not be achieved.

For the complete succession protection of family companies, certain restrictions should also be provided in the context of testamentary succession. Following the model of the rules on testamentary succession for protected farms, the testator should, as a general rule, be permitted to bequeath the family company by will to only one heir (analogous to Para. 1 Art. 21 of the ZDKG). By way of exception, it should be permissible for the testator to bequeath the family company to multiple persons if it is left to spouses or to one parent together with a child or adopted child, or their descendant (analogous to Para. 2 Art. 21 of the ZDKG).

An analysis of the provisions of the ZDKG governing the special inheritance regime for protected farms has shown that, in protecting family companies, it would be possible to adopt statutory measures that are essentially the same as, or similar to, those applied to the inheritance of protected farms. Such measures would prevent the fragmentation of a family company upon the death of the owner and, consequently, the potential dissolution of the company. It should be emphasized, however, that a complete transposition of the rules on the inheritance of protected farms would not be feasible. Within the framework of family companies, the subject of regulation is typically a legal person, which necessitates a consideration of the distinctive legal characteristics arising from membership in such an entity and the consequent subjection to the normative regime of corporate governance (Dugar, 2021, p. 36).

3. The Asset Management Foundation in Hungarian Law and Its Role in the Intergenerational Transfer of Family Wealth¹²

3.1. Introduction

Under Hungarian law, asset management foundations were introduced as a distinct type of foundation¹³ pursuant to Act XIII of 2019 (Official Gazette of Hungary no. 43 of March 14, 2019; *hereinafter* Act on Asset Management Foundations). The general provisions on foundations contained in the Hungarian Civil Code (Act V of 2013, Official Gazette of Hungary no. 30 of February 26, 2013; *hereinafter* HCC) apply to asset management foundations as supplementary rules. An asset management foundation may also be established for a public-benefit purpose; however, the present analysis focuses specifically on those established for private purposes, and in particular for the management of family wealth.¹⁴

Asset management foundations are situated within the general system of foundations. The previous Hungarian Civil Code (Act IV of 1959, Published in the Official Gazette of Hungary no. 108 of November 4, 1959), even after the political transition, permitted the establishment of a foundation only for a lasting public-benefit purpose. The current HCC does not prescribe a public-benefit purpose, thereby opening the way for the establishment of private-purpose foundations. Under the HCC, however, the founder may be a beneficiary of the foundation only if the foundation's purpose is the preservation and care of the founder's scientific, literary, or artistic works; and a relative of the founder may be a beneficiary only if the foundation's purpose is the preservation and care of that relative's scientific, literary, or artistic works, the relative's nursing, care, maintenance, the bearing of the relative's healthcare expenses, or the support of the relative's formal education by scholarship or other means.

In economic and legal discourse, a demand emerged for allowing both natural and legal persons to establish foundations whose principal activity is the professional management of assets. The codification of the rules on fiduciary

¹² All translations from Hungarian were prepared by the author, Kinga Ilyés.

¹³ For a general discussion of foundations in Hungarian law, see Csehi, 2006.

¹⁴ Separate regulation is provided for public benefit asset management foundations performing public duties under Act IX of 2021; however, this is a specific construct aimed primarily at carrying out state functions and therefore does not fall within the scope of the present analysis. See Cseporán, 2022, pp. 696–704. According to the cited author, “the public benefit asset management foundation performing public duties is a *sui generis* legal entity interwoven with public and private law elements, a ‘composite legal institution’ in which both its public law character (performance of public duties) and its private law character (foundation form) are equally emphasised.” Cseporán, 2022, p. 696.

asset management did not eliminate this demand, as international examples demonstrate that a foundation, as a legal entity, is suitable for the management of private wealth over the long term, even across generations (for a comparative international analysis, see Sándor, 2021, pp. 3–5). The purpose of the Act on Asset Management Foundations was to meet this market demand by creating a special form of foundation whose principal activity is asset management.

The asset management foundation thus came into being as a new type of private foundation. As has been generally observed, “the adoption of the Hungarian regulatory framework aligns with the international trend of recent decades, and its provisions are competitive with various foreign solutions” (Sándor, 2021, p. 3).

3.2. Conditions for Establishment

According to Section 2 of the Act on Asset Management Foundations, this type of foundation may be established for the purpose of managing the assets allocated to it by the founder and, from the income derived therefrom, carrying out the tasks specified in the deed of foundation, as well as making asset distributions for the benefit of the person or persons designated as beneficiaries. The essential function of this special type of foundation is to provide asset benefits to the beneficiary or beneficiaries defined in the deed of foundation (Arató, 2020, p. 171).

This form of foundation does not require the designation of specific beneficiaries; it is sufficient for the founder to set out criteria in the deed of foundation enabling the identification of the circle of beneficiaries (the same position is taken by Borbély, 2021, p. 35).

The purpose of the foundation may not, of course, involve any unlawful, immoral, or public policy–contrary activity (Sándor, 2021, p. 8).

The purposes of asset management foundations may be extremely diverse; therefore, the primary task of the relevant legislation was to establish their common characteristics and to define those specific features which distinguish this legal institution from the general form of foundation regulated in the HCC. In the case of this special type of foundation, the activity, primarily investment and portfolio management functions, constitutes the essential distinguishing feature.

The asset management foundation may, as an economic activity, manage the assets allocated to it or placed under its fiduciary management. This foundation is established expressly for the purpose of asset management in the interest of achieving the objectives and benefiting the beneficiaries defined in its deed of

foundation, and the income generated by such activity ensures the attainment of its purposes.

Asset management foundations carry out asset management, including investment activities, exclusively with respect to their own portfolio and do not provide investment services to third parties. However, as an economic activity, they may manage not only the assets allocated to them but also assets placed under their fiduciary management.¹⁵ This is a noteworthy innovation, described in the literature as meaning that, by creating the asset management foundation, the Hungarian legislature “was the first in the world to introduce the so-called hybrid trust solution, enabling the asset management foundation to manage not only the assets allocated to it but also those placed under its fiduciary management” (Borbély, 2021, p. 32).

In a fiduciary asset management relationship, the exclusive beneficiary of the managed assets is the asset management foundation; however, it may carry out the management for the purpose of achieving its statutory objectives (asset distributions for the beneficiaries). The asset management foundation may take assets into fiduciary management only for the purpose of fulfilling the objectives set out in the deed of foundation, and the settlor may transfer assets to the foundation for fiduciary management only subject to this condition.

The legislature stipulates that the asset management foundation may engage, as an economic activity, solely in the management of assets allocated to it or placed under fiduciary management under the prescribed conditions, and, unlike business corporations, is not entitled to engage in other economic activities. Nevertheless, within the framework for asset management set out in its deed of foundation, it may establish a business corporation or acquire a shareholding therein, as this forms part of its own portfolio and is thus consistent with its objectives. The restriction set out in Section 3:379(3) of the HCC applies equally to it: it may not be a member with unlimited liability, may not establish another foundation, and may not join one.

A distinctive feature of asset management foundations is that their typically substantial capital base ensures the generation of returns necessary for their purpose-driven activities, whether for the achievement of the foundation’s objectives or for the benefit of the beneficiaries, and enables the redistribution of such returns. To this end, the Hungarian legislature deemed it appropriate to

¹⁵ “An asset management foundation, by its mere establishment and the allocation of assets required for its formation, does not thereby become a fiduciary asset manager; it acquires such legal status only if it takes additional assets into fiduciary management for the statutory purpose.” See Arató, 2020, p. 173.

prescribe a statutory minimum capital which, by the standards of domestic law, is unusually high (Sándor, 2021, p. 9).

The establishment of an asset management foundation requires that assets equivalent to at least 600 million Hungarian forints¹⁶ be allocated to the foundation [the “minimum capital”, Section 3(1) of the Act on Asset Management Foundations]. The minimum capital is not identical to the total assets allocated to the foundation, but represents the mandatory statutory lower limit thereof. Accordingly, the initial assets may exceed the minimum capital. The founder is obliged to specify in the deed of foundation, for each asset item, the particulars necessary for its identification. Prior to submitting the application for registration of the foundation, the founder must make available assets in the amount of the minimum capital. As it was stated,

“thus—unlike in the case of other legal persons—there is no possibility of deferring the provision of the initial capital (the assets allocated to the foundation); this obligation must be fully discharged at the time of establishment. The legislation permits only the later provision of that part of the asset contribution which exceeds the statutory minimum capital (Arató, 2020, p. 172).”

The minimum capital requirement has been subject to academic criticism. According to one author, the statutory requirement of 600 million forints raises concerns in light of the principles of legal equality and the prohibition of discrimination, as it renders the establishment of this legal institution inaccessible to the vast majority of Hungarian society. The author analyses in detail the constitutional principles of equality before the law and non-discrimination, with particular attention to financial status as a protected characteristic, and argues that the regulation indirectly excludes fewer wealthy individuals from benefiting from this legal institution. It is noted that the objectives of an asset management foundation are open-ended and may be entirely private in nature, while in other jurisdictions the minimum capital requirement is significantly lower, thereby making the structure accessible to a much broader segment of the population. In Miczán's view expressed in the scientific literature, the current regulation not only restricts but effectively deprives less wealthy legal subjects of the right to establish a legal entity, to associate, and to dispose of property freely for this purpose; thus, the proportionality and constitutionality of the regulation may be called into question (Miczán, 2020, pp. 12-16).

¹⁶ Approximately EUR 1.5 million.

Similarly, it has been observed that

“from the fact that the legislature has set the minimum assets to be allocated to an asset management foundation at a level far exceeding the size of average Hungarian private wealth, it may be inferred that this legal institution was intended primarily not for domestic asset owners. The legislature’s primary objective may have been to attract to Hungary offshore wealth accumulated by Hungarian asset owners in tax havens since the political transition. In addition, it may have been intended to draw certain foreign assets to Hungary in the context of a geographical diversification strategy (...) Nonetheless, there will of course be asset owners in Hungary who can exploit the advantages of the asset management foundation, although many years may pass before the legal institution becomes widespread in domestic circles” (Arató, 2020, p. 173).

The minimum capital must be provided in such a manner that it is at the disposal solely of the asset management foundation following registration. The founder may transfer to the foundation assets exceeding the minimum capital at a later date, subject to a specified deadline. While the minimum capital is sufficient for registration, the foundation may demand the transfer of any assets exceeding the minimum capital if the founder fails to fulfil the obligation within the agreed time limit.¹⁷ The minimum capital does not include assets placed under fiduciary management; these must be provided by the founder independently.

Pursuant to the deed of foundation, the founder or a joining contributor may (beyond the asset allocation undertaken and fulfilled at the time of establishment or accession) also undertake to provide additional assets to the foundation in order to increase the assets allocated at the time of establishment or accession.

The minimum capital may be contributed in any form of asset permitted by the HCC for the establishment of legal persons. Accordingly, in addition to cash, the foundation’s assets may consist of in-kind contributions. Given that the appointment of a permanent auditor is mandatory for asset management

¹⁷ As Section 3 (4) of the Act on Asset Management Foundations states, where the exercise of the founder’s rights is vested in the executive body of the foundation (the board of trustees) or in the foundation asset controller, the foundation shall be entitled, through them, to demand fulfilment of this asset contribution. If the founder has retained the exercise of the founder’s rights personally and fails to fulfil this obligation despite a written request from the board of trustees to that effect, the board of trustees shall be entitled to exercise the founder’s rights until such fulfilment occurs.

foundations, the valuation of any in-kind contribution falls within the duties and responsibilities of the permanent auditor.

The deed of foundation of an asset management foundation must be executed either in notarial form or as a private deed countersigned by an attorney (Section 9(1) of the Act on Asset Management Foundations). Legal representation is mandatory in the court registration procedure. The deed of foundation must set out the fundamental purposes and principles governing the management and utilization of the foundation's assets. The founder may also attach, as an integral part of the deed of foundation, an investment policy statement. The investment policy statement must include the definition of the portfolio constituting the foundation's assets, provisions on risk management, and the decision-making procedure applicable to investments. If the founder does not attach the investment policy statement to the deed of foundation, one must be prepared, based on the foundation's purposes and principles, within six months from registration, on the proposal of the supervisory board, and approved by the person exercising the founder's rights. Where the founder's rights are exercised by the board of trustees, the approval of the investment policy statement shall be decided jointly by the board of trustees and the supervisory board, after obtaining the opinion of the foundation asset controller.

3.3. Exercise of Founder's Rights

Founder's rights may be exercised in three ways:

- (a) the founder retains the exercise of such rights personally, with the possibility of transferring them to the foundation at a later stage;
- (b) the founder designates the board of trustees to exercise the founder's rights;
or
- (c) in place of the board of trustees, the founder may designate a foundation asset controller.

In our view, the literature has rightly emphasized that it is inadvisable to grant a beneficiary the ability to exercise founder's rights, and the Hungarian regulation of asset management foundations is consistent with this position (Csehi, 2006, p. 343). This position is justified by the structural role of founder's rights in the internal constitution of the foundation. Founder's rights typically entail decisive influence over governance (notably the appointment and removal of trustees) and, depending on the founding instrument, the capacity to shape the framework of asset management and distribution. If these powers were conferred on a beneficiary, the beneficiary would cease to be merely the addressee of benefits and would become, in substance, a controller

of the institution. This would generate an inherent conflict of interest, since a beneficiary's rational incentive is to maximize individual advantage, potentially at the expense of the foundation's purpose, the long-term preservation of assets, and the equitable treatment of other, especially future beneficiaries. Accordingly, the exclusion of beneficiaries from founder's rights serves the autonomy of the foundation as a distinct legal person and supports the separation of roles.

The first scenario includes cases where the founder stipulates in the deed of foundation that the founder's rights shall transfer to the foundation upon the founder's death, dissolution without legal succession, or the occurrence of a condition specified in the deed. It is important to note that the transfer may concern either the entirety or only a part of the founder's rights.

Where the founder's rights are exercised by the board of trustees, and unless the deed of foundation provides otherwise, the appointment of members and the chairpersons of the board of trustees and the supervisory board, upon any vacancy in such positions, shall be decided jointly by the board of trustees and the supervisory board, with the additional requirement that the decision must also be supported by a majority of the members of the body in which the vacancy has arisen. The deed of foundation may also prescribe a further qualified majority requirement for such decisions.

Where the founder's rights are exercised by the foundation asset controller, and unless the deed of foundation provides otherwise, the appointment of members and the chairpersons of the board of trustees and the supervisory board, upon any vacancy, shall be decided by the foundation asset controller after consulting the board of trustees and the supervisory board. The removal of members and chairpersons of the board of trustees and the supervisory board of an asset management foundation may be decided in the same manner as their appointment, with the proviso that the deed of foundation may make such removal subject to conditions or restrictions.

3.4. Organization of the Asset Management Foundation

The operational management of the foundation is carried out by the board of trustees, which functions as the foundation's executive body. In respect of the board of trustees of a non-public benefit asset management foundation, the general rules apply, meaning that the board must consist of three members. However, the prohibition contained in the HCC, under which a beneficiary of the foundation and their close relatives may not, under penalty of nullity, serve as members of the board of trustees, does not apply to non-public benefit asset management foundations, thereby providing genuine flexibility (Borbély,

2021, p. 34). This fact, in turn, underscores the family character of such foundations. As the law *de lege lata* prescribes a five-member board of trustees only for public benefit asset management foundations, in our view, there is no impediment for a non-public benefit asset management foundation to have a sole trustee appointed by the founder as the sole executive organ of the foundation in accordance with the relevant provisions of the HCC. The rules applicable to the board of trustees shall apply *mutatis mutandis* to the sole trustee.

The appointment of a supervisory board and its functioning, as well as the engagement of a permanent auditor, is mandatory (Section 6(2) of the Act on Asset Management Foundations). The supervisory board must consist of at least three natural persons, and (unless the deed of foundation provides otherwise) the members shall elect the chairperson from among themselves. However, the law allows the deed of foundation of a non-public benefit asset management foundation to stipulate that no supervisory board shall operate; in such case, the functions and powers of the supervisory board are exercised by the foundation asset controller.

Where, in the case of an asset management foundation, the founder has designated the board of trustees to exercise the founder's rights, or has transferred such rights to the foundation, the founder must also appoint a foundation asset controller (Sándor, 2021, p. 10) in the deed of foundation for the purpose of monitoring the exercise of such rights and the management of assets in line with the foundation's purposes, independently of the foundation's supervisory body.¹⁸ A foundation asset controller may only be a statutory auditor's company, a statutory auditor, a law firm, an attorney-at-law, or another person of good repute who possesses a specialized higher education degree as defined in the deed of foundation. The founder, members and chairpersons of the board of trustees and the supervisory board, other officers or employees of the foundation, its auditor, its beneficiaries, and their relatives are ineligible to serve as the foundation asset controller. The deed of foundation may set out additional incompatibility rules for this position. If, in a non-public benefit asset management foundation, the founder designates the foundation asset controller instead of the board of trustees to exercise the founder's rights, the appointment of a supervisory board is mandatory.

¹⁸ The founder may authorize the asset management foundation, in the deed of foundation, to appoint the foundation asset controller. In such case, the decision on the appointment or engagement of the asset controller shall be taken jointly by the board of trustees and the supervisory board; however, such appointment or engagement shall require the approval of the registry court (Section 7(2) of the Act on Asset Management Foundations).

Thus, in our opinion, for a non-public benefit family asset management foundation, seven organizational (“governance”) models can be envisaged:

- (a) founder exercising founder’s rights + board of trustees + auditor (the simplest structure, with no obligation to appoint either a supervisory board or an asset controller);
- (b) founder exercising founder’s rights + board of trustees + supervisory board + auditor;
- (c) founder exercising founder’s rights + board of trustees + supervisory board + (optionally) asset controller + auditor;
- (d) founder exercising founder’s rights + board of trustees + asset controller exercising supervisory board functions (appointment mandatory) + auditor;
- (e) board of trustees exercising founder’s rights + supervisory board + (mandatory) asset controller + auditor;
- (f) board of trustees exercising founder’s rights + asset controller exercising supervisory board functions (mandatory) + auditor;
- (g) board of trustees + asset controller exercising founder’s rights + (mandatory) supervisory board + auditor.

These governance models reflect the possible combinations of the three types of founder’s rights holders (founder, board of trustees, asset controller) and the two types of supervisory structures (supervisory board or asset controller).

As has been noted, “it is apparent that the staffing requirements of an asset management foundation are extensive, and the founder must therefore anticipate significant maintenance costs” (Arató, 2020, p. 173).

The deed of foundation may prescribe qualification, educational, and other professional requirements for the chairpersons and members of the board of trustees and the supervisory board (Section 6(3) of the Act on Asset Management Foundations). Given that asset management foundations, particularly their executive and supervisory bodies, carry out professionally responsible functions, and that their operational security, prudence, and risk management are of significant interest to both the founder and the foundation, it is advisable for the deed of foundation to ensure that members of these bodies are well-prepared and possess appropriate professional competence.

3.5. External (Asset Controller) Oversight of Asset Management

It is appropriate to designate, outside the strict organizational structure of the foundation, a person vested with the necessary powers to intervene against

decisions causing loss of assets, violating the investment policy statement, or otherwise infringing lawful operation. This function is performed by the foundation asset controller, who, in particular, may initiate a lawfulness supervision procedure in the event of inaction by the supervisory board (Arató, 2020, p. 173). Where the board of trustees exercises the founder's rights, appointment of an asset controller is mandatory, and the deed of foundation must regulate both such appointment and the remuneration of the asset controller.

The function of the foundation asset controller is to monitor whether the asset management of the foundation complies with the objectives specified in the deed of foundation, the founder's asset management directives, and the provisions of the investment policy statement (Section 8(1) of the Act on Asset Management Foundations). The asset controller also monitors compliance by the board of trustees or supervisory board with the statutory obligations applicable to them.

The asset controller has a right to provide an opinion on matters falling within the scope of founder's rights exercised by the board of trustees. In terms of access to documents and the right to receive information, the asset controller has the same entitlements as the supervisory board.

If the operation or procedure of the board of trustees or the supervisory board exercising the founder's rights does not comply with the law or with the deed of foundation, the asset controller shall call upon the body concerned to restore lawful operation. If the body fails to comply with such request, the asset controller may initiate a lawfulness supervision procedure before the registry court.

If authorized by the deed of foundation, the asset controller may, in cases specified therein, apply to the court for the annulment of a decision of the board of trustees or supervisory board that contravenes the law, the deed of foundation, or the investment policy statement.

If no decision is taken on the filling of a position of member or officer of the board of trustees or supervisory board within 90 days from the occurrence of the vacancy, the registry court shall decide the matter upon the proposal of the asset controller.

The asset controller is entitled to remuneration, which must be paid from the assets managed by the asset management foundation.

It is important to note that the asset management foundation has no accounting obligation towards the beneficiary. However, in order to ensure lawful operation and effective oversight, the legislature has made the appointment of

an asset controller mandatory where the board of trustees exercises the founder's rights, as well as for public benefit asset management foundations performing public duties. In contrast, the institution of the protector, known in fiduciary asset management, may only be created under a dispositive regulatory framework. The fundamental function of the asset controller is not the enforcement of beneficiary rights, but the supervision of the lawfulness of the foundation's asset management activities; accordingly, the beneficiary has no direct influence over the asset controller's actions (Borbély, 2021, p. 41-42).

3.6. Restrictions on Asset Management by the Asset Management Foundation

The founder may, in the deed of foundation, determine the minimum level of assets allocated to the foundation below which the assets of the asset management foundation may not be reduced; this may not be set lower than the statutory minimum capital (Section 10(1) of the Act on Asset Management Foundations). In the absence of such a specification, the statutory minimum capital shall be deemed to constitute this threshold. This constraint reinforces the asset-lock character of the institution by setting a hard limit to the depletion of the endowment through distributions or other dispositions. It serves the protection of beneficiaries, particularly those with deferred, contingent, or future interests.

If the assets of the asset management foundation fall below the prescribed minimum level, the benefits payable to the beneficiaries shall be proportionally reduced or withheld entirely until the foundation's assets once again reach the minimum threshold.

3.7. Termination of the Asset Management Foundation

A non-public benefit asset management foundation may be terminated at the request of the founder exercising the founder's rights; upon such a request, the registry court, in non-contentious civil proceedings, shall establish the occurrence of the circumstance giving rise to the foundation's termination. The termination of the foundation does not affect the fulfilment of obligations already determined and due in favor of the beneficiaries.

An asset management foundation shall also be terminated if, for a continuous period of three full years, its assets do not reach the statutory minimum capital amount; in such a case, it shall be deemed that the achievement of the

foundation's purpose has become impossible. The objective of this rule is to exclude the operation of foundations that are permanently deprived of assets and thereby incapable of fulfilling their purpose. The legislature treats this situation, as a matter of statutory fiction, as equivalent to the impossibility of achieving the foundation's purpose.

3.8. The Significance of the Asset Management Foundation in Intergenerational Family Wealth Transfer

An asset management foundation is a purpose-bound, legal personality–possessing vehicle of assets, which institutionalizes the intergenerational transfer and preservation of family wealth. The assets are segregated, dedicated to a specific purpose, and managed in accordance with pre-established conditions, serving the family's long-term interests. Its normative basis lies in the supplementary provisions of the HCC and in the Act on Asset Management Foundations; the essential distinguishing feature of this construct is not the specificity of its founding purpose, but its professional asset management function.

The segregation of the foundation's assets, the purpose-bound and conditional redistribution of its yields, and the finely adjustable, pre-definable framework of beneficiary entitlements together ensure that the wealth serves family purposes not as a one-time inheritance, but as a regulated and sustainable stream of benefits. This arrangement moderates the risk of squandering large, lump-sum inheritances and prevents the fragmentation of wealth, particularly in family businesses, where ownership stability is institutionally separated from the distribution of returns.

The capital minimum functions as an economy-of-scale threshold designed to protect yield-generating capacity and continuity, despite the criticism raised in the Hungarian legal literature. The restriction of economic activities to the foundation's own portfolio limits risk-taking while enabling stable ownership structures in family businesses through participation in corporate entities. The board of trustees, the supervisory board, the mandatory auditor, and the foundation asset controller vested with protector powers collectively establish a well-adjusted governance and oversight system, addressing principal–agent tensions through institutional means and enforcing lawful, prudent asset management. Amendment mechanisms simultaneously preserve the core identity of the founder's intent and ensure adaptability to changes in the family, market, or legal environment; meanwhile, the inviolability of vested beneficiary rights is a prerequisite for maintaining trust and stability.

The construction is completed by the linkage of distributions to asset-preservation constraints and by a termination threshold tied to sustained capital loss, both of which prioritize the protection of the real value of the capital stock over immediate distributive interests and exclude the possibility of nominal operation. Thus, the asset management foundation is both a succession technique and, more fundamentally, a multi-generational family institution: within a coherent, legally disciplined framework of assets, entitlements, and risk management, it ensures that the founder's objectives and family values are realized over the long term in a predictable, conflict-minimizing manner.

These effects allow family wealth to operate not in response to ad hoc inheritance events, but within a pre-planned, transparent, and conflict-minimizing order, extending across generations. The asset management foundation offers a structural alternative to the estate-centered logic of succession: while succession opens upon death and the heir acquires the estate *ipso iure* (HCC Section 7:87 (1)-(2)), the decisive wealth-bearing positions may be relocated, by the prior endowment, into a continuing legal person, thereby reducing the practical pressure for post-mortem partition and co-ownership. At the same time, the instrument is compatible with *mortis causa* planning as well, since the HCC expressly permits the establishment of a foundation by written will or inheritance contract (Section 3:388. (1)). Its design, however, must be aligned with the Hungarian regime of compulsory share (HCC Section 7:75; Section 7:82). The base of the compulsory share is the net estate plus *inter vivos* "donations," explicitly including assets entrusted to asset management (HCC Section 7:80 (1)), subject to the statutory exclusions, most notably the ten-year rule (a temporal filter that excludes donations made more than ten years before death) (HCC Section 7:81 (1) a)). Accordingly, if endowments are made within the relevant period, the compulsory share may, where necessary, be enforced beyond the estate itself against recipients of donations within ten years irrespective of the chronological order of the gifts (HCC Section 7:84 (1) b)). The asset management foundation therefore channels succession planning into an institutional framework in which the stability of ownership can be preserved, and the distributional question is shifted to the level of benefits, while compulsory-share claims remain satisfiable if breached, typically in money (HCC Section 7:86 (3)).

A further, practically relevant objective in the Hungarian context is the preservation of family business assets as an undivided control block: by placing shares of a certain company into the foundation, ownership remains concentrated in a single, continuous legal person rather than being fragmented among heirs through succession. In turn, the economic interests of family members may be satisfied primarily through distributions from the returns on the business (dividends or other yield), while managerial control and strategic

decision-making are stabilized. The asset management foundation also enables intergenerational transfer by separating the continuity of ownership from the generational change in beneficiaries, so that wealth and control may pass across generations without repeated fragmentation at each succession event.

4. Conclusions

Advance planning for the transfer of a family company to the next generation is crucial for its continued existence and successful operation. If the owner does not arrange for the transfer of the family company in the event of death—or dies unexpectedly before doing so—the rules of inheritance law will apply. Slovenian inheritance law does not provide for special succession rules where the estate includes a family company. The application of the general rules of inheritance in such cases may lead to the division of the company and, in the worst case, to its dissolution. It is noteworthy that Slovenian legislation prescribes special rules for the inheritance of protected farms, which prevent their fragmentation through succession. An analysis of these special rules indicates that similar succession provisions could be introduced into legislation for situations where the transfer of a family company has not been arranged in advance and the general rules of inheritance must apply. The fundamental principles of such a regime would be the indivisibility of the family company upon succession and the requirement that the successor be able to take over the company under conditions that do not impose an excessive burden. Such an approach would prevent the fragmentation of the family company, ensure its transfer to an heir who is willing or qualified to continue its management, and preserve jobs within the economy.

Under Hungarian law, the asset management foundation constitutes an effective instrument for family wealth planning, as well as for the intergenerational transfer and preservation of family and business assets. By introducing greater flexibility into the rigid rules of succession, it ensures that assets are preserved for subsequent generations. The founder may predetermine, for several generations in advance, the conditions and beneficiaries entitled to the assets or to the income derived therefrom. As noted in the legal literature, “the legal institution of the asset management foundation is one of the most effective means of preserving, maintaining, increasing, and transferring substantial wealth across decades or even centuries, provided that the founder is able to contribute at least six hundred million Hungarian forints in assets and is capable of financing the relatively high operational costs arising also from the organizational structure of the asset management foundation. Family businesses will likewise be able to take advantage of this new opportunity under

such conditions, in order to overcome the difficulties associated with generational transition” (Arató, 2020, 174).

When considered together, the Slovenian proposal for special succession rules for family companies and the Hungarian asset management foundation highlight two distinct but complementary approaches to preserving family companies. The Slovenian model seeks to safeguard continuity through statutory limitations on fragmentation, thereby protecting the family company as an economic unit of wider social importance. It can serve as an effective legal tool to prevent fragmentation through succession if the intergenerational transfer has not been planned in advance. By contrast, the Hungarian foundation provides a private-law mechanism that enables families to exercise broad autonomy in determining the long-term governance and transfer of their wealth. Although these instruments differ in both accessibility and scope, they pursue the same fundamental goal of ensuring stability in intergenerational succession. A comparative view therefore suggests that both tools can be effective in protecting family companies and wealth. The Hungarian asset management foundation facilitates advance planning of the intergenerational transfer of family wealth, while the Slovenian model may function as a protective measure if such transfer has not been planned in advance. Since each tool applies in different circumstances, they could also coexist within a national regulatory framework to safeguard family companies and wealth in both scenarios.

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ACCOUNTING BOOKS AS EVIDENCE IN TAX AND CRIMINAL PROCEEDINGS OF THE REPUBLIC OF SERBIA

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Abstract

The authors' focus is directed toward the analysis of one frequently used means of evidence, as well as a comparative analysis of this means of evidence in tax and criminal proceedings. After a brief overview of the taxpayers' obligation to keep accounting books, special attention is devoted to the role of accounting books as evidence, first in tax proceedings and then in criminal proceedings. The importance of business books from the aspect of tax and criminal proceedings is reflected in the fact that in the event of a lack of evidence of the existence of the criminal offense of tax evasion, the court will issue an acquittal. Namely, there is a possibility that during the tax proceedings, omissions may occur that relate to an inadequately determined amount of tax liability or inadequate documentation used when determining the tax liability. In such cases, an expert examination of business books is a crucial evidentiary measure for convicting the perpetrator of the criminal offense of tax evasion. Irregularities in the keeping of business books during the tax proceedings may lead to an acquittal of the tax evader due to a lack of evidence.

For certain types of taxes, as well as for particular categories of taxpayers, accounting books play a key role in determining their tax liability. This raises the question of whether the role of this means of evidence in tax and criminal proceedings has been adequately regulated by the applicable procedural laws. In response to this

question, the authors, on the basis of the results obtained from their research, will propose a *de lege ferenda* solution.

Keywords: *tax proceedings, tax audit, accounting books, criminal proceedings, evidence collection*

1. Introduction

The proper and timely fulfillment of tax liabilities largely depends on taxpayers themselves and their attitude toward paying taxes. Since taxation reduces the disposable income of natural persons, or the profits of business entities, an accompanying phenomenon of the taxation process is taxpayer behavior aimed at partially or completely avoiding tax liabilities. When taxpayers violate tax regulations through unlawful actions, tax offenses occur, among which tax crimes represent the most serious form. Under normal circumstances, assuming that the taxpayer will voluntarily pay taxes, it is necessary to determine the amount of tax liability. This is achieved in tax proceedings conducted by the competent tax administration.

Bearing in mind that the evidentiary process in tax crimes is by no means an easy path to the final conclusion of criminal proceedings, since it depends on the type and manner of the tax crime, in addition to the skills and professional knowledge of the participants, and especially knowledge of criminal proceedings, it is necessary that certain evidentiary actions and items of evidence be firmly and unequivocally established in the legal norms. The authors approached the analysis of the subject matter using normative and comparative methods, and in the conclusion provided certain *de lege ferenda* proposals aimed at overcoming the observed shortcomings.

2. The Importance of Accounting Books from the Perspective of Tax Proceedings

2.1. The Obligation to Keep Accounting Books

In tax proceedings, tax authorities hold broad powers, which is logical given the importance of realizing the public interest. The nature of the tax and legal relationship is largely influenced by the necessity of protecting the state's fiscal interests, which consist in the timely and proper fulfillment of tax obligations by taxpayers. It is therefore understandable that obligations take precedence over the rights of taxpayers. However, in order to prevent unlawful and improper conduct by tax authorities, modern states, through their domestic legislation, as well as through certain measures and activities at the international level, establish taxpayers' rights as a balance to their obligations. The recognition and guarantee of taxpayers' rights should strengthen their position within the tax system (Andjelković, 2008, p. 164). The principal obligation of taxpayers is the timely payment of taxes. All other obligations imposed on taxpayers are conditioned by this main obligation. Among the list of obligations

prescribed by the Serbian legislature is also the obligation to keep prescribed accounting books and records for taxation purposes (Law on Tax Procedure and Tax Administration, Official Gazette of the Republic of Serbia, 80/02, 84/02, 79/03, 55/04, 61/05, 85/05, 62/06, 61/07, 20/09, 72/09, 53/10, 101/11, 2/12, 93/12, 47/13, 108/13, 68/14, 105/14, 91/14, 112/15, 15/16, 108/16, 30/18, 95/18, 86/19, 144/20, 96/21, 138/22 and 94/24 - LTPTA, Art. 25 para. 1 item 4).

Accounting books represent a type of record that taxpayers keep in accordance with the activity they perform, in the manner prescribed by law. Proper keeping of accounting books ensures reliable data on the business results of the taxpayer. According to our tax legislation, this obligation is imposed on companies and other legal entities, as well as on taxpayers who generate income from independent activity (entrepreneurs). Companies and other legal entities keep accounting books according to the double-entry bookkeeping system, in compliance with applicable accounting regulations. Entrepreneurs may keep accounting books either under the double-entry bookkeeping system or under the single-entry bookkeeping system. In the double-entry bookkeeping system, the following are kept: the income ledger, the expense ledger, and the ledger of fixed assets and small inventory. Entrepreneurs who pay tax on income from independent activity in a lump-sum determined amount (lump-sum taxed entrepreneurs) keep only the sales and purchase ledger. The double-entry bookkeeping system enables the accounting monitoring of the entire assets and business processes of the business entity. Accounting regulations prescribe in detail the keeping of the following accounting books: the journal, the general ledger, and auxiliary ledgers. The journal is an accounting book in which business changes are recorded chronologically. It may consist of a single book or several accounting books intended for business changes of certain items. The general ledger consists of accounts that systematically cover the balances and changes in assets, liabilities, equity, income, and expenses. It represents the basis for the preparation of financial statements. Auxiliary ledgers include analytical records that legal entities and entrepreneurs keep separately for different types of assets and liabilities, such as intangible assets, real estate, plants and equipment, long-term financial placements, etc. There are also other auxiliary ledgers, such as the cash journal, into which business changes arising from cash and other values kept in the cash register are recorded (Law on Accounting, Official Gazette of the Republic of Serbia, 73/2019, 44/2021 – LA, Art. 12 paras. 4, 5, 6, 8, 9). On the basis of accounting books, legal entities and entrepreneurs (except for those taxed on a lump-sum basis) prepare financial statements, the balance sheet and the income statement. While the income statement shows business success, for taxation the relevant document is the tax balance. Taxable profit, which constitutes the tax base, is determined by adjusting the profit from the income statement. This is achieved by aligning the revenues and expenses from the income statement pursuant to the provisions of the law governing corporate income taxation (Law on Corporate Income Tax, Official Gazette of the Republic of Serbia, No. 25/01, 80/02, 43/03, 84704,

18/10, 101/11, 119/12, 47/13, 108/13, 68/14, 142/14, 91/15, 112/15, 113/17, 95/18, 86/19, 153/20, 118/21, 94/24 – LCIT, Art. 6–33).

2.2. Accounting Books as Evidence in Tax Proceedings

The determination of the tax liability, tax collection, as well as the control of tax assessment and collection, is carried out through a tax procedure. This is a legal procedure representing a special administrative procedure, for which specific rules are prescribed, differing from those of the general administrative procedure. The rules of the tax procedure, as prescribed by the applicable law (LTPTA), are *lex specialis* in relation to the rules of the general administrative procedure, (Law on General Administrative Procedure, Official Gazette of the Republic of Serbia 18/2016, 95/2018, 2/2023 - LGAP). The main part of the procedure that precedes the issuance of a decision in an administrative matter is the process of evidence collection (Tomic, 2015, p. 413). In a tax procedure, the tax authorities resolve the administrative tax matter by issuing a tax administrative act. In this context, the procedural act of evidence collection plays a key role. As in other legal proceedings, facts in a tax procedure are established based on evidence. The provisions of the applicable law stipulate that the following may be used as evidence: “tax return, tax balance sheet, accounting books and records, accounting statements held by the tax administration and collected from the taxpayer or a third party, witness statement, expert report, inspection, and any other means by which facts can be determined” (LTPTA, Art. 43, para. 2).

In addition to the types of evidence that may be used in the procedure, a key aspect of the evidence collection is determining which party, the state authority or the taxpayer, bears the burden of proof. In a tax procedure, this issue is resolved so that, as a rule, the burden of proof lies with the tax authority. The tax authority bears the burden of proving the facts on which the existence of the tax obligation is based. In contrast, the taxpayer bears the burden of proof only for establishing facts that affect the reduction or elimination of the tax (LTPTA, Art. 51, para. 1). Therefore, the taxpayer is required to prove only those facts that are in his favor when attempting to reduce or fully eliminate the tax liability. The tax authority, on the other hand, is responsible for establishing all facts relevant to the existence and amount of the tax liability. During the process of establishing the facts, the tax authority may request that the taxpayer or a third party provide documents and records for inspection and verification, which can be used as evidence in the tax procedure. The applicable law specifies that these include: accounting books and records, accounting statements, business documentation, and other documents and evidence. Regarding the place of inspection and verification of the aforementioned evidence, the legislature has allowed the tax authority to decide whether the taxpayer or a third party must submit the documents to the offices of the tax authority, providing them electronically, or whether the inspection and verification will be conducted at the premises of the person required to provide them (LTPTA,

Art. 44, paras. 1 and 2). As in other legal proceedings, certain individuals are granted the right to withhold information, provide expert opinions, or refuse to present documents and items. The applicable law specifies which individuals may refuse to present accounting books and other records and under what conditions this refusal may be made. These individuals are divided into two groups. The first group consists of the taxpayer's family members, as defined by the law governing income tax.¹ The second group includes: clergy, lawyers, tax advisors, auditors, and doctors, but only regarding information that the taxpayer entrusted to them or that they obtained in their professional capacity related to the taxpayer's tax obligation. This also applies to their assistants and to persons participating in professional activities in preparation for a professional qualification. An exception to these rules applies to a person who, on behalf of the taxpayer, keeps documents, accounting books, and other records. This person may not refuse their presentation if the taxpayer would be obliged to present them had he kept them himself (LTPTA, Art. 46 para. 1 and 2, Art. 47 para. 1 and 2).

Analyzing the relevant provisions governing the use of accounting books in the evidence collection leads to the conclusion that the burden of proof lies with the tax authority, but the authority has the possibility to transfer the burden of obtaining evidence to the taxpayer, as the other party in the tax procedure, or even to a third party if the documentation is in their possession. In an administrative procedure, in the process of seeking material truth, the administrative body establishes the factual situation *ex officio*, applying the investigative principle. The purpose of the investigative principle remains the same, regardless of whether the procedure is initiated *ex officio* or at the request of a party (Milkov, Radošević, 2024, p. 522). The provisions of the law regulating tax procedures contain special rules compared to the general administrative procedure due to the specificity of the taxation process. Specifically, the determination of taxes represents a joint or individual activity of the tax authorities and taxpayers, aimed at assessing tax capacity and specifying the tax obligation (Andjelković, 2018, p. 134). Thus, the tax obligation is determined by the tax authority through the issuance of a tax decision, but for certain types of taxes and categories of taxpayers, self-assessment applies, whereby taxpayers themselves determine the amount of their tax obligation. In a tax procedure, two interests come into conflict. The first, the public interest, which consists of protection of the fiscal system, as the very purpose of the tax procedure is the determination and collection of taxes. The second, the need to protect the rights of the parties, since the taxpayer appears as the other party in the tax procedure. The taxpayer has a legal interest in ensuring that the existence of his tax obligation is determined and the amount of tax liability is assessed in a proper and lawful manner. From the perspective

¹ A family member, within the meaning of the Personal Income Tax Law, shall be considered to include: the spouse, parents, children, adoptee, and adoptive parent of the taxpayer (Personal Income Tax Law, 2025, Art. 10 para. 2).

of administrative procedure, the authority establishes the factual situation *ex officio*, in accordance with the investigative principle. In a tax procedure, the tax authority determines the tax liability by issuing a tax decision. Even in situations where self-assessment applies, during the subsequent tax control procedure, which follows the taxpayer's determination of his own tax liability, the tax authority is obliged to establish the material truth in the specific administrative tax matter. Therefore, the tax authority's role in the procedure of establishing facts based on the obtained evidence, including accounting books, is indisputable. However, the formulation upon which that the tax authority "may request" certain documents and records from the taxpayer or third parties remains imprecise. In this respect, it appears that the legislature, by using such vague language, has placed the taxpayer in a more uncertain position, as he is automatically the less protected party in the tax procedure. A party should be required to submit evidence, provide information, give statements, or appear in person before the authorities only when the law exceptionally requires it and when there are no other ways to establish the facts (Tomić, 2015, p. 430).

2.3. Evidence Collection in the Tax Control Procedure

The control of determining a tax liability is carried out by verifying the accuracy of the data provided by the taxpayer in the tax return. Tax control also includes checking the timeliness of tax payments to the appropriate payment accounts. Control can be conducted at the premises of the tax administration (so-called office control), where the tax return and the entire tax documentation are examined. For taxpayers who are required to maintain accounting books, the procedure includes a review of their financial statements, which are prepared based on the maintained business books. In this context, accurate and up-to-date bookkeeping is a prerequisite for correctly determining the tax liability. Improper bookkeeping may indicate the taxpayer's intention to evade tax payment. Therefore, if the tax administration identifies irregularities during the review of the tax return and accompanying documentation, it may order an on-site inspection at the taxpayer's business premises, at which point another type of audit takes place the field audit.

The legislature does not explicitly specify the evidence that may be used in the tax control procedure, as is done in the provisions on evidence collection in the tax procedure. However, according to the Opinion of the Ministry of Finance of the Republic of Serbia, all evidentiary means prescribed by the applicable law regulating the tax legal procedure may be used in the tax control procedure (Opinion Ministry of Finance, 2022. p. 83). In this context, during tax control, in order to verify the correctness, accuracy, and timeliness of tax calculation and payment, the accounting books and other records are inspected. If necessary, the tax inspector may seize accounting books, records, or other documentation until the completion of the tax control procedure. The inspector is obliged to issue a certificate to the taxpayer or the third party from whom the documentation was taken. If the taxpayer maintains accounting books and other

records on data processing devices, the tax inspector may, with a certificate, seize the device until the completion of the tax control (LTPTA, Art. 130, paras. 4 and 5).). However, the analysis of tax regulations raises the question of whether the legal gap in the provisions on the use of business books in the tax audit procedure can be filled with the opinion of the competent ministry. Legally, the opinion of the competent ministry does not have the force of law, because it represents an internal act that interprets legal regulations, and as such does not have binding legal force for individuals and legal entities. While in the provisions on evidence in tax proceedings the legislator acted completely correctly by explicitly mentioning business books, he did not do so in the provisions on tax audit. For taxpayers who are obliged to keep business books, tax audit is a key stage in the taxation procedure. This is when their financial statements are audited, on the basis of which they determined the amount of their tax obligations.

In addition to traditional tax control, there has recently been a modernization of the tax administration's approach based on a tax risk management strategy. Traditional tax control remains the primary source of obtaining information on taxpayers' business activities but has a limited scope. First, this is due to the increasing complexity of tax collection in modern business conditions, which take place not only within national borders but also through cross-border transactions and the establishment of financial and commercial relationships in the global market. Moreover, tax inspections are not conducted continuously, which benefits non-compliant taxpayers and contributes to the creation of the tax gap (Andjelković, 2016, p. 162). To properly determine a taxpayer's economic capacity and assess the amount of his tax liability, tax administrations apply certain techniques for monitoring taxpayer behavior. Traditional tax control focuses on detecting irregularities in already submitted tax returns as well as in the accounting books maintained by taxpayers. Compliance with tax regulations requires not only the application of tax provisions, but also "enhanced" relations with taxpayers. Tax authorities have developed more sophisticated risk management tools, grouping taxpayers into high-risk categories and applying a "lighter touch" audit for those classified as low-risk taxpayers (Owens, 2012, p. 516). Modern tax administrations adapt their operational models under the influence of factors such as technological advancement and digitalization across all domains. In an effort to increase efficiency and effectiveness, tax administrations continuously explore possibilities for adopting approaches that would encourage taxpayers' voluntary compliance with their tax liabilities. In this regard, tax administrations have enabled online submission of tax returns, online tax payments, as well as pre-filled or partially pre-filled tax returns. Technological innovations are thus applied to assess the accuracy and completeness of the data that taxpayers report when submitting tax returns and the required documentation. Although this often occurs through tax control, there is increasing use of automated electronic checks and cross-referencing of taxpayer data (OECD, 2024, p. 22).

If, during a tax control, the tax inspector determines that there is a basis for suspicion that a tax criminal offense has been committed, he prepares a report and submits it, along with the collected evidence, to the competent head of the tax administration. He is then obliged to forward it to the director of the tax police within 24 hours. However, if the control procedure reveals grounds to suspect a misdemeanor, the tax administration will submit a request to initiate misdemeanor proceedings to the competent misdemeanor court. In cases involving tax criminal offenses, there is an intersection of tax and criminal procedures. The tax police are responsible for detecting tax criminal offenses, and in pre-criminal proceedings, they act as a law enforcement body with powers granted under the criminal procedural legislation. At this stage, the procedure shifts from the domain of administrative tax proceedings to the criminal procedure (Popović, 2012, p. 183). If, based on the collected information, the tax police inspector determines that there are elements of a tax criminal offense, he prepares a criminal complaint, listing the evidence obtained during this procedure, and submits it to the competent public prosecutor.

3. On Evidence Collection and Evidence in Criminal Proceedings

A conviction of the perpetrator of a criminal offense is legal and legally grounded only when the act constituting the offense, as defined by the Criminal Code, only when it has been proven that a causal link exists between the act and the perpetrator's fault. Until the final assessment of evidence, the presumption of innocence applies, as one of the fundamental guarantees of the accused, proclaimed in both international and national legal frameworks. Evidence collection that culminates in a particular piece of evidence, as it represents a strong link between the criminal offense and the perpetrator, on one side, and the meritorious judicial decision on the other. To prove that a person committed a criminal offense, or to establish a legally relevant disputed fact, essentially means to determine the truth of its existence, i.e., that a specific criminal event actually occurred. The judicial assessment of the validity of evidence follows a complex path, sometimes with advances and sometimes with setbacks, depending on factors such as the severity and type of the offense, the manner of its commission, the personal characteristics of the perpetrator, and other factors that help characterize a criminal event.

When defining the concept of evidence, a distinction is made between evidence in the formal and material sense. In the formal sense, evidence is equated with the process of proving, which involves procedural actions aimed at establishing the truth of facts that are important for the judicial decision (Marković, 1908, p. 4-6). The material concept of evidence reflects its true essence: a set of grounds or reasons that confirm the truth or certainty of a fact of importance in criminal proceedings. Although it is clear that the evidence collection and evidences are closely connected and inseparable categories, they need to be defined separately, which has been done, i.e., they are separately named in the conceptual definition. Thus, although the evidence process

represents a specific form of criminal procedural actions through which evidence is obtained, it cannot be equated with the concept of evidence and defined under the term evidence in the formal sense. Instead, it should be referred to as the evidence collection, or more precisely, the evidentiary actions that actually constitute its content. This distinction in naming emphasizes the precision in defining form and essence, which is essential in criminal proceedings.

Although the reform of criminal procedural legislation has called into question the principle of truth as one of the fundamental principles of criminal proceedings (Bejatović, 2014, p. 51), we cannot overlook certain issues and perspectives regarding the truthfulness of knowledge of disputed legally relevant facts. Regardless of whether this principle has been altered by innovations in various criminal procedural institutions, it is certain that a court judgment can only be based on valid evidence, which establishes exclusively the truthfulness of knowledge about the existence of the disputed facts. Depending on whether the evidence process aims to establish absolute or relative truth, theory presents opposing views on how the court acquires knowledge of the existence or non-existence of a disputed legally relevant fact. Absolute truth arises from reason, i.e., it is based on pure rational considerations, whereas relative truth is based on experience (Marković, 1908, p. 6-15). In this sense, a judge attains absolute truth through his own sensory perception. While it is undeniable that truth, as an absolute category, can only be established or realized in this way, the reliability of the judge's own sensory perception remains questionable. This would ultimately mean that a criminal offense must be established in criminal proceedings, that is, directly before the court, and such cases are possible but very rare, so this concept of truth and the method of its ascertainment should neither be exclusive and generalized nor disregarded, but rather reserved for exceptional circumstances. On the other hand, there is a viewpoint that completely excludes the possibility of establishing facts through the court's direct sensory perception, based on the understanding that the subject of evidence collection can only be established through the evidence process (Vodinić, 1994, p. 283). Thus, a distinction is made between, on one side, direct sensory perception by the court or judicial panel and, on the other side, the evidence process. In relation to absolute truth, preference is given to relative truth, which is attained through the sensory perception of another person, i.e., through the collection, verification, construction, and evaluation of evidence regarding a criminal event that occurred in the past. Therefore, the evidence that confirms the highest degree of certainty, the truthfulness of knowledge about the existence or non-existence of a disputed fact, on which a court decision is based, is obtained through evidentiary actions, which include the discovery, collection, and verification of evidence. The link between the evidence collection, or evidentiary actions, and evidence is formed by evidentiary means. Evidentiary means are persons or objects through which the court acquires knowledge about the facts under investigation. Examples of evidentiary means include inspections, witnesses,

experts, and documents. More precisely, or in contrast to the aforementioned, when it comes to persons, they represent the source of evidence, while the facts or information they provide during testimony, i.e., the statements containing this information, represent the evidentiary means, that is, the form or mode through which evidence is presented. The situation is somewhat different with documents. Documents, such as financial records, constitute a source of evidence, with the information they contain serving as evidence, whereas an expert's testimony, based on his knowledge in the relevant field under examination, can serve as an evidentiary means for proving the fact in question. Distinguishing these concepts is important in criminal procedural literature, although it does not affect the quality or substance of evidence and the evidence collection.

4. Evidence Collection in Criminal Proceedings for Tax Offenses

Unlawful actions of taxpayers can take various forms. Some are prescribed by the Law on Tax Procedure and Tax Administration and fall under the categories of tax offenses and tax crimes. Other illegal methods of avoiding tax obligations are regulated by the Criminal Code (Criminal Code, Official Gazette of the RS, no. 85/2005, 88/2005 - corrected, 107/2005 - corrected, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 and 94/2024 - CC). A representative example of the latter category is tax evasion, which is the most dangerous and widespread form of tax crime (Pamisetty, 2025, p. 24). Since tax evasion manifests in multiple variants, often accompanied by different modes of execution by perpetrators aiming to conceal their actions and prevent prosecuting authorities from obtaining adequate and valid evidence, the need for specific evidentiary actions has proven necessary, especially given modern technical advancements. One such evidentiary action, which is gaining increasing significance, is expert evaluation.

Expert evaluation as a general evidentiary action is conducted when specialized knowledge and skills are required to clarify disputed facts in criminal proceedings. The nature of the criminal offense determines the type of expert evaluation required, for example, in a homicide case, a medical specialist in forensic medicine is engaged as an expert; in cases where there is suspicion that the perpetrator was insane or significantly impaired in mental capacity at the time of the act, a specialist in neuropsychiatry is engaged. Unlike these types of expert evaluations, which are primarily focused on the object of the attack or the personality of the perpetrator, in tax crimes, the subject of the expert evaluation is material items, in which the product of the criminal act may, but in most cases does not, become apparent. Due to the complex *modus operandi*, the expert evaluation itself can also be more complex.

Proving tax evasion, as a representative form of illegal tax avoidance, is determined by the method of execution. There are several modalities by which the perpetrator can evade taxes: providing false information about earned income, assets, or other facts affecting the determination of tax liability; failure

to report earned income, assets, or other relevant facts; and concealment of data by other means (CC, Art. 225). The act of execution can be based on commission (*delicta commissa*) or omission (*delicta omissiva*) (Bozić, Dimić, Djukić, 2020, p. 91). On the subjective level, the perpetrator's intent to avoid paying tax by any of the alternatively provided methods is required. For the objective condition of the offense, the amount of tax avoided must exceed one million dinars. The existence of more severe forms of the offense is not determined by the method of execution (which is the same as for the basic form) but by the amount of tax avoided. For the first more severe form, the amount must exceed five million dinars, and for the second more severe form, the amount must exceed fifteen million dinars. The perpetrator can be a natural person or a legal entity, i.e., a responsible person within a legal entity. With the establishment of corporate liability for criminal offenses (Gobert, Pascal, 2011, p. 21), the circle of taxpayers as potential perpetrators of tax evasion has been expanded. As an inevitable consequence, detection and evidence collection of the offense become more difficult (Oni, Godwin, 2023, p. 54), given the expanded possibilities for various prescribed modes of execution. One form of tax evasion can occur when a company, as a taxpayer and legal entity, intentionally attempts to avoid paying taxes by "splitting" total revenues among multiple business entities, thereby creating the impression that less income was earned. In such cases, expert evaluation becomes more challenging due to the volume of financial documentation across multiple entities (Dimitropoulos, Reading, 2025, p. 1-2). Nevertheless, an easing factor can be the availability of documents, provided that the recorded entries are accurate.

The expert evaluation procedure, regulated by the Criminal Procedure Code, is preceded by the activity of the tax police in the pre-investigation stage, where, based on collected information and facts from the tax inspector's report, they proceed to prepare a criminal complaint and submit it to the competent public prosecutor. After determining that a tax criminal offense (Process map on the criminal prosecution of tax evasion in the Philippines, 2009, p. 23-24), rather than a tax misdemeanor, has occurred, the prosecutor issues an order to conduct an investigation to further develop the evidentiary material. In addition to the tax police, who participate in the investigation and have all powers regarding the accused except for deprivation of liberty, it may be necessary to engage an expert to analyze the available financial documentation for the purpose of proving tax evasion (Rezaee, Riley, 2010, p. 73). The expert evaluation is determined and the expert appointed by the public prosecutor through an order for expert evaluation. As an evidentiary action, the expert evaluation involves reviewing the available disputed documentation, based on which the expert prepares a report and opinion. The need for an expert evaluation in criminal proceedings is conditioned by the results of evidence obtained in the tax procedure. The tax inspector's report, prepared based on a review of the taxpayer's books, may differ from the expert's findings and opinion in the criminal proceedings (Lalović, 2018, p. 31), or, during evidence collection in the tax procedure, incorrect documentation may have been used,

making it impossible to accurately determine the amount of tax evaded. During the calculation and determination of the amount of tax evaded, i.e., in the course of a tax audit, the documentation that reflects the business activities of taxpayers is decisive for identifying certain irregularities. Primarily, this refers to the documentation in which all business transactions have been recorded, forming the content of the accounting books. Since the accounting books include the journal, general ledger, and auxiliary ledgers, a distinction must be made among them to determine which is most important for calculating the amount of tax owed. In this context, the tax inspector should focus on the journal (which provides a chronological record of all business transactions) and the general ledger (which, in addition to the balance and changes in the company's assets, includes its liabilities, equity, income, and expenses), as these constitute the basis for the preparation of financial statements, rather than on internal records that pertain to general business facts, such as business partners' contact phone numbers, etc. (Raonić 2018, p. 12).

5. Accounting Books as Evidence in Criminal Proceedings – Regulatory Framework and Certain Dilemmas

The primary legislation that stipulates which evidentiary actions should be used to detect and prove criminal offenses in criminal proceedings is the Criminal Procedure Code. Through a comparative analysis of the current Criminal Procedure Code (Criminal Procedure Code, Official Gazette of the RS, no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021-decision US and 62/2021-decision US – CPC 2021) and the Criminal Procedure Code of 2010, i.e., the Criminal Procedure Code enacted in 2009 with its latest amendments and supplements from 2010 (Criminal Procedure Code, Official Gazette of the FRY, no. 70/2001 and 68/2002 and Official Gazette of RS, no. 58/2004, 85/2005, 115/2005, 85/2005-dr. law, 49/2007, 20/2009-dr. law, 72/2009 and 76/2010 – CPC 2010), we will attempt to determine the completeness of the current evidentiary provisions and provide certain suggestions and proposals *de lege ferenda*.

The CPC 2010 also prescribes and explains in detail: search of a residence and person (Art. 77–81); temporary seizure of items (Art. 82–86); handling of suspicious items (Art. 87–88); interrogation of the accused (Art. 89–95); examination of witnesses (Art. 96–109); inspection (Art. 110–112); and expert evaluation (Art. 113–132). It is regulated when and how each type of expert evaluation is conducted, covering all criminal offenses that can be proven in this manner. These include: examination and autopsy of a corpse, expert evaluation of bodily injuries, assessment of the mental state of the accused (psychiatric expert evaluation), and expert evaluation of accounting books. In the case of expert evaluation of accounting books, the authority conducting the procedure is obliged to instruct the experts on the direction and scope of the expert evaluation and specify which facts and circumstances should be determined (Škulić, 2007, p. 470). When it is necessary to organize a company's

accounting records prior to the expert evaluation of accounting books, the decision on organizing the records is issued by the authority conducting the proceedings based on a written report from the expert tasked with examining the accounting books (Škulić 2007, p. 470-471). The costs of organizing the accounting records are borne by the holder of the accounting books.

The current CPC 2021 provides for all the evidentiary actions previously regulated by the CPC 2010. However, it is contentious that it omits, as a type of expert evaluation, the examination of accounting books. Although the expert evaluation of accounting books in the CPC 2010 may not have been fully regulated, by prescribing the direction and scope of the expert evaluation, and by obliging the court to determine the direction and scope of the expert evaluation and the need to organize accounting records in certain situations, the law assigns significant importance to proving a specific group of criminal offenses. These are cases where, without reviewing the accounting books, it is nearly impossible to conduct and conclude the procedure. Such offenses include tax evasion and a number of other economic crimes, where essential characteristics of the criminal act (apart from the intention to evade tax in tax evasion cases) are established precisely through the analysis of accounting books.

In an attempt to overcome this type of problem, the examination of accounts and suspicious transactions has been analyzed. This evidentiary action is carried out when the public prosecutor obtains data from a bank or another financial organization regarding the financial transactions of a person suspected of committing certain criminal offenses (possession, obtaining, and distribution of pornographic material and exploitation of a minor for pornography (Art. 185, para. 4 CC); accepting a bribe in the conduct of business activity – Art. 230, para. 2 CC; giving a bribe in the conduct of business activity – Art. 231 CC; money laundering – Art. 245, para. 5 CC; trading in influence – Art. 366, para. 2 CC; accepting a bribe – Art. 367, para. 4 CC; giving a bribe – Art. 368, para. 2 CC) (CPC 2021, Art. 143). However, an important omission is seen from the public prosecutor's scope when conducting evidentiary action, tax evasion, a substantive criminal law issue, which is partially significant for proving cases, considering that tax evasion, in addition to belonging to the group of economic crimes, in most cases constitutes a predicate offense for money laundering (OECD, 2017, p. 58–61).

The possible negative impact of the aforementioned legal omissions has been indicated by an analysis of available data from the Republic Office of Statistics of the Republic of Serbia (RZSRS). The subject of statistics analysis in the following tables with comparative presentation of the reasons for acquittals in the criminal offense of tax evasion for the past five years period (2019-2023), in order to examine the impact of legal omissions on the final outcome of the criminal proceedings. CPC 2021 provides that the court may issue an acquittal when the act that is the subject of the accusation is not a criminal act, or due to lack of evidence (Art . 423, para . 1 and 2) The court

may find that there are no elements of the criminal offense of tax evasion, if the criminal proceedings could not establish the taxpayer's intention to evade tax, which is actually a subjective element of the essence of this criminal offense. On the other hand, it is possible that omissions may occur in the tax proceedings that may relate to an inadequately determined amount of evaded tax, or inadequate documentation used when determining the amount of tax debt. In such cases, the examination of business books is a crucial evidentiary measure for the conviction of the perpetrator of tax evasion. The following tables show that the absence of an expert examination of business books as the main means of evidence plays a major role in the acquittal of tax evaders, i.e. the acquittal due to lack of evidence.

Table No. 1. The absence of elements of the criminal offense of tax evasion as a reason for issuing an acquittal for the period 2019-2023

Year	The act is not a crime
2019	2
2020	2
2021	2
2022	/
2023	2
Total	8

Source: <https://www.stat.gov.rs/oblasti/pravosudje/punoletni-ucinioci-krivicnih-dela/>, author's processing

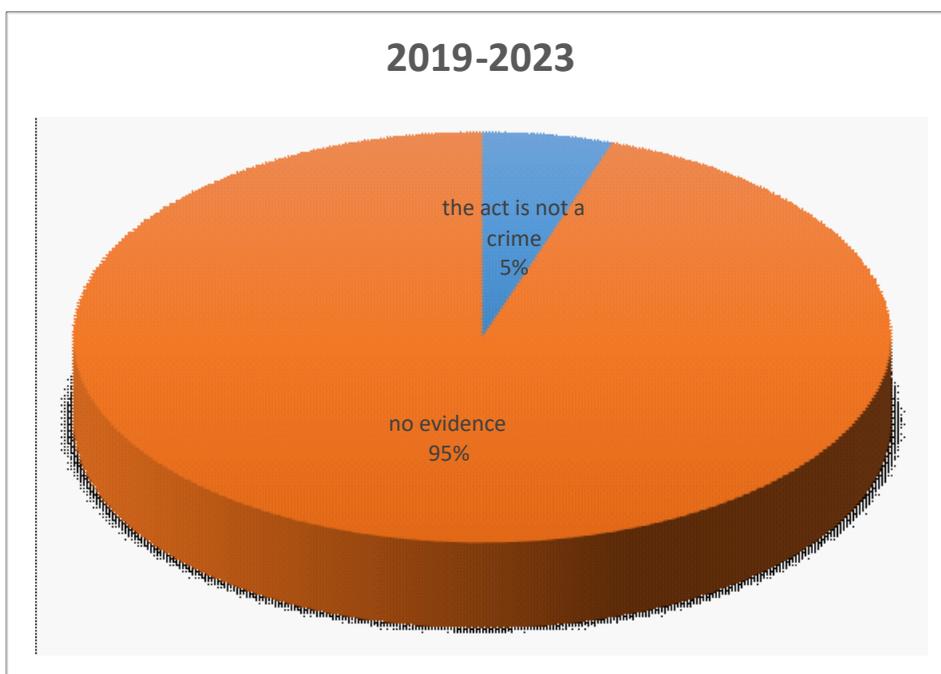
The absence of elements of the criminal offense of tax evasion appears in each year of the research as a reason for passing a acquittal verdict in an equal number of cases (2 for each year).

Table No. 2. Lack of evidence as a reason for acquittal in the criminal offense of tax evasion for the period 2019-2023

Year	There is no evidence
2019	31
2020	32
2021	31
2022	34
2023	19
Total	147

Source: <https://www.stat.gov.rs/oblasti/pravosudje/punoletni-ucinioci-krivicnih-dela/>, author's processing

The highest number of acquittals due to lack of evidence was made in 2022 (34), followed by 2020 (32), in equal numbers in 2019 and 2021 (31), while the lowest number was observed in 2023 (19).

Chart 1. Percentage of reasons for acquittals in the criminal offense of tax evasion

Of the total number of acquittals for the past five years, 155, the share of those issued due to the absence of elements of the criminal offense of tax evasion is only 5%. In the remaining 95%, lack of evidence was the reason for the acquittal.

6. Conclusion

Research of the legal framework shows that the legislature acted correctly by explicitly listing accounting books as evidence in the tax procedure. Their significance in determining the amount of tax liability for certain types of taxes is indisputable. Precisely for this reason, certain categories of taxpayers are obligated to maintain accounting books. However, the analysis of tax regulations raises the question of whether the legal gap in the provisions on the use of business books in the tax audit procedure can be filled with the opinion of the competent ministry. Legally, the opinion of the competent ministry does not have the force of law, because it represents an internal act that interprets legal regulations, and as such does not have binding legal force for individuals and legal entities. While in the provisions on evidence in tax proceedings the legislator acted completely correctly by explicitly mentioning business books, he did not do so in the provisions on tax audit. For taxpayers who are obliged to keep business books, tax audit is a key stage in the taxation procedure. This is when their financial statements are audited, on the basis of which they determined the amount of their tax obligations.

The role of accounting books in the evidence collection is conditioned by the type of criminal offense committed. They are of particular importance in proving tax-related criminal offenses, specifically tax evasion, which represents the most severe form of illegal tax avoidance. Considering that the perpetrator, as a taxpayer, seeks to avoid paying various types of taxes (value-added tax, personal income tax, corporate profit tax, and mandatory social security contributions), accounting books generally constitute a key segment, i.e., an evidentiary means in the process of proving such unlawful conduct. If accounting books are not available for analysis, or if business transactions are deliberately recorded inaccurately, the evidence collection becomes difficult or, in some cases, impossible. Certainly, expert evaluation in this area represents a highly important evidentiary action, as it is performed by a professional possessing specialized knowledge, an expert in finance and economics. Regardless of the complexity of the evidence collection, expert evaluation of accounting books as a distinct type of expert evaluation should have a normative foundation. Comparative normative analysis has shown that this type of expert evaluation was once explicitly provided for, but has been neglected in the current legal framework. This narrows the range of criminal offenses that can be proven exclusively through this method. Further analysis, aiming to identify a sufficiently adequate solution, has determined that even the evidentiary action of reviewing bank accounts and suspicious transactions cannot be applied to the most severe form of illegal tax avoidance. The negative effects of the

aforementioned legal omissions, observed from a practical aspect, are reflected in the fact that acquittals are rendered in as many as 95% of cases due to lack of evidence. To address this issue, *de lege ferenda* proposals are directed toward supplementing the current legal framework, so that, in addition to the previous statutory provisions, it would comprehensively regulate the matter of expert evaluation of accounting books, in the same way as it has been done for other types of expert evaluations.

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DO VARIOUS FORMS OF CORRUPTION EXERT DIFFERENT EFFECTS ON ENTREPRENEURSHIP: EVIDENCE FROM CEE (POST)TRANSITION COUNTRIES

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Abstract

The paper analyses the effect of different forms of corruption on entrepreneurship in a sample of Central and Eastern European countries: Albania, Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Montenegro, North Macedonia, Serbia, Romania, Slovakia and Slovenia. The contribution of this paper is twofold. The paper contributes to the existing literature through panel data analysis of the effect of various forms of corruption on new business density rates in the 2006-2020 period. The types of corruption included in the analysis cover judicial, legislative, executive, and public sector corruption, and political corruption index as the aggregate measure. The results show that not all corruption types have the same effect on entrepreneurship. Aggregate measure of political corruption adversely affects formal entrepreneurship. However, three particular types of corruption – public sector corruption, legislative corrupt activities and judicial corruption – have opposite effects. While public sector corruption and legislative corrupt activities harm the new business density rate, it is shown that larger judicial corruption is positively related to the number of newly registered firms.

Keywords: *corruption, entrepreneurship, post-transition, Eastern Europe*

1. Introduction

The existing literature on corruption and entrepreneurship is not concord with respect to their correlation so to suggest the existence of a complex multidimensional relation. On the one hand, corruption can be an obstacle to entrepreneurship and general development (Harrison, 1999; Laffont, 2006; Mauro, 1995; Palmier, 1983; Papava and Khaduri, 1997) by increasing business costs, reducing access to financial resources, diminishing institutional trust and creating an uneven playing field where only those with access to closed networks or resources can succeed (Acemoglu and Verdier, 2000; Anokhin and Schulze, 2009; Cheung, 1996; Kiltgaard, 1988; Rose-Ackerman, 1999, 2010; The World Bank, 1997). On the other hand, moral and ethical considerations apart (Kordonsky, 2012), corruption may be regarded as creating opportunities for entrepreneurship by enabling entrepreneurs to avoid burdensome regulations and bureaucratic processes (Morris and Polese, 2016), gain access to valuable resources and contracts, and build informal networks (e.g. Dreher and Gassebner, 2013; Leff, 1964; Mauro, 1995; Simic Banovic, 2015).

Embedded in the above debates, this paper relies on Aidt's (2009) approach, which suggests that different types of corruption may have different effects on entrepreneurship. In particular, he highlights the *grease the wheels* hypothesis, where corruption may be seen as boosting some economic performance, but which could apply only to isolated instances of corruption, and not to systemic corruption. Analysing the impact of corruption, or any other aspect related to the institutional environment, on entrepreneurship thus poses a challenge since the conceptual framework linking individual choices on becoming entrepreneurs with the institutional environment remains relatively underdeveloped (Aidis, Estrin and Mickiewicz, 2012). Corruption is a multidimensional phenomenon that surpasses mere economic incentives (Muramatsu et al., 2021; Rose-Ackerman and Palifka, 2016). Moreover, multidimensionality is reflected in both the definition and measurement of corruption. The most common definition of corruption found in literature is the one of the World Bank (1997), according to which corruption is the abuse of public office for private gain, and as such, covers a wide range of behaviour.

The starting research question (RQ) in this paper is what is the impact of different types of corruption (executive, legislative and judicial) on entrepreneurship, proxied by the new business density rates in Central and Eastern Europe (CEE) (post)transition countries. Realizing the above considerations, the main contribution of this research is two-fold. First, empirically, the paper analyses a number of post-socialist countries, some of which are now EU members, but still record high corruption levels. The countries included in the analysis illustrate a diverse set of post socialist countries, which share common history, but have diverged due to following

different paths of political and economic liberalization. The countries included in the analysis are Albania, Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Montenegro, North Macedonia, Serbia, Romania, Slovakia and Slovenia. The data for corruption are retrieved from the Varieties of Democracy (V-Dem) database of the University of Gothenburg (Coppedge et al., 2023). Very often, micro and macro data portray different pictures, implying that various types of corruption could play different roles. Second, theoretically, this paper seeks to detangle the different forms of corruption to test the effects of each on entrepreneurship. We engage with the existing literature through panel data analysis of the effect of various forms of corruption on new business density rates in the 2006-2020 period. The results show that aggregate political corruption, as well as public sector corruption, adversely affect entrepreneurship. However, legislative corruption and judicial corruption have opposite effects. While legislative corruption also harms the new business density rate, it is shown that larger judicial corruption is positively related to the number of newly registered firms.

The outline of the paper is as follows. After the Introduction, Section 2 offers an overview of the existing literature on the relationship between corruption and entrepreneurship. Further, Section 3 delivers methodological considerations and descriptive analysis of the main variables - various types of corruption and entrepreneurship, and control variables. Section 4 discusses the obtained results. Finally, Section 5 offers some concluding remarks and ideas for further research.

2. Literature review and hypothesis development

There is no firm and one-way agreement on the effect of corruption on entrepreneurial activity. Indeed, diverging results show that it can both positively and negatively affect entrepreneurial activity, depending on the specific context and circumstances. Some cases demonstrate the negative effect of corruption on entrepreneurship, and they prevail in the literature. In this line of research, while analysing nascent entrepreneurship and entry rate, Park and Shin (2022) suggest that the higher control of corruption is linked with more entrepreneurial endeavours. Further, Lepojević, Đukić and Stefanović (2019) analyse the impact of corruption on establishing new businesses through the analysis of the Western Balkan and the EU countries. The authors' results show that corruption negatively affects the establishment of new businesses, increasing the cost of starting a business and reducing the income that could be used for start-ups. This adverse effect is higher in countries with an insufficiently stable and underdeveloped macroeconomic environment, such as the Western Balkans, than in developed European countries. Further, Dempster and Isaacs (2017) examine the relationship between entrepreneurship, perceptions of corruption, and economic freedom. They show that, where economic freedom is present, lower corruption positively affects entrepreneurship. However, some aspects of economic freedom, such as legal enforcement and property rights, may negatively impact entrepreneurial

activity. Vorley and Willimas (2016) further examined the impact of corruption on entrepreneurship in transition economies (i.e. Romania and Bulgaria) and showed that corruption has adverse effects in terms of negative perception towards entrepreneurship, especially in a group of entrepreneurs with growth potential. They highlight that corruption weakens the dominant institutional framework and institutional reforms, which aim to develop entrepreneurship. Similar results were also obtained by Pathak, Xavier-Oliveira and Laplume (2015), who examined the moderating effect of corruption on entrepreneurial intentions. Specifically, the authors showed that corruption hampers individual entrepreneurial traits (self-efficacy, fear of failure and opportunity recognition) but strengthens the role of networks. Khyareh and Amini (2021) show that overall governance quality, including better control of corruption, has a significant positive impact on opportunity-driven entrepreneurship and an opposite impact on necessity-driven entrepreneurship. Avnimelech, Zelekha and Sharabi (2014) discovered that countries with high levels of corruption usually face low levels of productive entrepreneurship, with the results being more significant in developed than in developing countries.

Berdiev and Saunoris (2018), using cross-section data for more than 60 countries in the 2001–2010 period, found that corruption deters entrepreneurship in the formal sector and promotes informal entrepreneurship. Similarly, Aidis, Estrin and Mickiewicz (2012) found that freedom from corruption positively affects entrepreneurship. Dejardin and Laurent (2023) also show that corruption hinders the opportunity-based entrepreneurship, i.e. while corruption could have a positive effect on entrepreneurship by greasing the wheels of ineffective administrative machinery, the marginal effect of corruption is negative within the group of developed countries.

Following these findings, the main research hypotheses in this paper are the following:

H₁: Higher political corruption is negatively associated with new business density rate in CEE (post)transition countries.

H₂: Higher public sector corruption is negatively associated with new business density rate in CEE (post)transition countries.

However, some works suggest the opposite. Liu et al. (2018), analysing the effects of corruption on entrepreneurship in emerging countries based on microdata from 2002 to 2009, show that corruption has a nonlinear impact on entrepreneurship. They conclude that corruption promotes entrepreneurship when corruption levels are low, while high levels hinder entrepreneurship. Thus, according to them, corruption can have a diminishing effect on entrepreneurship. Similarly, Chowdhury, Audretsch and Belitski (2019) showed that corruption acts as a grease the wheel of business, with the effect being stronger for developing countries, while in developed countries with higher-quality institutions it has a negative effect. Szyliowicz and Wadhvani

(2007), when analysing the data on a sample of 175 countries, found that corruption has a positive effect on entrepreneurship. Vučković, Basarac Sertić and Šimić Banović (2016), on a sample of 23 EU countries for a 2001-2015 period obtained that higher corruption relates to increased entrepreneurial activity as measured by TEA index.

Since there is little attention given in the literature to the fact that the correlation is determined by definition and specific type of corruption, through an in-depth examination of the available data we fill this research gap and delve into the extent to which different types of corruption impact entrepreneurship. Thus, we analyse effects of different types of corruption, with additional three hypotheses (H3, H4 and H5) being formed.

H3 is related to executive corruption. Rullo (2021), for example, points out that executive leaders hold considerable decision-making power and oversee significant financial resources. Consequently, they become increasingly vulnerable to the pressures of various interest groups trying to influence public policy. This scenario reveals a partnership between executives and corporations. Additionally, it is evident that new executive leaders, utilising their substantial leadership influence, can secure concrete advantages, such as favourable policy choices or prioritised access to government contracts.

H3: Higher executive corruption is negatively associated with new business density rate in CEE (post)transition countries.

The hypotheses H4 and H5 focus on the judiciary and legislative corruption. Ippoliti, Melcarne, and Ramello (2015) identify two ways the judiciary influences entrepreneurship. First, a well-functioning judicial system is crucial for creating a healthy environment for entrepreneurs, particularly regarding property rights, since an inefficient judiciary can undermine economic agents' willingness to respect previous agreements. Second, an ineffective judiciary raises the costs of accessing the legal system, favouring those with stronger legal bargaining power and resulting in limiting access to credit. A corrupt judiciary is particularly concerning because as long as the judicial system remains corrupt, efforts to tackle corruption in other areas will also be impeded (Palifka, 2006).

Regarding legislative corruption, corrupt legislators may for example introduce tax exemptions or other loopholes in exchange for bribes, reducing revenue potential. And the more complex and opaque the tax system, the easier it is for officials to exercise discretion in its administration and demand bribes or kickbacks in return for a favourable outcome (Mauro, Medas & Fournier, 2016).

H4: Higher judicial corruption is negatively associated with new business density rate in CEE (post)transition countries.

H₅: Higher legislative' corruption is negatively associated with new business density rate in CEE (post)transition countries.

As this analysis seeks to shed light on how corruption can affect businesses and whether certain forms of corruption have a more detrimental impact than others, it also provides policy inputs for the primacy of institutional quality over the number of entrepreneurial ventures. Audretsch et al. (2022) stress that different types of entrepreneurship require different, context-adjusted policies. They point out that the impact of corruption on necessity- and opportunity-entrepreneurship is not the same and that the size of the effect depends on the types of government expenditure. Corruption is also recognised as an important determinant influencing (pathological) learning and weak economic performance in the policy reform process (Freytag and Renaud, 2007). While distinguishing between entrepreneurial ecosystems in developed and developing and transitional countries, Belitski, Grigore and Bratu (2021) offered a list of policy recommendations aimed at diminishing political entrepreneurship in developing and transitional societies. In a similar vein, based on the comparative studies, Wegner (2019) warned that anti-corruption policies aimed at stabilizing new democracies are likely to fail despite their intrinsic value mostly because they are insufficiently linked to the local circumstances actors.

3. Data and Methodology

3.1 Data and variables

Dependent variable

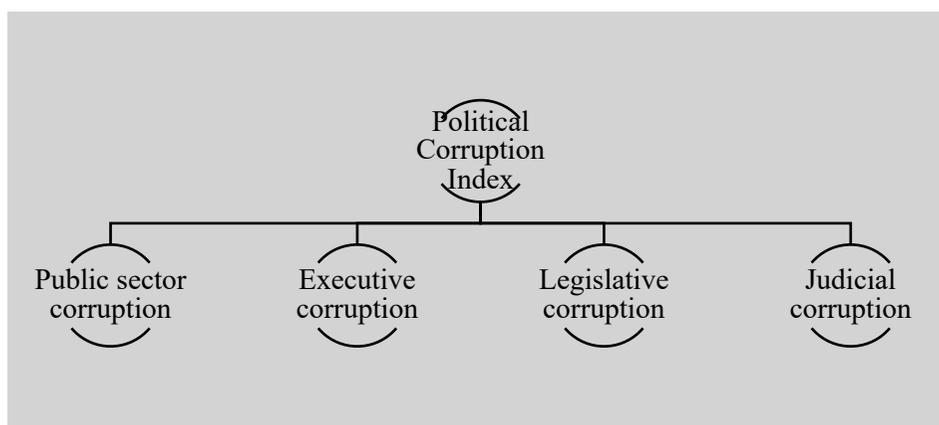
Defining and measuring the phenomenon of entrepreneurship is a complex task, as it involves various elements related to starting and running a business. It usually involves a combination of both quantitative and qualitative data to capture entrepreneurship's complex and dynamic nature. This paper uses an indicator of the new business density rate of the World Bank Entrepreneurship Database (World Bank, 2024), defined as the number of newly registered firms with limited liability per 1,000 working-age people (ages 15-64) per calendar year, a proxy for formal entrepreneurship. This is also a limitation of our study since this data could be combined with the informal entrepreneurship data. Still, as suggested in Polese (2022), the number of unregistered companies is extremely limited in countries where registration is relatively uncomplicated, and there are understandable taxation rules, as is the case in our target countries. As a result, we can assume that the unobserved economy is not that relevant and therefore focus only on formal entrepreneurship.

Independent variables

Corruption is a widespread issue in CEE countries, as evidenced by various corruption measures on macro (e.g. Control of Corruption (World Bank Worldwide Governance Indicators) and Corruption Perception Index (Transparency International), and also on the level of individual enterprises that recognise corruption as one of the biggest obstacles to doing business (e.g. Enterprise Survey database of EBRD and World Bank). Regarding the firm (micro) level, in the latest regular Enterprise Survey (WBES), firms from the region identify corruption as one of the major obstacles to doing business (along with the tax rates and inadequately educated workforce). Based on available data, e.g. in Albania, around 35% of firms were asked for bribe payments and this is significantly higher than the average for the region, which is around 8%. As a result, entrepreneurs face many uncertainties in all phases of doing business while for those entrepreneurs with connections, corruption can lead to an unfair advantage. Consequently, small and medium-sized firms may find it challenging to compete with larger, more established enterprises with greater access to resources. For example, Bartlett (2023) analysed the impact of political connections on business performance in SEE and his results showed that political connections negatively impact firm performance, especially in the services sector.

Although the primary corruption variables used in the prevailing literature are the above-mentioned Corruption Perception Index of Transparency International and the World Bank Governance Indicators, i.e. the Control of Corruption, which measures the perceptions of corruption, defined as the exercise of public power for private gain (Kaufmann et al., 2016), we employ a novel approach by the use of the political corruption index. This index measures corruption covering different levels of the polity realm (executive, legislative and judicial corruption), which, combined with public sector corruption, taps into several distinguished types of corruption: 'petty' and 'grand'; bribery and theft; both types of corruption aimed at influencing law-making with the one affecting implementation (Coppedge et al., 2023). The results of the V-Dem corruption measures assessment (McMann et al., 2016) suggest that these measures are particularly useful when conducting substantive research in which the theory is most salient in non-Western societies or researchers expect heterogeneous effects across contexts. The structure of the aggregate Political Corruption Index, as published by V-Dem (Coppedge et al., 2023), is presented in Figure 1.

Figure 1. Political Corruption Index

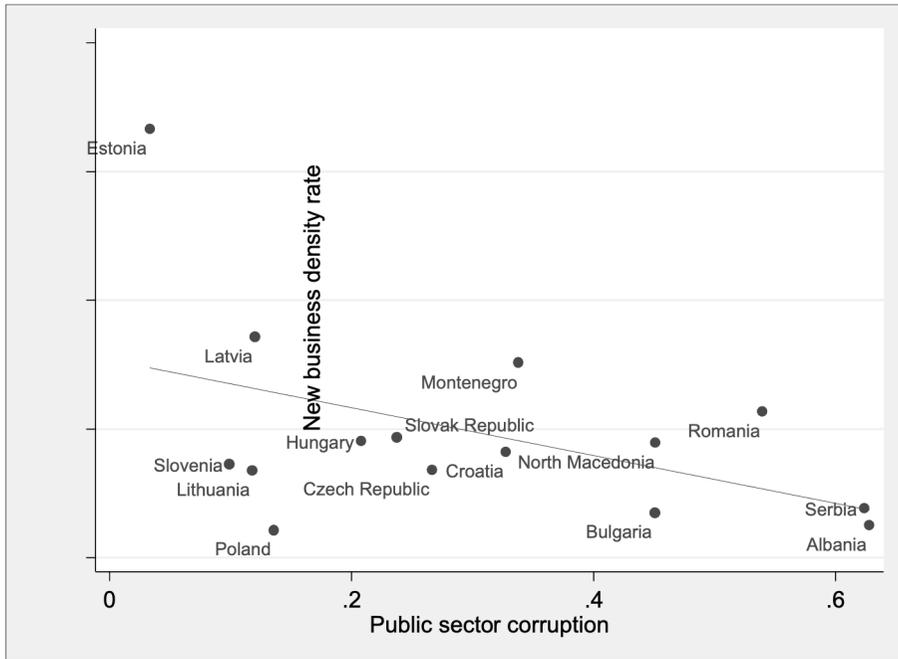


Source: Authors compilation based on V-dem database

The public sector corruption index measures to what extent public sector employees grant favours in exchange for bribes, kickbacks, or other material inducements and how often they steal, embezzle, or misappropriate public funds or other state resources for personal or family use. It takes values 0-1, from low to high corruption. This variable serves as a proxy for petty corruption. Next, executive corruption measures how routinely members of the executive or their agents grant favours in exchange for bribes, kickbacks, or other material inducements and how often they steal, embezzle, or misappropriate public funds or other state resources for personal or family use. It uses values 0-1 for low to high corruption. Judicial corruption measures how often individuals or businesses make undocumented extra payments or bribes to speed up or delay the process or obtain a favourable judicial decision. It takes values 0-4 to indicate high to low corruption. Finally, legislative corruption include accepting bribes, helping to obtain government contracts for firms that the legislator, or his family, friends, political supporters, own, doing favours for firms in exchange for the opportunity of employment after leaving the legislature, stealing money from the state or from campaign donations for personal use. This scale uses values 0-4 to indicate high to low corruption (Coppedge et al., 2023). Political corruption is calculated as the average of the four types described above, with each type being given the same weight. The advantage of using these data is that the V-Dem indexes of corruption have not been used to shed light on the relationship between corruption and entrepreneurship.

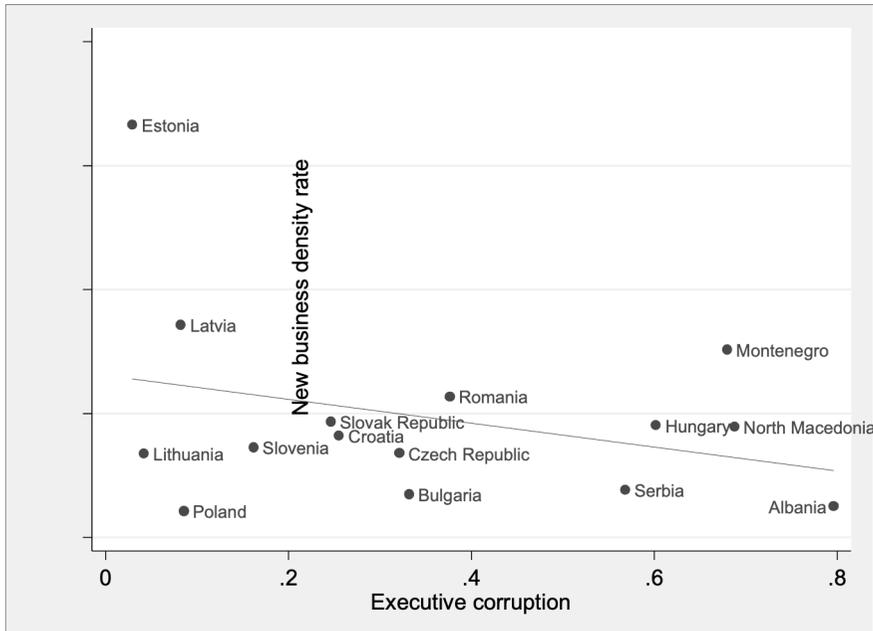
Figures below show the correlation between different types of corruption and formal entrepreneurship rates (we calculated average values for the 2006-2020 period in all included countries).

Figure 2. Relation between public sector corruption and formal entrepreneurship



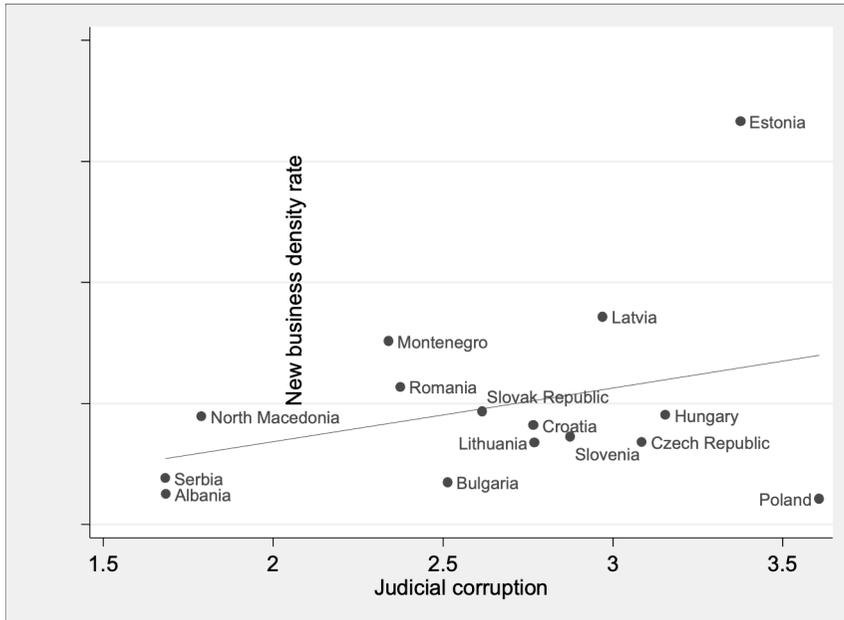
Source: Authors' calculation

Figure 3. Relation between executive corruption and formal entrepreneurship



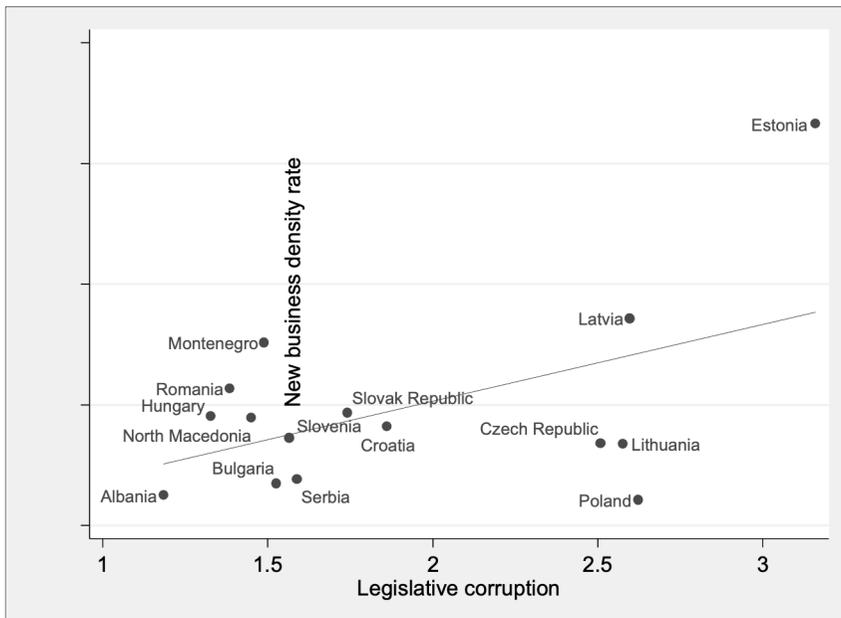
Source: Authors' calculation

Figure 4. Relation between judicial corruption and formal entrepreneurship



Source: Authors' calculation

Figure 5. Relation between legislative corruption and formal entrepreneurship



Source: Authors' calculation.

The trend line through all four graphs implies that corruption hinders entrepreneurship. Precisely, with the public sector (Figure 2) and executive corruption index (Figure 3) whose larger values imply an increase in corruption, the correlation is negative – higher corruption means lower entrepreneurship rates. On the other side, with judicial (Figure 4) and legislative corruption (Figure 5), where lower values imply larger corruption, the correlation is positive meaning that higher (lower) values of the index mean higher (lower) entrepreneurship rates.

It can therefore be suggested that generally higher corruption may be related to the lower number of registered firms. As this is only the intuitive conclusion in this phase based on descriptive statistics, in the next section, we proceed with the econometric investigation of corruption effects on new business density rates, including a larger number of control variables.

Control variables

We included several control variables in the model. First, the GDP per capita variable is included since economic development strongly affects entrepreneurship and unemployment in a country, as unemployment can motivate some individuals to seek entrepreneurial activity (see Audretsch et al., 2022). Additionally, the measure for human capital as the percentage of the population enrolled in tertiary education was added (the data for both variables are retrieved from World Bank WDI database). Next, we include the control variable for the business environment quality for which the data from Fraser's Economic Freedom of the World database was used, i.e. precisely the business regulation component capturing the extent to which regulations and bureaucratic procedures restrain entry and reduce competition (Gwartney et al., 2023). Since some of the countries in the sample are EU members, a dummy variable reflecting the EU membership is also included as the control variable. Finally, we include the share of the population aged 15-64 years (retrieved from World Bank WDI database).

Table 1 provides an overview of descriptive statistics of all variables used in the analysis. We can see that for most variables, both standard deviation and a wide range between minimum and maximum values could suggest considerable variability or heterogeneity in the data.

Table 1. Descriptive statistics of variables

VARIABLES	(1) N	(2) mean	(3) sd	(4) min	(5) max
New business density rate	223	4.868	4.132	0.467	24.79
Executive corruption	225	0.351	0.259	0.0150	0.844
Legislative corruption	225	1.905	0.624	0.709	3.159
Political corruption	225	0.381	0.222	0.0350	0.781
Judicial corruption	225	2.640	0.594	1.314	3.626
Public sector corruption	225	0.305	0.194	0.0300	0.675

VARIABLES	(1) N	(2) mean	(3) sd	(4) min	(5) max
Business environment quality	225	6.956	0.844	4.888	8.969
GDP pc	225	12,778	6,010	2,973	27,596
EU	225	0.693	0.462	0	1
Pop 15-64	225	67.58	2.030	62.95	72.12

Source: Authors' calculation.

3.2 Methodology

The main research question (RQ) explored in this paper relates to the effects of different forms of corruption on entrepreneurship. Thus, we estimated the base model, i.e. Model 1 with aggregate political corruption index as the main independent variable of systemic corruption, and four models with corruption sub-components as main independent variables: public sector corruption (Model 2), executive corruption (Model 3), judicial corruption (Model 4) and legislative corruption (Model 5).

As the sample includes countries with different characteristics (e.g. economic, social, and political) which increases the likelihood of heterogeneity in panel data (Wooldridge, 2012), in order to deal with unobserved heterogeneity associated with panel data, fixed-effect estimators can be employed. We employ panel data regression with Driscoll-Kraay standard errors for coefficients estimated by the fixed-effects estimator. Cross-sectional dependence is one of the challenges in panel data settings, thus, yielding inconsistent estimates. Unlike standard techniques, the Driscoll and Kraay (1998) algorithm accounts for cross-sectional dependence, which results in consistent and robust estimated standard errors. The Driscoll-Kraay algorithm assumes that the error structure is heteroscedastic, autocorrelated up to some lag and correlated between the groups in the panel (Hoechle, 2007)¹. We use fixed effects panel data estimation. The following model was estimated:

$$y_{i,t} = \alpha_i + \beta X_{i,t} + u_{i,t} \quad (1)$$

where $y_{i,t}$ is the dependent variable (new business density rate) and $x_{i,t}$ denotes the independent and control variables described above (corruption variables, business environment quality, GDP per capita, or population aged 15-64). Two of the corruption variables, legislative and judicial, are adjusted for the analysis so that the increase in the value implies larger corruption.

¹ Autocorrelation was tested with Wooldridge Test for Autocorrelation (p-value=0.0000); and cross-sectional dependency with Breusch-Pagan test of independence (p-value=0.0000).

4. Results and Discussion

The obtained results are presented in Table 2. The three hypotheses are confirmed (H₁, H₂, and H₅, the two are rejected (H₄ as the coefficient obtained is opposite of the one expected, and H₃ as the result with the corruption variable is not statistically significant). The results show that political (aggregate) corruption and public sector corruption hinder entrepreneurship, as measured by the new business density rate. Next, while executive corruption is not statistically significant, legislative and judicial corruption have diverse direction of effects. Legislative corruption adversely affects the new business density rate, while judicial corruption is positively associated with our entrepreneurship variable, drawing attention to the shortcomings in the judicial system. It is a well-established viewpoint that the judiciary is most likely to be linked to corruption in transition countries. The latest Corruption Perception Index (Transparency International, 2023) specifically reflects on the corruption in the justice system in Europe, as it erodes trust and public confidence in both the administration and application of justice.

Table 2. Results of estimation

VARIABLES	Model 1 H ₁	Model 2 H ₂	Model 3 H ₃	Model 4 H ₄	Model 5 H ₅
Political corruption	-0.166** (.0731)				
Public sector corruption		-0.242*** (.0764)			
Executive corruption			0.0011 (.0383)		
Judicial corruption				0.183** (.0846)	
Legislator corruption					-0.582*** (0.1434)
Regulatory environment	0.453** (.2009)	0.403** (.1832)	0.478** (.2164)	0.485** (.2236)	0.548*** (0.1936)
GDP p/c	0.204** (.0586)	0.224*** (.0636)	0.198*** (.0692)	0.214*** (.0449)	0.198*** (0.0538)
Population 15-64	-1.995*** (.6423)	-2.093*** (.6708)	-2.235*** (.6517)	-2.509*** (0.7896)	-1.9334** (0.6327)
EU dummy	0.262*** (.1601)	0.228 (.1594)	0.283* (.1490)	0.269* (.1341)	0.257 (0.1599)
Constant	6.542 (3.2819)	6.738 (3.4128)	7.751** (3.210)	8.713** (2.7035)	6.759 (3.1758)
Observations	223	223	223	223	223
Number of groups	15	15	15	15	15
Within Rsq	0.18	0.18	0.17	0.17	0.21

Notes: Standard errors in parentheses, *** p<0.01, ** p<0.05, * p<0.1

Source: Authors' calculation

The obtained results have justified the main motivation behind the research, i. e., that we have to detangle different forms of corruption and test the effects of each on entrepreneurship. According to the findings, there appears to be a complex relation between various types of corruption and their impact on entrepreneurship. Two types of corruption appear to be particularly important – legislative and judicial corruption. Specifically, it seems that higher levels of corruption among legislators have a negative impact on entrepreneurship. This is expected because legislators are responsible for designing laws, regulations, and policies that directly affect the business environment, which may result in unfavourable business regulatory framework or in a lack of transparency. Conversely, the positive correlation between judicial corruption and entrepreneurship suggests that higher levels of judicial corruption are linked to higher levels of entrepreneurship, which seems counterintuitive. However, some research touches upon this aspect, such as Belitski, Chowdhury and Desai (2016), Belitski, Grigore and Bratu (2021), Riaz and Cantner (2021). Entrepreneurs may sometimes view (or anticipate) a certain degree of judicial corruption as a means to speed up legal procedures, which may incentivize entrepreneurship. Additionally, it is possible that a corrupt judiciary may not necessarily discourage entrepreneurship, especially in a case when entrepreneurs believe that they can express their influence through informal channels.

Thus, revisiting the links between entrepreneurship and corruption may seem redundant. Yet, the findings of this research deepen the analysis of the reflections of political entrepreneurship in a post-transitional entrepreneurial environment. They provide empirical evidence of the relationship between corruption and entrepreneurship that could be named the entrepreneurial ‘phone justice’ (the ‘phone justice’ phenomenon is named and presented by Ledeneva, 2008). At the policy level, the findings pinpoint the necessary domains to be targeted when developing policy recommendations aimed at an increase of new businesses. Most studies so far have emphasised the hindering effects on entrepreneurship, not necessarily highlighting the type of corruption that needs to be addressed first in order to (most likely) result in ‘invisible foot’ effects (Lambsdorff, 2007) in post-transitional entrepreneurial ecosystems. The “invisible foot” disentangles how corruption punishes honesty, it is therefore proposed to use the inherent risk of betrayal in corrupt dealings to shift incentives toward honest behaviour. Thus, this study provides compatible policy inputs to the previous studies questioning the policy aspect of corruption and entrepreneurship at the various stages of country’s development (Audretsch et al, 2022; Belitski, Grigore and Bratu, 2021; Khyareh and Amini, 2021). The afore-stated policy implication is in line with Audretsch et al. (2022), who claim that different types of entrepreneurship require different, context-adjusted policies, and with Belitski, Grigore and Bratu (2021) who provided a list of policy recommendations aimed at diminishing political entrepreneurship in developing and transitional societies.

5. Conclusion

This paper analysed the effects of corruption on entrepreneurship rates in CEE post-transition countries. The performed analysis expands previous research in terms of exploring different forms of corruption on the new business density rates. We performed an econometric analysis using a fixed-effect panel model for the 2006-2020 period. Countries analysed include Albania, Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Montenegro, North Macedonia, Serbia, Romania, Slovakia and Slovenia. Findings support the main motivation of the research, i.e., that different types of corruption exacerbate different effects on entrepreneurship rates.

The results showed that political corruption in general, as well as public sector corruption hinder entrepreneurship measured by the new business density rate. Moreover, while executive corruption effect is not statistically significant, legislative and judicial corruption have divergent effects. Legislative corruption adversely affects the new business density rate, while judicial corruption is positively associated with entrepreneurship variables, drawing attention to the shortcomings in the judicial system. The findings, from a policy aspect, underline the importance of efficient anti-corruption reforms that need to be context-specific, particularly within legislative and judicial systems. Overall, the findings suggest the need to focus primarily on increasing the institutional quality rather than a number of entrepreneurial ventures.

Finally, as a future research avenue, it would be worthwhile to explore the short- and long-term effects of anti-corruption policies, taking into account the distinction between opportunity and necessity driven entrepreneurship within an institutional context that features resistance (inherited characteristics). Additionally, stemming from the primary limitation of this research, which is the utilisation of new business density rate as a proxy for entrepreneurship, another potential direction for research could involve examining entrepreneurship development and measuring the success of new businesses over time as a crucial dependent variable.

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**LEGAL CHARACTERISTICS OF A MAXIMUM MORTGAGE WITH
AN ANALYSIS OF THE LATEST CASE LAW**

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Abstract

The article examines the legal nature and transferability of the maximum mortgage under the Slovenian Law of Property Code (Stvarnopravni zakonik or in abbreviation SPZ), focusing on Article 146(4) and its interpretation in case law and theory. It first recalls the accessory nature of liens, which normally follow the secured claim as to creation, scope, transfer and extinction. Against this background, it shows how the maximum mortgage was designed to secure fluctuating or future claims arising from an ongoing creditor–debtor relationship, up to a registered ceiling amount. The authors reconstruct the prevailing Slovenian view that, in the case of a maximum mortgage, the accessory link exists not between individual claims and the mortgage but between the business relationship and the maximum mortgage as a protective right in rem. They contrast this functional understanding with the literal wording of Article 146(4) SPZ, which excludes the transfer of the mortgage when a secured claim is assigned, and with the conservative approach of the Supreme Court. According to its case law, an assigned claim secured by a maximum mortgage is transferred without security, which reduces its market value and narrows the practical usefulness of this instrument. Using German and Austrian law as key comparators, the article argues that the Slovenian solution is unnecessarily rigid and departs from models that allow, under certain conditions, the transfer or transformation of a maximum mortgage into a fixed mortgage when claims are assigned or when the credit relationship is reduced to a single outstanding claim. The authors endorse the more recent doctrinal position and the approach taken by the Higher Court of Ljubljana, under which individual

“sub-mortgages” arise within the maximum mortgage and accompany the assigned claim to the new creditor, creating a community of mortgagees governed by general rules of the Obligations Code. The general view that a maximum mortgage is more flexible than a fixed mortgage is, in the Slovenian context, undermined by the current statutory wording and restrictive case law, which call for a systemic and functional reinterpretation of Article 146 SPZ – or, failing that, for legislative reform.¹

Keywords: *Maximum mortgage, accessory nature, transfer of the mortgage, individual mortgage, creditor-debtor relationship*

1. Introduction

The dogmatic concepts of property law and other areas of civil law were laid down as early as the time of Roman law. These legal and historical starting points underlie the regulations in many of the civil law codifications adopted by individual countries in the 19th century or early 20th century (e.g., the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch or in abbreviation ABGB)). In modern times, law must keep up with the needs of society and business practice. For this reason, it is necessary to check whether certain legal institutes still meet these modern needs. It is therefore inappropriate to regard certain cumbersome legal rules that were formed more than a hundred years ago as immutable in the sense that their suitability cannot be debated. One of the key aspects of the constitutional principle of the rule of law is the predictability of legal consequences. The predictability of legal consequences, as a value criterion included in the principle of the rule of law, requires that legal entities have the opportunity to clearly and unambiguously predict legal consequences at the time of entering a certain legal relationship. In this sense, only a clear and comprehensive legal regulation can ensure the predictability of consequences. Due to the principle of a limited number of legal positions or rights in real estate mortgage (hereafter referred to as *rem*) in property law, which is a fundamental principle of that law, clarity, internal consistency and transparency of the regulation in the area of property law are particularly important (Plavšak & Vrenčur, 2020, pp. 105-108).

Slovenian Law of Property Code (Stvarnopravni zakonik or in abbreviation SPZ) has been in use for more than 22 years. During this period, its use has shown that some legal rules do not meet the needs of modern business practice, while others should be revised due to their ambiguity. With the aim of preparing a clear, transparent and functional regulation of property law relations, a group

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of initiators submitted expert material to prepare amendments to SPZ to the Ministry of Justice of the Republic of Slovenia in 2016. In 2017, the same group of experts prepared a comprehensive proposal for amendments and additions to SPZ, which was not acceptable to the ministry (Plavšak & Juhart & Vrenčur, 2017). The proposal also included provisions relating to liens (especially mortgages). The Act on Amendments to the Property Law Code – SPZ-B, adopted by the National Assembly of the Republic of Slovenia in March 2020, does not contain any new provisions on mortgages (Vrenčur, 2019, pp. 1113-1126).

A mortgage is undoubtedly the most important security in property law, enjoying the greatest reputation in banking practice and occupying a central place among the securities for loans and other financial and business claims of creditors. It is therefore important that the law provides a clear and functional regulation of mortgagees, indeed for business in general, for the sake of legal clarity and predictability of legal consequences for participants in legal transactions. The drafter of the amendment to SPZ-B failed in their task to functionally regulate and update the legal rules of mortgage law despite an excellent opportunity. Furthermore, the drafter of the amendment to SPZ-B failed to regulate (correct) anything at all in Section 2, Part VI of SPZ, which regulates mortgages.

In this article, we will present the issue of inadequate regulation of maximum mortgage in Slovenian law. The first chapter will provide a general discussion of the accessory nature of land pledges, followed by a chapter on maximum mortgages, in which we will discuss the issue of transferability of maximum mortgages. We will compare the stances of case law and legal theory and present comparative law arguments that support the transferability of maximum mortgages. We will conclude with our own position on the issue at hand.

2. Accessory nature of land pledges

An important feature of liens is their dependence on the secured claim. It follows that a lien is a dependent (accessory) right in relation to the claim it secures. This means that a lien is not an independent derived right in rem and is also not an independently transferable right. The principle, or legal rule, of accessory nature was already known in Roman law. It stems from the broader principle of "*accessio cedit principali*", which means that accessory rights share the legal fate of the main right (Krajnc, 2020, p. 484). In the relationship between the lien and the secured claim, the lien is an accessory right, and the claim is the principal right to which the lien is subordinate (Tratnik, 2012, p. 27). Some other rights that do not have independent legal existence like the lien (i.e., they are dependent or accessory rights), also have the same relationship to the claim as the principal right. These are, in particular, the right arising from a surety, the right to interest, the right to a contractual penalty, forming rights and

the like (e.g., see Art. 418 of the Slovenian Obligations Code (Obligacijski zakonik or in abbreviation OZ)).

Upon examining the methods of exercising a lien, we can find that accessory nature is most evident in the transfer of a lien. An independent transfer of a lien is not possible. Its transfer to a new creditor is possible only if the lien creditor has transferred the claim, secured by the lien, to the new creditor. The term exercising a lien not only refers to its transfer, but also other forms of disposal. These are primarily the waiver of the lien and the encroachment of the lien. One of the methods of disposal that is no longer relevant today is the conversion of a mortgage into a land debt, due to the abolition of land debt with the amendment to SPZ-A in 2013 (compare Plavšak, 2012, pp. 58-59). These methods of disposal or exercising a lien belong only to the lien holder.

A lien depends on the secured claim in terms of its origin, scope, transfer, repayment and termination (Stöcker & Stürner, 2012, pp. 49-50). In short, we can say that the right of lien depends on the origin and existence of the secured claim (Hinteregger & Schwimann, 1998, p. 262). The principle of accessory nature thus defines the most important characteristic of the right of lien, regardless of the fact that there are some exceptions to this principle. A lien can also be established to secure a future or contingent claim (see Art. 129 SPZ; e.g., to secure a bank's recourse claim arising from the payment of a bank guarantee for rectifying defects during the warranty period or to secure a line of credit). The maximum mortgage, which is not a special type of mortgage at all, but has all the characteristics of a protective right in rem, holds a special place in the system of liens. We will discuss this in more detail later in the article.

If the legal transaction that was the legal basis for the creation of the secured claim is invalid, the lien is also invalid. A similar legal effect occurs when exercising the right of rescission. For example, if the creditor of the secured claim withdraws from a loan/credit agreement with *ex tunc* effects, the lien also ceases to exist due to its accessory status. However, such a legal consequence does not occur if the creditor of the secured claim recalls the claim. Such a recall is a unilateral entitlement to form or change the relationship that causes a change in the existing legal relationship, for example, an unmatured credit claim is converted into a matured claim. This means that when the lender exercises the right to recall the claim, due to the borrower's breach of obligation, all previously unmatured loan installments become due.

A mortgage is a derived right in rem that conditionally excludes ownership rights of real estate. If the mortgage is realized, through a forced sale of real estate carried out by the court, the owner loses ownership of the real estate. The mortgage is effective against the respective or current owner of the mortgaged real estate. This means that the respective owner of the mortgaged real estate is liable to fulfill the secured obligation up to the value of the real estate or up to the amount obtained from the sale of the encumbered property. This is particularly important in cases where the personal debtor, the borrower, is not

also the real debtor or the pledger. This usually occurs if the pledger pledges his real estate for another's debt or if the personal debtor, who is also the real debtor, after the creation of the mortgage, alienates/transfers the mortgaged real estate to a third party, who does not also assume the personal debt. A personal debtor, who is also a real debtor, is liable for both the obligation with their remaining assets, and with the real estate encumbered by the mortgage. This does not apply to the real debtor, who is liable only up to the value of the real estate or up to the amount that can be obtained from the sale of the encumbered property. The fact is that a mortgage provides the creditor with a favorable order of repayment from the value of the real estate, which the creditor normally does not have on the debtor's other assets. The absolute effect of a mortgage is also reflected in the priority rule, which states that earlier or older derived rights in rem take precedence over later or younger derived rights in rem (*prior tempore, potior iure*) (Plavšak, 2020, pp. 124-126, Juhart & Tratnik & Vrenčur, 2004, p. 79). Art. 6 SPZ inconsistently states: "If more than one right in rem exists over the same thing, the right in rem of the same type which was acquired first shall take precedence over the right in rem which was acquired later." The priority principle, or rule, not only applies to the competition of multiple rights of the same type, but also resolves the competition of different derived rights in rem, e.g., between a mortgage and a right of superficies (Vrenčur, 2016, pp. 32-42).

An older mortgage has an effect against the younger one in such a way that the holder of the older mortgage is repaid first from the proceeds of the sale of the encumbered real estate, followed by all the creditors whose claims are not secured by a mortgage. In other words, the pledgee enjoys the right of priority in repayment before all those who have acquired a lien after him or do not have a lien. Therefore, we say that the lien includes a preferential repayment entitlement, which is activated if the secured claim is not paid when it falls due. The order of priority of repayment rights depends on the creation of individual liens. This is of fundamental importance, as the subsequent mortgage creditors are exposed to the risk of not being repaid otherwise secured claims (see Art. 147 SPZ).

A change in the owner of the encumbered real estate does not affect the existence and thus the legal effect of the mortgage, as the mortgage has effect as a derived or absolute right in rem in relation to an indefinite number of persons (*erga omnes*; Art. 5 SPZ) (Plavšak, 2020, pp. 115-119, Vrenčur, 2016, pp. 27-32).

3. Maximum mortgage

3.1. Legal characteristics of a maximum mortgage

In Slovenian law, the maximum mortgage is regulated in Art. 146 SPZ. The text of the cited provision of SPZ reads: "(1) A mortgage can also be established by determining the maximum amount for which an immovable property may be used as a guarantee for securing claims (maximum mortgage). (2) A

maximum mortgage may be used to secure individual claims or claims originating from a specific legal relationship, the amount of which is not determined at the moment when the mortgage is established. (3) A maximum mortgage shall also be used to secure all interest and costs with regards to the secured claims up to the maximum amount. (4) In the event of an assignment of a claim which is secured by a maximum mortgage, any transfer of the mortgage shall be excluded."

A mortgage is generally dependent (accessory) on the secured claim, both in terms of its origin, scope, transfer, repayment and termination (Plavšak & Vrenčur, 2020, pp. 970-971). Notwithstanding the above, a mortgage can also be established to secure a contingent and future claim (see Art. 129 SPZ). This provision represents a legal departure from the strict accessory nature of a mortgage to the claim. When securing contingent claims, claims that will arise under a suspensive condition are particularly relevant, for example, a recourse claim of a bank against the subscriber of a bank guarantee that has been cashed in by the beneficiary. These are claims the occurrence of which depends on the realization of an uncertain fact (compare Art. 59 OZ). Future claims, however, are considered for mortgage security in particular if they are likely to arise, but the moment when they will arise is uncertain, for example, a bank claim from a line of credit or a bank claim from a revolving credit. In case of a mortgage, the possibility of securing future and contingent claims is limited by the rules regarding the registration of a mortgage in the land register. Given the fact that a mortgage is registered with information on the amount of the secured claim, maturity, interest rate and any valuation clause, it is most often possible to establish only a maximum mortgage to secure future and contingent claims (due to the absence of information defining the claim). However, there are no obstacles to registering a fixed mortgage in the land register that secures future claims, provided that all the defining elements of this claim that need to be entered in the land register are known. Thus, even before the secured claim arises, a bank loan, including a line of credit or a revolving credit, can be fully determined as to amount, maturity, interest rate, and repayment terms, so this data can be entered in the land register (Plavšak & Vrenčur, 2020, pp. 1002-1005, Tratnik, 2016, pp. 734-735).

The legal effect caused by the statutory accessory nature of the mortgage is that the mortgage ceases to exist in the substantive legal sense upon the termination of the secured claim. This effect occurs regardless of the fact that the mortgage was originally established to secure a future or contingent claim. As mentioned, the establishment of a fixed mortgage is permissible both for securing an existing claim and for securing a future or contingent claim. In this fixed mortgage, for example, for securing a future claim. Later, when the claim arises, an accessory relationship is established between the claim and the mortgage and not between the business relationship and the mortgage. Due to accessory nature, the existing lien cannot be used to secure a new claim, though the exception applies to a maximum mortgage. It is therefore not possible to maintain the old lien to secure a new claim when the original claim, which was

secured by the same fixed mortgage, already ceased to exist. An accessory or fixed lien ceases to exist when the secured claim ceases to exist (see, e.g., second paragraph of Art. 154 SPZ, which regulates typical situations that are grounds to extinguish a mortgage in the substantive sense), and a new lien must be established to secure a new claim. The Supreme Court of the Republic of Slovenia emphasized that nowhere in the Slovenian legal system is there any provision that allows either transferring an already established mortgage, either due to payment or an exhausted mortgage, to a new claim or the replacement of the secured claim. According to the Supreme Court, this fact does not constitute a legal void, but rather indicates that the Slovenian regulation does not allow such transferability of a mortgage. The reason lies in the effect of the principle of accessory nature, i.e. the rule according to which ancillary things or rights share the legal fate of the main thing or right, in this case of a claim. If this claim does not exist, either because it did not arise at all or has ceased to exist, then the mortgage as a lien on the immovable property formally exists due to its entry in the land register, but it is a voided, vacated mortgage, one that no longer has content or meaning (see Supreme Court of the Republic of Slovenia Judgment II Ips 48/2012 of 11 April 2012). Austrian substantive mortgage law has more flexible rules for the transfer of a fixed mortgage. Slovene property law did not regulate these rules when SPZ was adopted. Under Austrian law, an existing vacated and not yet deleted mortgage can be used to secure a new claim that does not exceed the amount of the registered mortgage or secured claim. This is a special form of use of the mortgage by the owner, that is on the basis of a document that shows that the first secured claim ceased to exist (see paragraph 469 ABGB). The Austrian model of the transfer of a fixed mortgage was also adopted by the Croatian legislator. Accordingly, it is stipulated in the second paragraph of Art. 347 of the Croatian Act on Ownership and Other Real Rights (*Zakona o vlasništvu i drugim stvarnim pravima*) that “Before the mortgage is deleted in the land register, the owner of a piece of real property encumbered by the mortgage may transfer the mortgage to a new claim not greater than the one that is entered and that has terminated based on a certificate or another document proving the termination of the claim secured by the mortgage.”

A maximum mortgage (German: *Höchstbetragshypothek*) can be used to secure claims arising from a specific legal relationship, the amount of which is not specified at the time of the mortgage. SPZ stipulates that in the event of an assignment of a claim, secured by a maximum mortgage, any transfer of the mortgage shall be excluded (fourth paragraph of Art. 146 SPZ). This would suggest that in the case of a maximum mortgage there is no accessory relationship between the specific claim and the mortgage. The established position in literature and case law is that in the case of a maximum mortgage, there is accessory relationship between the business relationship and the maximum mortgage. If an individual claim within the maximum mortgage ceases to exist, the maximum mortgage itself does not cease to exist as well. If a claim, secured by a maximum mortgage, is assigned, the mortgage is not

transferred to a new creditor, not even partially. A more recent theory in this regard explains that a maximum mortgage is not a subtype of a mortgage at all but has the characteristic of a protective derived right in rem, such as the preliminary notes of the acquisition of a mortgage or the priority notice to acquire a mortgage. The maximum mortgage itself does not include a preferential repayment entitlement. Rather, this entitlement is granted to individual mortgages that arise within the maximum mortgage when an individual claim arises from a business relationship secured by the maximum mortgage. An individual mortgage, however, takes effect precisely when the maximum mortgage takes effect (Plavšak, 2016, p. 117, Vrenčur, 2019, p. 1121, Plavšak, 2018, p. 133, Plavšak, 2020, p. 1054). According to theory, this characteristic must be considered when interpreting the fourth paragraph of Art. 146 SPZ. The mentioned paragraph, which states, that “in the event of an assignment of a claim, secured by a maximum mortgage, any transfer of the mortgage shall be excluded, means that the assignment of an individual claim to a new creditor does not transfer the maximum mortgage as a security right in rem”. This rule does not exclude the general rule according to which the transfer of a claim to the new creditor also transfers the individual mortgage, created within the maximum mortgage. If the holder of the maximum mortgage transfers to the new creditor a claim from a business relationship that is secured by a maximum mortgage, a situation arises that has the same characteristics as the situation that arises if the mortgagee transfers to the new creditor only part of the claim or some of the claims that are secured by the same ordinary, fixed mortgage. Thus, even in the case of the transfer of an individual claim secured by a maximum mortgage, the assignor and the new creditor become joint holders of the maximum mortgage (Plavšak, 2016, p. 118). This creates a situation, when a certain right belongs to several subjects, which is normatively regulated within the civil law framework in OZ (Plavšak, 2020, pp. 1010-1012). The same lien can therefore be acquired jointly by several persons, or such a situation can arise in the case of an assignment of part of the claim or individual claim, secured by a mortgage or maximum mortgage. By creating a situation, in which the holders of the same right are two or more persons, mutually obligatory rights and obligations arise between these persons in their internal relationship with regard to the exercise of the entitlements contained in this joint right. According to the general rule set out in the first paragraph of Art. 1004 OZ, it is presumed that the shares of individual holders of the same right are equal. Such a presumption is not appropriate for the community of several holders of the same lien. Therefore, the proposed third paragraph of the new Art. 136.a SPZ establishes a presumption that the secured claims of an individual creditor upon the exercise of such lien are repaid in a share that is equal to the ratio between the amount of the secured claims of this creditor and the total amount of the claims of all creditors secured by this lien. The Ministry of Justice of the Republic of Slovenia did not accept this proposal of the expert group when drafting its amendment to SPZ-B (Plavšak & Juhart & Vrenčur, 2017, p. 54).

3.2. Relevant comparative law perspective (German and Austrian maximum mortgage regulations)

When drafting the fourth paragraph of Art. 146 SPZ, which stipulates that in the event of an assignment of a claim which is secured by a maximum mortgage, any transfer of the mortgage shall be excluded, our legislature followed the German regulation of the fourth paragraph of Section 1190 of the German Civil Code (Bürgerliches Gesetzbuch or in abbreviation BGB), but did not take into account the entire context of the German regulation. According to the fourth paragraph of Section 1190 BGB, a claim, secured by a maximum mortgage, may be transferred in accordance with the general rules applicable to assignment (Section 398 BGB et seq.), and if the claim is transferred in accordance with these rules, the transfer of the mortgage is excluded. This means that in this case, only the claim is transferred to the new creditor (assignee), but not the maximum mortgage. A property encumbered by a maximum mortgage continues to guarantee up to the registered maximum amount for other claims that will arise from the business relationship with the previous creditor, the assignor (Dugar, 2020, p. 1058). A special feature of German law is that claims secured by a mortgage are not transferred under the rules on assignment, but instead under the rules that apply to the transfer of rights in rem in real estate. A claim that is merely secured, without a mortgage, cannot generally be transferred under German law (see Section 1153 BGB). This means that the fourth paragraph of Section 1190 BGB provides an exception to the general rule regarding a maximum mortgage by allowing the independent transfer of a claim, by assignment, without a mortgage. Only in this case is the transfer of the mortgage excluded, otherwise it is not. Thus, the maximum mortgage is generally transferred according to the rules that apply to the transfer of a mortgage-secured claim, i.e. on the basis of an agreement on the assignment of the claim (together with the mortgage) and the entry of the transfer in the land register (section 1054 BGB). Let us add that the issue of transferring a maximum mortgage is practically irrelevant, as mortgage has been completely replaced by land debt in German business practice (see also Wolf & Wellenhofer, 2015, pp. 449-460, Dugar, 2020, pp. 1057-1058).

Under Austrian law, in the event of the assignment of individual claims, secured by a maximum mortgage, the mortgage can be transferred, whereby the mortgage in respect of the amount of the assigned claims, with the debtor's consent, automatically converts into a fixed mortgage (Tratnik, 2008, p. 15). Dugar (2020, p. 1058) explains that in Austrian case law and legal theory, it is controversial whether a maximum mortgage is transferable. According to the prevailing view in theory, the transfer of a maximum mortgage is only possible if the transferee enters into a framework credit relationship on the basis of a contract transfer. The debtor must also consent to such a transfer of the contract. In case of an assignment of an individual claim arising from a business relationship, the maximum mortgage is transformed into a fixed mortgage in respect of the amount of the assigned claim and is transferred to a new creditor

in this form. The Austrian Supreme Court (Oberster Gerichtshof or in abbreviation OGH) has emphasized that a distinction must be made between the framework credit relationship and individual claims arising within the framework of this relationship. The transfer of a maximum mortgage is possible if, with the consent of the debtor, the entire framework credit relationship is transferred to the new creditor, which means that all rights and obligations arising from this relationship are transferred to the new creditor. An individual claim from the framework credit relationship, and with it the mortgage, can only be transferred if the framework credit relationship is reduced to one claim arising from this relationship and no further use of the credit line is envisaged in the future. In this case, the maximum mortgage may be transformed into a fixed mortgage and in this form is transferred together with the assigned claim to the new creditor (OGH Judgment, 3Ob218/11x of 14 December 2011). Only if the debtor agrees to the transfer of the entire business relationship, i.e. when it concerns the transfer of a contract, which is regulated in more detail in Art. 122 OZ, or if the credit limit is reduced to a single claim of the creditor and it is obvious that the limit will no longer be used, the mortgage with the highest amount can only be tied to this claim and no longer to the credit limit, so that the mortgage can also be transferred to a new creditor. In this case, the maximum mortgage is treated as a fixed mortgage upon transfer and, as such, is transferred to the transferee of the claim. Only if the debtor agrees to the transfer of the entire business relationship or if the credit limit is reduced to a single claim of the creditor and it is obvious that the limit will no longer be used, the maximum mortgage is only tied to this claim and no longer to the credit limit, so that the mortgage can also be transferred to the transferee. By reducing the maximum amount to a single outstanding claim, for example by removing the credit limit on the part of the existing creditor, the mortgage with the maximum amount at the time of the transfer of the claim, or purchase, is treated as a fixed-amount mortgage and, as such, is transferred to a third party, the transferee (OGH Judgment, 3Ob218/11x of 14 December 2011, point 37 of the reasoning).

Compared to the German regulation, which the Slovenian regulation was modeled after, Art. 146 SPZ represents a simplified version of the German regulation and, if read literally, does not meet the needs of business practice, as it reduces the turnover and thus the value of the creditors' claims, secured by the maximum mortgage (see also Kurzbauer, 1999, pp. 14-15, Tratnik, 2008, p. 15). The Slovenian regulation is stricter compared to the German and Austrian regulations, which are the most similar regulations, and in fact reduces rather than increases the flexibility of the maximum mortgage. Therefore, the provision of the fourth paragraph of Art. 146 SPZ must be interpreted systemically and functionally.

3.3. Slovenian case law

In the past, the Supreme Court of the Republic of Slovenia explained that a maximum mortgage represents a departure from accessory nature, as it does not protect individual claims, but instead only the fundamental debtor-creditor relationship from which the claims originate. The accessory nature of this mortgage is therefore lesser and different than that of a classic mortgage. Therefore, in the event of an assignment of a claim, secured by a maximum mortgage, the transfer of the mortgage is excluded (fourth paragraph of Art. 146 SPZ) (Supreme Court of the Republic of Slovenia Decision II Ips 407/2005 of 12 July 2007). Due to these positions of Slovenian case law, difficulties arise when applying or interpreting the fourth paragraph of Art. 146 SPZ, as it is not unambiguously clear whether, when transferring individual or collective claims secured by a maximum mortgage, the security (the individual mortgage that was created within the maximum mortgage) is also transferred to the new creditor. Therefore, the group of initiators of the proposal to amend SPZ-B envisaged certain changes. For instance, in paragraphs five to seven of Art. 146 SPZ, they envisaged the legal possibility for the holder of a maximum mortgage to transform this maximum mortgage into a regular, fixed mortgage (Plavšak, Juhart, Vrenčur, 2019, pp. 55-56, Vrenčur, 2019, pp. 1121-1123). The Ministry of Justice of the Republic of Slovenia did not take this proposal into account when preparing its proposal for the amendment SPZ-B.

In its latest decision, the Supreme Court of the Republic of Slovenia once again took a conservative position regarding the transferability of the maximum mortgage (Supreme Court of the Republic of Slovenia Decision II Ips 43/2024 of 7 February 2025). This position was taken in connection with the challenged decision of the Higher Court in Ljubljana (VSL Decision I Cp 836/2022 of 28 November 2023). The Supreme Court has once again clarified that under SPZ, in the event of an assignment of a claim secured by a maximum mortgage, the transfer of the mortgage is excluded (fourth paragraph of Art. 146 SPZ). In case of a maximum mortgage, there is no accessory relationship between an individual claim and the mortgage, but rather an accessory relationship between the business relationship and the maximum mortgage. Should an individual claim within the maximum mortgage cease to exist, so does the maximum mortgage itself. If a claim, secured by a maximum mortgage, is assigned, the mortgage is not transferred to the new creditor, not even partially. In its reasoning, the Court explained (points 12 to 19 of the reasoning of the Supreme Court decision, decision II Ips 43/2024 of 7 February 2025) that a maximum mortgage is a subtype of mortgage regulated in the first paragraph of Art. 146 SPZ. This stipulates that “a mortgage can also be established by determining the maximum amount for which an immovable property may be used as a guarantee for securing claims (maximum mortgage)”. A maximum mortgage can be used to secure an individual claim or claims that arise from a specific legal relationship, the amount of which is not determined at the time the mortgage is established. A maximum mortgage is therefore, in its content, a

form of a lien that is registered in the land register and allows the lien creditor to also secure claims that will arise and are not yet known, in terms of amount, at the time the security is established. The security is enabled by entering the maximum amount up to which the mortgage still provides security in the land register. SPZ, in the fourth paragraph of Art. 146, explicitly stipulates that in the event of an assignment of a claim secured by a maximum mortgage, the transfer of the mortgage shall be excluded. Since the maximum mortgage provides a so-called "open" of security, the legislature's intention with this provision was to exclude competition between creditors in the same priority order that could occur upon the transfer of an individual claim. This means that when an individual claim arises from a business relationship secured by a maximum mortgage, no individual ordinary mortgage is created within the maximum mortgage, as advocated by the more recent theory. If a new ordinary mortgage were to automatically arise with the emergence of each new claim, this could lead to competition between the original and the new creditor. This is precisely what the legislature wanted to prevent with the fourth paragraph of Art. 146 SPZ. In case of a maximum mortgage, there is therefore no accessory relationship between an individual claim and the mortgage, but rather an accessory relationship between the business relationship and the maximum mortgage. If an individual claim within a maximum mortgage ceases to exist, the maximum mortgage does not cease to exist as well. If a claim, secured by a maximum mortgage, is assigned, the mortgage is not transferred to the new creditor, not even partially. This is the essential message of the fourth paragraph of Art. 146 SPZ. It is an exception, *lex specialis*, to the general rule in Art. 148 SPZ, according to which the ordinary mortgage, unless otherwise agreed, follows the claim.

A further question is whether a maximum mortgage can be assigned by a special contract. This is not expressly prohibited by the fourth paragraph of Art. 146 SPZ, but the restrictions are dictated by the internal characteristics of the maximum mortgage. A maximum mortgage may not be divided, as division would circumvent the purpose of the rule from the fourth paragraph of Art. 146 SPZ described above. Another effect to be avoided is that the transferred maximum mortgage would serve to secure newly arising claims in the relationship between the mortgage debtor and the new mortgage creditor, since the mortgage debtor never agreed to such security. A maximum mortgage can therefore only be transferred if the new creditor, with the debtor's consent, assumes the entire legal relationship that is the basis for the creation of the claim. A special situation arises if the creditor-debtor relationship is reduced to a single, or perhaps a few, claims and the fundamental relationship between the pledgee and the principal debtor ends and it is clear to all participants that new claims from this relationship will no longer arise. In this case, the maximum mortgage is limited to the remaining claim. In all other cases, the transfer of the maximum mortgage is excluded. The Supreme Court found that the court of second instance, due to an incorrect substantive assessment of the maximum mortgage and its consequences, in the case of the transfer of claims to a new

creditor, did not exhaust the defendant's appeal and did not take a position on all of the defendant's appeal statements in the revision challenging the legally decisive factual findings of the court of first instance. Therefore, it found that the contested judgment had no grounds in this regard due to the incorrect application of the fourth paragraph of Art. 146 SPZ. The defendant's revision was found well-founded, which is why the Supreme Court overturned the judgment of the court of second instance in the contested part relating to the validity of the transfer of the maximum mortgage as it concerned the decision on the counterclaim in points 2, 3 and 4 of the claim, in accordance with the second paragraph of Art. 380 of the Slovenian Civil Procedure Act (*Zakon o pravdnem postopku* or in abbreviation *ZPP*). Consequently, it also annulled the decision on the costs of the appeal proceedings.

The Supreme Court did not accept and rather ignored, the position that individual fixed mortgages arise within a maximum mortgage with the creation of individual claims, which take effect from the moment the maximum mortgage takes effect as a security right. A new creditor of an individual claim who becomes a co-holder of a maximum mortgage does not compete with the assignor of this claim any differently than a new creditor in the assignment of part of a claim or only certain claims secured by a fixed mortgage. The same lien may be acquired jointly by several persons, or such a situation may arise in the assignment of part of a claim or individual claim secured by a mortgage or maximum mortgage. When a situation arises where two or more persons are holders of the same right, mutual (obligational rights, and obligations of these persons arise in the internal relationship between these persons regarding the exercise of the entitlements contained in this joint right and the fulfillment of any obligations related to the ownership or exercise of the right. These relationships are regulated by the general, dispositive rules in Chapter XXVIII of the Special Part of OZ. For these internal relationships, we use the term legal community (Art. 1003 OZ). A lien is a dependent accessory right in relation to a secured claim. Therefore, it can only arise and exist if a secured claim exists. The situation of a community of several lien holders can arise when the holders of a claim secured by a lien are two or more creditors, or when several claims are secured by the same lien, the holders of which are different creditors, for example, in the case of a syndicated bank loan (Plavšak & Juhart & Vrenčur, 2017, p. 54, Vrenčur, 2019, p. 1121).

In addition, it depends on the will of the assignor whether he will assign an individual claim or not and thereby voluntarily agree to the legal position of the creation of joint ownership of the maximum mortgage. Therefore, the Supreme Court's argument, stating that "if a new ordinary mortgage was automatically created with the creation of each new claim, this could lead to competition between the original and new creditor", is questionable. Another weak argument is the Court's assertion "that a maximum mortgage may not be divided, since division would circumvent the above-described purpose of the rule from the fourth paragraph of Art. 146 SPZ. Another effect that we must absolutely avoid is that the transferred maximum mortgage would serve to

secure newly created claims in the relationship between the mortgage debtor and the new mortgage creditor, since the mortgage debtor has never agreed to such security". The mortgage debtor, pledgee, guarantees the value of the real estate for the payment of the claim or claims up to the maximum amount (first paragraph of Art. 146 SPZ). If the value of the real estate is not sufficient, the pledgor, who is also a personal debtor, guarantees the payment of the claim with his remaining assets. If the pledgor is not also a personal debtor, his guarantee is limited to the value of the real estate, or to the credit, obtained through the forced sale of the encumbered real estate. In addition, the legal position of the debtor may not be impaired in any way due to the assignment of the claim. The transferee has the same rights against the debtor as the assignor had against him before the assignment. In addition to the objections the debtor has against the transferee, the debtor may also assert against him all of the objections he could have asserted against the assignor until he learned of the assignment (Art. 421 OZ). A detailed analysis of the described legal situations shows that the assignment of individual claims, secured by a maximum mortgage, does not in any way worsen the legal position of the debtor. With the assignment of an individual claim, which, on the basis of Art. 418 OZ and Art. 148 SPZ, means an automatic transfer of the individual fixed mortgage, which arose at the moment of the creation of this individual claim based on a business relationship, and which has a secured priority order from the moment at which the maximum mortgage takes effect as a security right, joint ownership of the maximum mortgage arises. When a situation arises where two or more persons are the holders of the same right, mutual obligational rights, the obligations of these persons arise in the internal relationship between these persons, which are regulated by the Obligations Code in the context of the legal community (Arts. 1003 to 1011 OZ).

The basic purpose of the maximum mortgage is in its more flexible legal concept compared to the fixed mortgage and not vice versa. With the interpretation offered by the Supreme Court, the maximum mortgage becomes more fixed in this respect than the fixed mortgage. This was certainly not the legislature's intention, but rather a lapse of the legislature in summarizing the German regulation (Tratnik, 2008, p. 14-15). Therefore, Art. 146 SPZ must be interpreted systematically and thus functionally.

In the contested judgment (VSL Judgment I Cp 836/2022 of 28 November 2023), the Higher Court of Ljubljana applied the position of more recent legal theory (Plavšak, 2020, p. 1054), which is the position that we also advocate in this article. It explained that "SPZ awkwardly stipulates that in the event of the assignment of a claim, secured by a maximum mortgage, the transfer of the mortgage is excluded. According to more recent positions in theory and case law, this rule only states that the transfer of an individual claim to a new creditor does not transfer the maximum mortgage as a protective right in rem. However, it does not exclude the general rule, according to which, with the transfer of a claim to a new creditor, the individual mortgage that arose within the maximum mortgage is transferred to secure this claim". The Higher Court in Ljubljana

then points out that the fundamental rule of civil procedure is that a judgment is effective between the parties.

“The constitutional requirement for an adversarial procedure and the right of a party to be heard also implies the requirement that a judgment may only bind those persons who had the opportunity to participate in the procedure in which it was issued. The expansion of the subjective limits of finality is an exception to the general rule, permissible only in specially justified cases, e.g. in the case of legal succession, single co-litigation, in judgments regarding the challenge of legal acts and the determination of the (non)existence of disputed claims in bankruptcy, in status disputes, etc. The defendant in that case was a mortgage debtor because his property right was registered after the registration of the maximum mortgage, but this does not mean that he is bound by a final judgment on the existence and amount of the claim issued in a procedure in which he did not participate. SPZ awkwardly stipulates that the transfer of the maximum mortgage is excluded. But according to recent theoretical and case law, this rule only states that the transfer of an individual claim to a new creditor does not transfer the maximum mortgage as a security right in rem as well. However, it does not exclude the general rule according to which the transfer of a claim to a new creditor transfers the individual mortgage that was created (within the maximum mortgage) to secure this claim” (Higher Court in Ljubljana, Judgment I Cp 836/2022 of 28 November 2023).

4. The formative effect of the mortgage transfer

With the assignment of a secured claim to a new creditor, the lien is also transferred to him (Art. 418 OZ, Art. 148 SPZ, Art. 1018 OZ). Since the lien has a protective function, it is understandable that it can generally only be transferred together with the secured claim. It is emphasized that the independent existence of a lien is already conceptually excluded if the pledge is not intended for security (Kundi, 2003, p. 76). The general rule in assignment is that the new creditor acquires the same rights as the assignor had before him. This means that he enters into the position of the creditor both with regard to the claims and with regard to other accessory rights, with the transfer of a secured claim, the mortgage is also transferred, unless otherwise agreed (first paragraph of Art. 148 SPZ, see also Hinteregger, 1998, p. 264). Even in comparative legal systems, the transfer of a mortgage takes effect with the assignment (by mortgage) of the secured claim and not only with the entry in the land register, as incorrectly stated in the second paragraph of Art. 148 SPZ. The entry of the transfer of a mortgage does not have a formative effect, but

only a publicity effect (see also: Supreme Court of the Republic of Slovenia, Judgment III Ips 131/2005 of 23 May 2007 and decision II Ips 75/2009 of 11 June 2009). Since the mortgage is transferred to the new creditor automatically, due to the assignment of the claim secured by the mortgage, a special transaction for the transfer of the mortgage is not required. However, since the new creditor can only register the transfer of the mortgage on the basis of a document, suitable for registration, according to the rules of land registry law, such a document, referred to in the third paragraph of Art. 40 of the Slovenian Land Register Act (Zakon o zemljiški knjigi or in abbreviation ZZK-1) will be required to harmonize the land registry status, with regard to the change of the mortgage holder. If the assignor refuses to issue such a document, the basis for registering the transfer of the mortgage will be a final declaratory judgment by which the court establishes the transfer of the mortgage (Plavšak, 2012, pp. 63-64).

The lien is also transferred to the new creditor due to the effect of subrogation, *cessio legis*. For example, if the guarantor fulfills the obligation of the principal debtor that is secured by a mortgage on real estate owned by the principal debtor, he takes the place of the lien creditor both with regard to the secured claim and the lien (Art. 1018 OZ, see also Art. 275 OZ, which is the general rule for *cessio legis*). The latter is also true for contractual subrogation (see Art. 274 OZ). Here too, for the same reason as in the case of contractual assignment, publicity must be ensured regarding the change in the mortgage creditor. A land registry permission is not required to reconcile the land registry status; the registered owner's consent (see third paragraph of Art. 40 ZZK-1) in which the old creditor acknowledges the transfer of the mortgage, is sufficient. When we say that no land registry permission is required, we want to emphasize that the new creditor has acquired the mortgage directly on the basis of the law, which is why the old mortgagee does not have the right to dispose of the mortgage in the sense of its transfer. Nevertheless, due to the rules of land registry law, a suitable registered owner's consent is required for recording the transfer of the mortgage. In fact, the situation is the same as in the contractual assignment of a claim secured by a mortgage.

In accordance with these rules, an individual mortgage that was created within the maximum mortgage, is also transferred.

5. Conclusion

The general view that a maximum mortgage is more flexible than a fixed mortgage, which is also established in comparative legal systems, has been called into question due to inadequate stances taken in the Slovenian case law. According to the position of the Supreme Court of the Republic of Slovenia, it is possible to assign a claim, secured by a maximum mortgage, only without a mortgage, i.e. without security, which is of key importance for the enforcement

of the preferential right to repayment provided by the mortgage. This means that such an unsecured claim is practically uninteresting for potential buyers of claims, as no one wants to take over or acquire a claim without mortgage security. For this reason, experts have already proposed amendments to SPZ in the past, specifically with regard to the maximum mortgage, following the example of the German and Austrian regulation of the maximum mortgage, where this type of mortgage is regulated much more flexibly. This means that comparative law arguments confirm our efforts for a more appropriate regulation of the maximum mortgage in SPZ. The fact is that SPZ inadequately stipulates that in the event of assignment of a claim, which is secured by a maximum mortgage, the transfer of the mortgage shall be excluded (fourth paragraph of Art. 146 SPZ). The theory therefore attempts to interpret this inadequate provision systematically, since otherwise the regulation of the maximum mortgage would prove to be completely dysfunctional.

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**ON A CONSTITUTIONAL AND NATIONAL IDENTITY OF THE EU
MEMBER STATES: SAME BUT DIFFERENT? ^{1,2}**

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Abstract

This article examines whether the concepts of national identity and constitutional identity in the European Union's legal framework can be used interchangeably. By tracing the historical evolution and *travaux préparatoires* of Article 4(2) TEU, the paper demonstrates that the drafters consistently employed the term national identity as an autonomous concept of EU primary law, deliberately omitting any reference to constitutionality. Building on the theoretical framework proposed by Elise Cloots, the article develops a teleological and interpretative argument showing that the interchangeable use of these terms lacks textual and historical support. It then examines how Member States' constitutional courts, particularly the German Federal Constitutional Court have constructed a doctrine of constitutional identity review rooted in national constitutional law. This jurisprudence distinguishes constitutional identity as an absolute, domestically defined limit to European integration, while national identity under Article 4(2) TEU functions as a principle of respect constraining the exercise of Union competences. The article concludes that conflating these two notions risks both conceptual confusion and constitutional deadlock within the EU. A clear differentiation between national and constitutional identity is therefore essential for maintaining a coherent balance between national sovereignty and the primacy of EU law.

Keywords: *constitutional identity, national identity, constitutional law, primacy, sovereignty*

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1. Introduction

Almost twenty-five years after its adoption, the Maastricht Treaty remains a milestone that reshaped European integration by creating the European Union (EU) as we know it today. While the Treaty of Lisbon (2009) revised the founding treaties into their current form, certain provisions, most notably Article 4(2) of the Treaty on European Union (TEU), continue to provoke scholarly debate that is far from concluded.

The Maastricht Treaty introduced the three-pillar structure and expanded EU competences into areas previously reserved for Member States, including foreign policy, defence, and justice. In response, Member States sought safeguards to protect sovereignty, leading to the inclusion of two key concepts: subsidiarity (now Article 5(3) TEU) and respect for national identity (now Article 4(2) TEU) (Cloots, 2015).

Article 4(2) TEU requires the EU to respect the equality of Member States before the Treaties, their *national identities*, and their essential state functions. The reference to “*national identities*” has become the focal point of academic discourse (see Schnettger, 2021; von Bogdandy & Schill, 2011; Blagojević, 2017; Konstadinides, 2013a). Some authors regard it as a *national constitutional identity clause* (Blagojević, 2017), while others use “national” and “constitutional” identity interchangeably (von Bogdandy & Schill, 2011). This ambiguity is mirrored in the jurisprudence of national constitutional courts, which invoke Article 4(2) TEU in diverse and sometimes inconsistent ways (Trybunał Konstytucyjny, 2021a; 2021b; Alkotmánybíróság, 2021).

The differing approaches across Member States (particularly Germany, Italy, and Poland) illustrate the uncertainty surrounding identity protection. Key questions persist: Are the terms *national* and *constitutional identity* equivalent? Does Article 4(2) TEU protect both, or only the former? And how is this distinction applied in practice?

Building on previous research (Kiššová, 2021; 2022a; 2022b; 2023), this article argues that Article 4(2) TEU enshrines a *national identity clause*, whereas constitutional courts have developed *constitutional identity* through their case law. Thus, equating the two is conceptually inaccurate. This critique follows Cloots (2016), who contends that conflating these terms undermines analytical clarity and legal precision.

The article therefore aims to refine Cloots’ reasoning and provide a framework distinguishing *national identity* from *constitutional identity* within Article 4(2) TEU. It contends that maintaining this distinction is essential for preserving the balance between EU integration and Member States’ constitutional autonomy, thereby preventing potential interpretative and institutional deadlocks within the Union.

2. Reviewing Cloots' views on the non-interchangeability of the two concepts

In her article, Cloots (2016, p. 83) presents three main arguments explaining why *national identity* and *constitutional identity* cannot be used interchangeably in relation to Article 4(2) TEU. First, she grounds her reasoning in the theory of legal interpretation. Second, she argues that the protection of *national identity* and the protection of *constitutional identity* are based on different normative assumptions. Third, she emphasises that the drafters of the Treaties had sound reasons for employing the term *national identity* rather than *constitutional identity*.

I will now focus more closely on Cloots' first argument, in which she contends that interpreting Article 4(2) TEU through the lens of *constitutional identity* lacks a sound foundation in legal interpretation theory. According to Cloots (2016, p. 83), several authors have referred to Article 4(2) TEU in different ways, most commonly framing it as an expression of *national constitutional identity* or, alternatively, as *constitutional identity* in a general sense. It is indeed the case that, when examining scholarly works addressing Article 4(2) TEU, the vast majority of authors use the terms interchangeably, often without reflecting on whether such usage is appropriate (See: Besselink, 2010; Besselink, 2012; Claes, 2012; Konstadinides, 2013b). I concur with Cloots on this point, as my own analysis likewise confirms that academic literature frequently employs both concepts interchangeably (see: Callies & Van der Schyff, 2021; Drinóczi, 2020; Hamulák, Kopal, & Kerikmäe, 2017; Kelemen & Pech, 2019). The cases analysed in these studies primarily concern issues of constitutional pluralism and constitutional identity, either within selected Member States or specifically in the contexts of Hungary, Poland, and Germany. In these works, the authors employ the term of *constitutional identity* in relation to Article 4(2) TEU. Their analyses focus either on the general notion of *constitutional identity* or on its application in the case law of the Court of Justice of the European Union (hereinafter also referred to as "CJEU") and the constitutional courts of individual Member States, including the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) (hereinafter also referred to as "BVerfG"), which is discussed later in this article.

Cloots (2016, p. 84) contends that the authors thereby engage in what she describes as a "conceptual leap," which, in her view, lacks substantive justification. She argues that this "conceptual leap" is not founded on a sound theory of legal interpretation. At best, it seems that the authors implicitly assume that the drafters of the Lisbon Treaty intended to reassure constitutional courts that had insisted on the recognition of their respective constitutional orders. In this regard, Cloots argues that such authors appear to interpret Article 4(2) TEU through an "*intentionalist interpretation*" referring to the intention

of the treaty-makers, i.e. the drafters of the Lisbon revision which rephrased Article 4(2) TEU into its current form. Cloots (2016, pp. 85–86) advances two counterarguments: first, that the so-called “*intentionalist approach to the theory of legal interpretation*” is widely contested, and second, that EU law lacks an “*tradition of intentionalism*”, as the Court of Justice rarely relies on the drafters’ intentions or historical records in its interpretive practice.

At this juncture, however, I take the liberty of engaging critically with Cloots’s argument regarding the absence of an intentionalist tradition in the jurisprudence of the Court of Justice, thereby laying the foundation for the present article. It is indeed true that, for a considerable period, the Court refrained from relying on the *travaux préparatoires* when interpreting the Treaties, largely due to their general unavailability.⁴ Yet, in later CJEU case law, most notably in *Pringle*⁵ and/or *Inuit Tapiriit*⁶, the Court appears to have relied on a teleological approach when addressing preliminary reference question. In the case *Inuit Tapiriit*, the General Court employed a teleological interpretation to determine the purpose of introducing the notion of a “*regulatory act*” in Article 263(4) Treaty on the Functioning of the European Union (hereinafter also referred to as “TFEU”) by analysing the drafting history of that provision (Lenaerts & Gutiérrez-Fons, 2013, pp. 19–20). In the appellate proceedings in this case, Advocate General Kokott expressly addressed the use of *travaux préparatoires*, emphasising that, owing to the increased transparency in the treaty revision process, *travaux préparatoires* are emerging as a new and useful supplementary interpretative tool for the interpretation of EU primary law, provided that the wording, context, and objectives of a provision do not yield a clear answer.⁷

While I concur with Cloots in her position that the concepts of *national identity* and *constitutional identity* cannot be conflated under Article 4(2) TEU, I intend to expand her argument by relying precisely on a teleological (and to some extent intentionalist) interpretation of Article 4(2) TEU. For this reason, the following analysis will primarily examine the drafting history of Article 4(2) TEU. Subsequently, the argument regarding the non-interchangeability of the two concepts will be further developed through an analysis of the approach adopted by one of the most active guardians of *constitutional identity* – the

⁴ See: Opinion of Advocate General Mayras delivered on 28 May 1974 in *Reyners v Belgium*, Case 2/74, ECLI:EU:C:1974:59, p. 666.

⁵ Judgement of the Court of Justice of the European Union of 27 November 2012, *Thomas Pringle v Government of Ireland and Others*, Case C-370/12, EU:C:2012:756, para. 135.

⁶ Judgement of the General Court of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council*, EU:T:2011:419.

⁷ Opinion of Advocate General Kokott delivered on 17 January 2013 in *Inuit Tapiriit Kanatami and Others v European Parliament and Council*, Case C-583/11 P, ECLI:EU:C:2013:2, para. 39.

BVerfG. This analysis builds upon Cloots's (2016, p. 83) observation concerning the distinct theoretical narratives underpinning these two concepts. The central hypothesis of this article may therefore be formulated as follows: *Under Article 4(2) TEU, the concept of national identity cannot be equated with that of constitutional identity.*

3. Extending Cloots' views on the non-interchangeability of the two concepts

In this chapter, I will build upon Cloots's (2016) analysis and draw on an examination of the previous revisions of Article 4(2) TEU. In doing so, I demonstrate that the drafters of the Treaties never intended to introduce the term "constitutional" in this context but, from the outset, consistently framed the concept in EU primary law by reference to the term *national*. I then proceed to analyse each relevant treaty revision and its *travaux préparatoires*.

3.1. National identity in the process of treaty revision: from Maastricht to Lisbon

3.1.1. The Maastricht Treaty

The preparation of the Maastricht Treaty was carried out within the framework of two parallel Intergovernmental Conferences (one devoted to Economic and Monetary Union and the other to Political Union), held during the Luxembourg and Dutch Presidencies. The Conferences were launched at the Council meeting in Rome in December 1990 and concluded approximately one year later at the European Council of 9–10 December 1991 in Maastricht (Loth, 2013, pp. 67–84). With respect to Article 4(2) TEU, there are no relevant *travaux préparatoires* originating from the drafting of the Maastricht Treaty.⁸ In my view, however, the various draft versions of the Treaty shed light on the background of the drafting process. The observable changes in the provision concerning the *national identity clause* invite reflection on why these specific modifications were introduced into the text.

In April and June 1991, the Luxembourg Presidency presented two separate drafts of the Maastricht Treaty. clause appeared in Article D(1) of the first draft and in Article G(1) of the second draft. The wording of Article D(1) was as follows (Noël, 2025):

⁸ The available *travaux préparatoires* contain no references to the drafting process of Article F. See: *Draft Treaty amending the Treaty establishing the European Economic Community with a view to achieving Economic and Monetary Union, Bulletin of the European Communities*, Supplement 2/91.

“The Union shall exercise its powers with due respect for the national identity of the Member States and their constitutional systems founded on democratic principles.”

From this wording, it is evident that the drafters intended from the outset to employ the term *national identity* while, according to a grammatical interpretation, simultaneously distinguishing the constitutional systems from that concept through the use of the conjunction “and”. It can therefore be argued that, already in the very first draft, *national identity* appeared as an autonomous notion, distinct from “the constitutional systems of the Member States”, which could otherwise be understood as denoting *constitutional identity*.

It is therefore particularly relevant to examine the wording in the second Luxembourg draft of the TEU, in which Article G(1) removed any reference to constitutionality, resulting in the following formulation:

“The Union shall respect the national identity of its Member States, whose systems of government are founded on democratic principles.”⁹

Here, the modification in the text regarding the scope of the Union’s obligation is also noteworthy. The original clause *“The Union shall exercise its powers with due respect for...”* was replaced with the more neutral *“The Union shall respect...”*. As a result, the provision no longer delineated the ambit of the Union’s competences nor the scope of the obligation.

At this stage, divergent language in the linguistic versions may also be observed. In the French versions of both drafts, the verb *respecter* was consistently employed in relation to Article D(1) and (2), as well as Article G(1) and (2). In contrast, the English versions of different draft texts referred to the Union’s duty to *“have due regard”* to the *national identity* of the Member States. Only in the final version of the Maastricht Treaty was this obligation reformulated in the English text as *“respect”*. This discrepancy is particularly striking, as the formulation *“have due regard”* appears, in terms of both formality and binding force, stronger than the term *“respect”*.

In the draft presented by the Dutch Presidency in September 1991, the *national identity clause* was absent altogether and was therefore not the subject of further discussions after the second Luxembourg draft.¹⁰ The Maastricht

⁹ *Projet de traité sur l'Union de la présidence luxembourgeoise* [Draft Treaty]. (1991, June 18). Luxembourg. Retrieved from: https://www.cvce.eu/en/obj/projet_de_traite_sur_l_union_de_la_presidence_luxembourgeoise_luxembourg_18_juin_1991-fr-dbebd2a6-a860-4915-8edf-0a228ecde976.html.

¹⁰ *Projet de traité vers l'Union européenne de la présidence néerlandaise* [Draft Treaty]. (1991, September 24). Maastricht. Retrieved from: https://www.cvce.eu/en/obj/projet_de_traite_vers_l_union_europeenne_de_la_presidence

Treaty, signed on 7 February 1992, eventually codified the *national identity clause* in Article F(1) in essentially the following unchanged wording:

“The Union shall respect the national identity of its Member States, whose systems of government are founded on the principles of democracy.”¹¹

The Maastricht Treaty thus marked the first introduction of *national identity clause* into EU primary law as an autonomous legal notion, without any reference to the constitutional systems of the Member States or any other indication of a linkage between *national identity* and *constitutional identity*. At the same time, the drafters did not shy away from engaging with constitutionality altogether. Article F(2) laid down the Union’s obligation to respect “...*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law*”. This provision played an essential role in primary law at that stage of integration, since the EU had not yet codified fundamental rights in its own legal order. The Union therefore committed to respecting fundamental rights derived from the constitutional traditions common to the Member States, but only as general principles of EU law. In my view, the drafters (as can be inferred from the changes observed between the two Luxembourg drafts) clearly intended to separate the *national identity clause* from any reference to the constitutionality of Member States.

The *national identity clause*, as introduced by the Maastricht Treaty, subsequently generated uncertainty, particularly regarding its potential interchangeability with *constitutional identity*, an uncertainty that began to dissipate only gradually with the progressive implementation of various areas of EU integration. What, precisely, constitutes the *national identity* of a Member State? Is this clause legally enforceable by the Member States, or is it merely a political declaration by the Union *vis-à-vis* the Member States? Does the *national identity clause* serve as a barrier between Member State sovereignty and the primacy of EU law?

One would logically expect answers to these questions to be found primarily in CJEU case law. Yet, when drafting the Maastricht Treaty, Member States deliberately chose not to confer upon the Court jurisdiction to interpret or review the common provisions of the Treaty, which at that time included the

nce_neerlandaise_maastricht_24_septembre_1991-fr-d39ea094-caef-4bab-a345-f8ba104bb740.html.

¹¹ European Union. (1992). Treaty on European Union (Maastricht Treaty). Official Journal of the European Communities, C 191, 1-112.

national identity clause.¹² Llivina (2014, pp. 150–151; see also von Bogdandy & Schill, 2010, p. 706) argues that the rationale behind this choice lies in Article F(2). The Member States, she explains, were reluctant to “*hand over the gavel*” to the Court in such a sensitive domain as fundamental rights and freedoms, fearing in particular that the Court might also claim interpretative authority over *national identity* as enshrined in Article F(1).¹³

3.1.2. The Amsterdam and Nice Treaties: Article 6(3) TEU

With the adoption of the Amsterdam Treaty, the European Union was preparing for the accession of the post-communist countries within the framework of the so-called “big enlargement” of 2004. By enshrining in Article 6(1) TEU the declaration that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the legal systems of the Member States,” fundamental rights ceased to be merely general principles of EU law as referred to in Article F. Instead, they became a foundational principle of the Union, legally enforceable under the TEU – then Article 7 TEU, Article 309 EC, or Article 46 TEU (see Molinier, 2005). However, with the enshrinement of the principles in Article 6(1) TEU, the *national identity clause* was “relegated” to Article 6(3) TEU, in the following shortened form:

“*The Union shall respect the national identities of its Member States.*”¹⁴

From the wording of the clause, the phrase “... *whose systems of government are founded on the principles of democracy*” disappeared. In my view, the reason for this omission lies in the fact that the principle of democracy had, by then, been expressly incorporated among the values set out in Article 6(1) TEU, and it was therefore no longer necessary to reiterate it in the context of *national identity clause*. At the same time, the newly inserted Article 46 TEU conferred on the Court of Justice jurisdiction to review compliance with Article 6(2) TEU. The *national identity clause*, however, remained excluded from judicial review.

¹² Article L of the Maastricht Treaty.

¹³ Nonetheless, during this period, one CJEU judgment referred to national identity where the Court held that respect for the national identity of the Member States constitutes merely a “*legitimate aim*” and therefore should not be balanced against other principles of the European Union. See: Judgment of the Court of Justice of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxembourg*, Case C-473/93, ECLI:EU:C:1996:263, para. 35.

¹⁴ European Union. (1997, October 2). Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. Official Journal of the European Communities, C 340, 1-144.

The Treaty of Nice did not introduce any changes with regard to the *national identity clause*.

3.1.3. The Draft Treaty on the Constitution for Europe: The One That Tells Us the Most?

It is rather paradoxical that the milestone in the history of the European Union, which I dare to describe as one of the greater setbacks of European integration, is also the one for which we have the richest collection of *travaux préparatoires* since the Maastricht Treaty. Why, then, should one look behind the scenes of the drafting process of a treaty that never entered into force? The relevance lies precisely in the fact that the drafters of the Lisbon Treaty drew extensively upon the Draft Treaty on the Constitution for Europe (hereinafter also referred as “*Draft Constitutional Treaty*”). The very notion of *national identity*, as developed in the *Draft Constitutional Treaty*, was formulated in almost identical terms to those found today in Article 4(2) TEU. The drafters of the *Draft Constitutional Treaty* paid particular attention to articulating this concept, and the corresponding *travaux préparatoires* provide us with the most comprehensive insight into how the idea of *national identity* was conceived and shaped. Let us therefore proceed step by step.

The 2004 and 2007 EU enlargements exposed institutional limits of the Nice Treaty framework. To address them, the European Council convened the 2001 Convention on the Future of Europe in Laeken to prepare a new constitutional framework. Eleven working groups examined key issues – division of competences, treaty simplification, democratic legitimacy, and a coherent constitutional document. Their work culminated in the Draft Constitutional Treaty, which ultimately exceeded the initial expectations of its drafters.

For this article, particular importance lies in Working Group V, chaired by Henning Christophersen, which examined complementary competences, areas of national policy closely linked to Member States’ identity (Working Group V, 2002a, p. 1). The group focused on redefining these competences and clarifying the overall division of powers, emphasising that the Union may act only within the limits conferred by the Treaties. It also highlighted the need for clear, citizen-oriented definitions that would distinctly separate Union and national powers. (Working Group V, 2002a, pp. 2–3).

During the deliberations of the Working Group V, Christophersen issued an independent *Opinion Paper* outlining several possible models for defining the limits of the Union’s competences within the Treaty framework (Christophersen, 2002a, pp. 2–3). Among the four proposed models (the *Community Model*, the *Union Model*, the *Constitutional Model*, and the *Political Model*) it was the Union Model that explicitly incorporated the notion of *national identity* as a potential criterion for demarcating the boundaries of EU competence. According to Christophersen (2002, p. 2), the Union Model possessed a key advantage: it was already embedded within the TEU framework and was thus both familiar and adaptable, allowing it to be expanded

to address matters of particular relevance to citizens. Christophersen (2002a, p. 2) went even further by proposing an extended interpretation of the *national identity clause* (then enshrined in Article 6(3) TEU) suggesting that the *national identity* of the Member States encompasses their constitutional and political structures, including regional and local organisation, the administration and enforcement of law (except where the Treaties provide otherwise), relations between the state and the church, policies concerning income redistribution and the maintenance or enhancement of social welfare benefits, the exclusive right to levy personal taxes, and so forth.

Christophersen's ideas articulated in his *Opinion Paper* were subsequently reflected in the final report of the Working Group V, which provided a comprehensive examination of the division of competences within the Union. Spanning eighteen pages, the report advanced a number of proposals that, in modified form, can be discerned in the current Treaty framework following the Lisbon revision. Particularly noteworthy is Part Seven of the report, which addressed the principles governing the exercise of EU competences. Alongside the core principle of competence allocation, the Working Group V explicitly identified respect for *national identity* as one such guiding principle. It is, however, striking that the concept was not placed among the "*other general principles governing the exercise of competence*", a category that included, for example, subsidiarity and proportionality (Working Group V, 2002a, p. 13).

From its inception, the *Draft Constitutional Treaty* drafters appear to have regarded *national identity* as a distinct and self-standing legal instrument within primary law, intended to delineate the substantive limits of the Union's powers. This understanding is further reinforced by the explicit formulation of the principle in the Working Group's report, which described it as "*a fundamental principle... [that] constitutes essential elements of national identity, which the EU must respect in the exercise of its competence*" (Working Group V, 2002a, p. 10). Had this not been the case, one would likely have encountered critical reactions from other members of the Convention to the content of Working Group V's final report. Further evidence supporting this understanding emerges from other contemporaneous materials, notably the report by Joachim Wuermelling (representing the European Parliament) which endorsed the view that the *national identity clause* "*should give the impression of a list of 'important competences' of the Member States rather than a negative catalogue of Union competences*" (Working Group V, 2002b, p. 4). Equally relevant is Christophersen's concluding statement (2002b, pp. 6–7) on the outcome of Working Group V's deliberations at the Convention, in which he characterised respect for *national identity* as a provision operating concurrently with the exercise of Union competences – that is, wherever the EU acts within the scope of its conferred powers, it must do so in accordance with the principle of respect for *national identity*. Importantly, the intention of the Working Group V was not to substantively alter the concept, but to render it more transparent and accessible to EU citizens.

The remainder of Section 7 of Working Group V's final report is crucial for interpreting the *national identity* clause, offering rare insight into how the concept was understood – insight absent for Article 4(2) TEU due to the lack of Lisbon *travaux préparatoires*. In framing national identity as a limit on Union competences, Working Group V likely drew inspiration from Christophersen's Union Model. Consequently, this formulation has come to be referred to as the "Christophersen clause" (Christophersen, 2002a, p. 2; see also: von Bogdandy & Schill, 2011, p. 1426). The Working Group V (2002a, p. 11) focused on two areas in which it identified the competences of the Member States as fundamental (i) *the basic structures and essential functions of the Member State*, which included: (a) the political and constitutional structure, including regional and local self-government; (b) state citizenship; (c) territory; (d) the legal status of churches and religious communities; (e) national defence and the organisation of armed forces; (f) the choice of official languages; and (ii) *the fundamental public policy choices and social values of the Member State*, which included: (a) income redistribution policy; (b) taxation and the selection of specific taxes; (c) the social security benefits system; (d) the education system; (e) the public healthcare system; (f) the preservation and development of culture; and (g) compulsory military or civilian service. The Working Group V thus emphasised the need to clarify Article 6(3) TEU, as only in this way could the main concerns expressed within the group and in other forums regarding the preservation of the role and significance of the Member States in the Treaties be properly addressed. However, the report provides no clear explanation as to why some elements were classified as *basic state structures* while others were treated as *fundamental public policy choices and social values of the Member State*. Of particular note is Working Group V's conclusion that such a provision neither constitutes nor establishes an exception. Member States thus remain bound by the Treaties, yet, at the same time, this does not mean that Union activity can never affect these areas (Working Group V, 2002a, p. 11).

In the final draft of the *Draft Constitutional Treaty*, the *national identity clause* was codified in Article I-5(1), entitled "*Relations between the Union and the Member States*", which provided as follows:

*"The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security."*¹⁵

The provision delineates the dual dimension of the principle: the structural (respect for Member States' constitutional and political organisation)

¹⁵ Official text from the Draft Treaty establishing a Constitution for Europe, OJ C 310, 16 December 2004, p. 11.

and the functional (recognition of their essential state functions). Its wording anticipates almost verbatim the formulation later enshrined in Article 4(2) TEU, thereby confirming a strong line of textual and conceptual continuity between the *Draft Constitutional Treaty* and the Lisbon revision. This continuity suggests that the Lisbon drafters did not conceive *national identity* as a newly created legal instrument but rather as a refined constitutional safeguard, inherited from the Convention's work, designed to preserve the core elements of Member State sovereignty within the evolving constitutional framework of the Union.

The analysis of the *Draft Constitutional Treaty* yields several observations relevant to the present inquiry. First, the *national identity clause* was never conceived as a negative delimitation of competences, nor as a derogation from EU law. Instead, it was envisaged as a principle operating on the same normative plane as the doctrine of primacy of EU law, aimed at safeguarding certain domains where the Union exercised so-called functional competences. Secondly, the deliberations of the Working Group V attributed to *national identity* a considerably broader set of fundamental elements than the “basic political and constitutional structures” that now dominate the formulation of Article 4(2) TEU. Finally, and perhaps most importantly, the *travaux préparatoires* reveal no meaningful engagement with the idea of *constitutional identity* in conjunction with the term of *national identity*. This conceptual separation would only emerge later, through post-Lisbon judicial and academic developments.

3.1.4. Lisbon Behind Closed Doors: The Unrecorded Identity and the Continuity Beneath Silence?

The rejection of the Draft Constitutional Treaty ushered in a period of ambivalence—both closure and unfinished business—that, despite political disappointment, was intended as a phase of institutional self-reflection (Luxembourg Presidency, 2005). This period ended with Germany's 2007 Council Presidency, which raised expectations for renewed leadership in shaping the Union's future.

The Berlin Declaration, adopted on the fiftieth anniversary of the Treaties of Rome, became the first concrete step forward. Serving as both political roadmap and symbolic recommitment, it outlined the framework for negotiations on a new treaty to be endorsed by the European Council in June 2007 (European Communities, 2007). Germany then initiated discreet bilateral consultations with Member State governments to secure rapid consensus.

These talks revealed two opposing camps: those seeking to preserve the substantive content of the failed Constitutional Treaty and those preferring a return to the institutional framework of Nice. The ensuing Intergovernmental Conference operated under similar confidentiality, leaving no record of *travaux préparatoires* and depriving scholars of the interpretative material available during the Convention process.

While the broader institutional reforms of the Lisbon Treaty have been thoroughly examined elsewhere (Piris, 2010; Giuliani, 2007), the present discussion focuses specifically on the national identity clause now codified in Article 4(2) TEU.

It may be observed that the Lisbon Treaty reproduced Christophersen's clause almost verbatim, as originally formulated in Article I-5 of the Draft Constitutional Treaty. The sole substantive addition distinguishing Article 4(2) TEU from its constitutional predecessor is the inclusion of a third sentence explicitly reaffirming that "*in particular, national security remains the sole responsibility of each Member State*". The consolidated wording of the *national identity clause* now reads as follows:

„The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”¹⁶

Although *travaux préparatoires* for the Lisbon revision are largely unavailable, it remains debatable whether one may accept the thesis that, since no textual amendments were introduced to the provision as originally proposed in the Draft Constitutional Treaty, reliance may nonetheless be placed on the preparatory documents related to that draft.

For the purposes of this article, I accept this thesis, since if the wording of the provision remained unchanged, it is reasonable to assume that its substance and underlying rationale did not change either. Accepting this interpretative premise means advancing and substantiating the argument that *national identity clause* is intrinsically linked to the exercise of the Union's competences and does not constitute a derogation clause for the Member States.

What, however, remains "shrouded in mystery" is the rationale behind the systematic placement of the concept within Article 4 TEU positioned between the principle of conferral and the principle of sincere cooperation. In my opinion, its placement within the general provisions of the TEU, immediately following Article 4(1) TEU, which codifies the principle of conferred competences, confirms its function as a structural safeguard delimiting the scope of Union action within its competences.

Building on the preceding analysis, this section advances three claims. First, from Maastricht through Lisbon the terminology has remained stable:

¹⁶ Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012, p. 17.

treaty drafts and revision working groups consistently speak of *national identity*. Second, if one accepts that Working Group V drew on the earlier drafting efforts, the *travaux préparatoires* to the Draft Constitutional Treaty provide a legitimate conceptual baseline for defining the meaning and function of the clause in EU primary law. Third, a purely drafting-history perspective is ultimately inadequate. The absence of Lisbon's *travaux préparatoires* undermines institutional memory and weakens transparency in a constitutional project of this scale – a shortcoming that warrants explicit criticism.

Consequently, the analysis must turn to Member States' practice: how national authorities understand and operationalise Article 4(2) TEU in practice. That inquiry also illuminates the important non-equivalence between *national identity* and *constitutional identity*, which should not be treated as interchangeable categories.

3.2. Constitutional Courts and protection of identity: the case of Germany

The term of identity entered the European scholarly discourse in a systematic manner only in the second half of the twentieth century. From the 1960s onwards, it gradually became a subject of sustained scholarly inquiry across disciplines including history, philosophy, sociology, and political science (e.g. see: Bartal, 1998; Brubaker & Cooper, 2000). Conceptual frameworks emerging from the humanities and social sciences thus gradually began to influence legal scholarship, drawing legal theorists into discussions on the term of identity. Nevertheless, law as a discipline entered this debate relatively late: for a long period, the concept of identity had little, if any, significance within the legal reasoning of the European Community.

A turning point came with the transition from the European Communities to the European Union. A process of profound constitutional and structural transformation characterized by the establishment of the Economic and Monetary Union and the introduction of the Union's three-pillar system (Patakyová et al., 2025, pp. 82–83). In this new institutional setting, the idea of *national identity* became embedded in the Union's treaty framework.

Membership in the European Union entails not only a partial transfer of sovereignty from the national to the Union level but also an inherent recalibration of the constitutional order within the Member States. Successive revisions of the Union's founding treaties have introduced far-reaching transformations that, in turn, prompted Member States to articulate their constitutional boundaries *vis-à-vis* the expanding scope of EU competences. From the outset, several Member States voiced concerns about the potential encroachment of EU law upon their domestic legal orders, seeking to preserve the fundamental principles of statehood – the so-called hard core (material core) of their constitutions. In this respect, Germany and Italy stand out for their long-standing constitutional jurisprudence resisting the idea of the absolute supremacy of EU law, instead promoting a vision of conditional primacy

grounded in the protection of *constitutional identity*.¹⁷ Both constitutional courts have sought to safeguard those elements of their domestic constitutional orders that are deemed inviolable and non-transferable, and therefore lie beyond the reach of the integration process. It is within this context that the notion of *constitutional identity* began to emerge with increasing prominence. As reflected in their constitutional jurisprudence, the notion carries a meaning distinct from that of *national identity* as enshrined in Article 4(2) TEU.

In particular, the BVerfG progressively articulated the doctrine of *constitutional identity* as a protective shield against the encroachment of EU law into domains regarded as forming the essential core of the German constitutional order. As part of this jurisprudential evolution, the BVerfG formulated two complementary doctrines: the *ultra vires review* and the *constitutional identity review* – both designed to demarcate the limits of permissible European integration and to safeguard the core principles protected by the eternity clause of the German Constitution (*Grundgesetz*) (hereinafter also referred to as “the GG”). Since I have examined the *ultra vires doctrine* in detail elsewhere (see: Kiššová, 2022a), the following discussion will focus on *the constitutional identity review*, as developed and refined by the BVerfG in its post-Maastricht and Lisbon case law.

From a historical perspective, the term *constitutional identity* first appeared in the case law of the BVerfG in the 1970s. Since then, the Court has further developed this concept and gradually applied it within the context of the relationship with the legal order of the European Union, particularly when assessing the claim of the absolute supremacy of EU law. In this regard, the judgments in *Solange I* and *Solange II* are of key importance,¹⁸ as they marked the Court’s first use of the so-called *ultra vires doctrine*. The following section focuses primarily on the *Lisbon Treaty decision* and the *OMT decision*, in which the BVerfG explicitly elaborated on the notion of *constitutional identity*.

3.2.1. The Lisbon Treaty Judgement

The *Lisbon Treaty* judgment represents a pivotal moment in this analysis, as the BVerfG not only delineated the outer limits of the European integration process, but also articulated the doctrine of *constitutional identity review*. At first sight, it may seem that the BVerfG operates primarily with the term of *national identity*, a concept that appears repeatedly throughout the

¹⁷ For example see: *Corte costituzionale*, judgment of 18 December 1973, No. 183/1973, [*Frontini*]; *Corte costituzionale*, judgment of 22 October 1975, No. 232/1975, [*Industrie Chimiche Italia Centrale*]; *Corte costituzionale*, judgment of 5 June 1984, No. 170/1984, [*Granital*]; *Corte costituzionale*, judgment of 13–21 April 1989, No. 232/1989, [*Fragd*].

¹⁸ *BVerfG*, Judgment of 29 May 1974, Case 2 BvL 52/71; *BVerfG*, Judgment of 22 October 1986, 2 BvR 197/83.

judgment. In conjunction with Article 50 TEU, the Court refers to *national identity* as a legal instrument serving the protection of state sovereignty.¹⁹

However, the BVerfG subsequently elaborates on these considerations in a distinct doctrinal direction, shifting the focus from the protection of *national identity* under EU law to the preservation of *constitutional identity* under the GG. A cornerstone of this doctrinal development is Article 79(3) of the GG to which the BVerfG accords the status of an *eternity clause*. This provision encapsulates the very essence of Germany's *constitutional identity*, safeguarding it from amendment or erosion. Specifically, Article 79(3) renders immutable Articles 1 to 20 GG, which enshrine the core constitutional principles of human dignity, personal liberty, the rule of law, democracy, and federalism.²⁰

In its comprehensive assessment of the compatibility of the Lisbon Treaty with the GG, the BVerfG concluded that the transfer of sovereign powers to the European Union must not extend into areas safeguarded by the eternity clause of Article 79(3) GG. The Court identified a number of constitutionally sensitive domains that are essential for preserving Germany's democratic capacity for self-determination. These domains encompass, e.g. criminal law and the state's monopoly on the use of force, fiscal autonomy in determining public revenue and expenditure, the constitutional configuration of the welfare state, as well as culturally embedded areas such as family law, education, and religious affairs. Collectively, these spheres constitute the core elements of Germany's *constitutional identity* that remain beyond the reach of European integration.²¹

The BVerfG emphasised that criminal law is deeply rooted in each state's cultural, historical, and linguistic context. While recognising shared European values, particularly the right to a fair trial, the Court held that harmonisation of criminal law within the EU is feasible only to a limited extent and mainly in cross-border cases.²²

The BVerfG similarly held that decisions on the use of armed forces must remain at the national level and cannot be transferred to supranational bodies, even within collective security frameworks, as such delegation would breach the constitutional principles of peace and democracy enshrined in Article 23(1) GG.²³

In the fiscal sphere, the BVerfG stressed that the Bundestag must retain ultimate authority over budgetary decisions. Although not every financial commitment arising from Germany's participation in the EU or other international bodies violates this principle, the Court affirmed that parliamentary budgetary autonomy constitutes a non-transferable core element

¹⁹ *BVerfG*, Judgment of 30 June 2009, 2 BvE 2/08, (*Lisbon Judgment*), para. 153.

²⁰ *Ibidem*, paras. 216–217.

²¹ *Ibidem*, para. 252.

²² *Ibidem*, para. 253.

²³ *Ibidem*, paras. 254–255.

of Germany's constitutional identity.²⁴ The Court further held that social policy must remain primarily within the domestic competence of Germany, given that the European Union's powers in this area are limited and subsidiary in nature.²⁵ The BVerfG also identified education, family law, and religion as integral to Germany's *constitutional identity*, arguing that these areas, deeply rooted in national history and culture, must remain within domestic competence. By emphasising them, the Court reaffirmed that constitutional identity safeguards cultural diversity and pluralism within the EU, ensuring integration does not erode Member States' foundational structures.²⁶

The principle of conferral and the obligation to respect *national identity* as enshrined in Articles 6(3) and 4(2) TEU collectively embody the constitutional traditions and fundamental principles of the Member States. These provisions delineate the constitutional basis upon which the European Union's legal order interacts with national legal systems, affirming that Union law does not derive its authority in opposition to, but rather through, the constitutional frameworks of the Member States.²⁷ Nevertheless, the BVerfG drew a clear boundary, affirming that the inviolable *constitutional identity*, enshrined in Article 79(3) of the GG, remains beyond the reach of European integration. In this regard, the BVerfG affirmed that the responsibility for integration must allow for judicial scrutiny, particularly in cases of manifest overreach of EU competences that threaten to encroach upon the inviolable constitutional identity of Germany. Such scrutiny is exercised through the *constitutional identity review*.²⁸ At this point, the Court delineated its jurisdiction to perform *constitutional identity review*, a competence that originates in German constitutional law itself and derives from the principle of openness of the GG towards European law. According to the Court, this form of review is justified on two principal grounds: a) it does not conflict with the principle of loyal cooperation under Article 4(3) TEU; and b) the absence of such review would deprive the Member States of any means to safeguard their fundamental political and constitutional structures, which are explicitly recognised under Article 4(2) TEU. The Court thus argues that the protection of *national identity* and *constitutional identity* are complementary and mutually reinforcing. On this basis, the *constitutional identity review* serves as a mechanism for protecting only a specific part of *national identity* – namely those principles of Articles 1 to 20 of the GG, which Article 79(3) GG designates as inviolable. Through this framework, the Court ensures that the primacy of EU law applies only within the scope of continuing constitutional authorisation granted by the German constitution.²⁹

²⁴ *Ibidem*, para. 256.

²⁵ *Ibidem*, paras. 257–259.

²⁶ *Ibidem*, para. 260.

²⁷ *Ibidem*, para. 234.

²⁸ *Ibidem*, para. 240.

²⁹ *Ibidem*, para. 240.

3.2.2. The OMT Judgement

The legal position of the BVerfG discussed above was reaffirmed and further developed in its ruling on the *OMT* (Outright Monetary Transactions) case.³⁰ In this case, the Court examined whether Germany's participation in the OMT mechanism, designed to stabilise the euro area through the purchase of government bonds of eurozone Member States conditional upon participation in financial assistance programmes, was compatible with the GG.

The Court held that if an EU act infringes upon the principles protected under Article 79(3) GG, such an act is invalid within the German legal order. A key part of the *OMT* judgement lies in the Court's express clarification that the *constitutional identity* under the GG is not identical to the *national identity* as referred to in Article 4(2) TEU. First, the *national identity* of a Member State may be broader in scope than its constitutional identity. Second, under the interpretation of the CJEU, *national identity* serves merely as a *legitimate objective* to be taken into account in the application of EU law. By contrast, the constitutional identity protected by Article 79(3) GG is inviolable and non-negotiable, immune to balancing against other legal interests or values (see more: Kiššová, 2022, pp. 39–43).³¹

Therefore, it can be argued that above mentioned marks a crucial doctrinal distinction introduced by the BVerfG: The CJEU treats *national identity* as a contextual principle of respect, subject to balancing within the EU legal framework and, on the other hand, the BVerfG treats *constitutional identity* as an absolute barrier derived from the German constitutional order itself, which operates autonomously from EU law. By drawing this line, the *OMT* judgement crystallised the dual-layer model of identity protection: one anchored in EU law (Article 4(2) TEU) and another in constitutional law (i.e. Article 79(3) GG). This model underpins the later *PSPP* (*Weiss*) judgement, where the Court explicitly invoked both the *ultra vires* and *identity control doctrines*.³²

In conclusion, it may be observed that the BVerfG draws a clear distinction between the concept of *national identity* as enshrined in Article 4(2) TEU and the mechanism of *constitutional identity review*. The Court recognises a difference between the substantive content and functional purpose of each concept in the relationship between the European Union and its Member States. The *national identity clause* operates as a limitation directed at the European Union, restraining the exercise of its competences and requiring respect for the essential political and constitutional structures of the Member States. Its substantive elements, however, partially overlap with those that constitute the *constitutional identity* of a state. By contrast, *constitutional identity* (and the corresponding *constitutional identity review*) forms a distinct mechanism of domestic constitutional law. Its content and boundaries are determined

³⁰ *BVerfG*, Judgment of 14 January 2014, 2 BvR 2728/13, para. 27 (*OMT*).

³¹ *Ibidem*, paras. 27–29.

³² *BVerfG*, Judgment of 5 May 2020, 2 BvR 859/15, paras 116 *et seq.* (*PSPP* or *Weiss*).

autonomously by the Member State, and through the *constitutional identity review*, the constitutional court exercises supervisory control to ensure that the essential core of the constitution remains untouched by the process of European integration.

4. Summary of the findings: Distinguishing National and Constitutional Identity

The analysis conducted in the preceding sections supports Cloots's original argument regarding the non-interchangeability of *national identity* and *constitutional identity*. The analysis conducted in the preceding sections supports Cloots's original argument regarding the non-interchangeability of *national identity* and *constitutional identity*. Through the analytical framework presented in section 3 hereof, this article has sought to expand and reinforce that argument. The findings confirm the working hypothesis that, within the meaning of Article 4(2) TEU, the concept of *national identity* is not identical to that of *constitutional identity*. Accordingly, references to Article 4(2) TEU should neither be equated with nor interpreted as referring to *constitutional identity*.

The first argument for the non-interchangeability of the two concepts lies in the historical and textual origin of the term *national identity* as embedded in Article 4(2) TEU. From the earliest drafts of the Maastricht Treaty onwards, the clause has evolved as an autonomous concept of EU law, whereas the expression *constitutional identity* is entirely absent from the *travaux préparatoires* of any treaty revision up to and including the Lisbon Treaty.

The second argument emerges from the Member States' constitutional courts' development of the doctrine of *identity review*, particularly in Germany, Italy, and Poland.³³ Among these, the BVerfG remains the most influential actor in shaping the discourse on the relationship between EU law and national-constitutional law. Its jurisprudence (beginning with *Solange I* and *Solange II* and continuing through the *Lisbon Treaty* judgement and the *OMT* judgement) demonstrates a consistent, intellectually coherent, and legally respectful approach. The BVerfG's doctrines of *ultra vires review* and *identity review* are both sophisticated and restrained in nature. Crucially, the Court distinguishes clearly between *national identity* as a limitation on EU competences and *constitutional identity* as a mechanism of domestic constitutional self-protection. The latter, developed in the *Lisbon Treaty* and *OMT* judgements, serves to safeguard the core of the GG against both international obligations and domestic actions. In my view, such review, when conducted within the limits of the principle of loyal cooperation (Art. 4(3) TEU), cannot be regarded as conflicting with EU law.

The third, and at the same time practical, argument for the non-interchangeability of these concepts lies in the potential consequences of

³³ See: *Trybunał Konstytucyjny*, Judgment of 11 May 2005, case no. K 18/04 (*Accession Treaty Judgment*) and *Trybunał Konstytucyjny*, Judgment of 24 November 2010, case no. K 32/09 (*Lisbon Treaty Judgment II*).

misunderstanding the distinction between the doctrine of respect for *national identity* under Article 4(2) TEU and the doctrine of *constitutional identity review*. In this regard, I refer to the proceedings before the Polish Constitutional Tribunal in *P 7/20*³⁴ and *K 3/21*³⁵ judgements, which, in my view, reflect a fundamental misapprehension of both *national identity clause* under Article 4(2) TEU and the manner in which the BVerfG applied *constitutional identity review* in the *OMT* judgment. Based on my prior research into the activity of the Polish Constitutional Tribunal (see: Kiššová, 2023, pp. 130-142), I conclude that the Polish Constitutional Tribunal conflated and distorted the meaning of both identity protection doctrines. It employed the term *constitutional identity* in connection with Article 4(2) TEU, while simultaneously invoking the reasoning and terminology of *constitutional identity review* as developed by the BVerfG.³⁶ Although the Polish Constitutional Tribunal in *P 7/20* and *K 3/21* judgments formally declared that it was conducting a *constitutional identity review* following the German model, the purpose and context of this review were entirely different. The declared review was carried out under fundamentally divergent circumstances and by different means from those employed by the BVerfG.

The difference between the two situations is most apparent in the subject matter of the decisions rendered by the German and Polish constitutional courts. The BVerfG applies *constitutional identity review*, often alongside *the ultra vires doctrine*, in relation to secondary EU law, whereas the Polish Constitutional Tribunal has challenged the validity of EU primary law itself. Their motivations also differ – in Germany, such cases arise from individual constitutional complaints without political intent. By contrast, in the *K 3/21* judgement, the proceedings were initiated directly by the Prime Minister Morawiecki, a politically engaged actor. Another distinction concerns their attitude toward EU law. The BVerfG consistently emphasises respect for the effects of EU law and recognises the CJEU’s authority. When conducting *constitutional identity review*, the BVerfG considers it indispensable to observe procedural obligations, in particular by initiating preliminary reference proceedings to enable the CJEU to express its opinion on the contested issues. The Polish Constitutional Tribunal, however, refrains from engaging in such judicial dialogue –neither in the context of *constitutional identity review* nor when invoking *national identity clause* under Article 4(2) TEU.

In conclusion, it may be asserted that drawing attention to the non-interchangeability of *national identity* and *constitutional identity* in the context of Article 4(2) TEU carries genuine legal significance. The aim of this article has been to demonstrate that, since the adoption of the Maastricht Treaty, EU primary law recognises only the *national identity clause*. Ultimately, the determination of what constitutes the “*fundamental political and constitutional structures*” of a Member State falls exclusively within the interpretative

³⁴ *Trybunał Konstytucyjny*, Judgment of 14 July 2021, case no. P 7/20.

³⁵ *Trybunał Konstytucyjny*, Judgment of 7 October 2021, case no. K 3/21.

³⁶ *Trybunał Konstytucyjny*, Judgment of 14 July 2021, case no. P 7/20, paras. 124–125.

competence of the CJEU. If one accepts the relevance of the *travaux préparatoires* to the Draft Constitution Treaty, and particularly the documents of the Working Group V, the meaning of the *national identity* clause in Article 4(2) TEU can be defined with precision. At the same time, if one acknowledges the interpretative approach of the BVerfG, it becomes evident that the *constitutional identity review* conducted by constitutional courts rests on a different legal foundation and possesses a broader substantive scope, as its content is determined autonomously by each Member State.

In light of the foregoing analysis, this article recommends that both the CJEU and national constitutional courts adopt a more precise and disciplined use of the concept of *identity* within the EU constitutional framework. The CJEU should continue to interpret Article 4(2) TEU as a clause protecting *national identity* understood in structural and functional terms, rather than extending it to *constitutional identity*. Conversely, national constitutional courts should exercise *constitutional identity review* with self-restraint and in compliance with the principle of sincere cooperation under Article 4(3) TEU. Establishing a clearer conceptual boundary between *national* and *constitutional identity* would prevent the instrumentalization of these notions in domestic political discourse and reduce the risk of constitutional confrontation between EU law and national constitutions.

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- Trybunał Konstytucyjny*, Judgment of 24 November 2010, case no. K 32/09.
- Trybunał Konstytucyjny*, Judgment of 7 October 2021, case no. K 3/21.

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THE EVOLUTION OF CORPORATE MANAGEMENT - A MIXED SYSTEM?¹

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Abstract

There are two systems of corporate governance typically employed worldwide: monistic and dualistic. Traditionally, in some Central and Eastern European countries, the dualistic approach has been dominant, requiring a strict separation of the executive and supervisory bodies. In the last few years, in a movement that can be considered an intra-European legal convergence, there have been various corporate legislation reforms. This article is devoted to analyzing the results of those reforms, and they have, in fact, created in hitherto traditionally dualistic systems the legal possibility of transitioning to a monistic system. While the dualist system has not been totally abandoned, an alternative option of organ formation has been introduced in selected companies, modelled on certain case law jurisdictions. The article thus shows the evolution and reasons for such a process and assess its effectiveness. The article does not, in principle, analyse the traditional Western European legal systems, where the issues in question have been discussed for years in a theoretical context. Instead, it focuses on new legislation in Poland and Ukraine, two countries which have recently made very significant changes to their legal frameworks. This approach makes it possible to highlight the latest European trends. In the article, reference is made to a number of arguments supporting the introduced mixed system, while simultaneously rejecting the previous view that legislation must adopt either a single-tier or a two-tier system. This therefore relates to the private nature of companies, the freedom to shape their internal relations, and the experiences of European companies.

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Introduction

In general, there are two systems of corporate governance typically employed worldwide: monistic and dualistic. Without going into unnecessary detail, monistic essentially refers to a system with a single authority which governs, represents and oversees, while the dualistic system means that these functions are split into two bodies in which one governs and represents, while the second body supervises (Szumański, 2015, p. 497). Traditionally, in some Central and Eastern European countries connected with the German legal tradition, the dualistic approach has been dominant, requiring the strict separation of the executive and supervisory board (Ibid. p. 497). Sometimes, depending on the type of company, e.g. in limited liability companies, it was possible, under certain conditions, not to appoint a supervisory board or an audit committee (§ 1 article 213 and § 2 article 213, Commercial Companies Code, 2020). Nevertheless, even then, the supervisory function was carried out by shareholders and not by a separate part of the executive body (Ibid., § 1 article 212).

However, in recent years, corporate law reforms have taken place, resulting in intra-European legal convergence. While the dualistic system has not been abandoned, an alternative has been introduced in some companies, modelled on the approach adopted in certain common law jurisdictions. Within a single legal system, the freedom to form corporate bodies has therefore been bolstered. This article shows the evolution and reasons for this process and assesses its effectiveness. In particular, an amendment to the Polish Commercial Companies Code (CCC) and selected provisions of the new Law of Ukraine on Joint-Stock Companies will serve as a reference point for the wider arguments advanced. In addition, this article addresses a more profound question as to whether or not there is any point in maintaining an exclusively monistic or dualistic approach to corporate management in national legislation.

Polish and Ukrainian Commercial Law from a European Perspective

In civil continental legal systems, which includes Poland, (David, 1989, p. 159), it is generally accepted that a basic division can be made between different branches, or more accurately, “fields”, of law, such as civil law, criminal law or administrative law. Some scholarly debates in the past focused on discussions about the boundaries that delineate these fields (Ibid. pp. 89-90), i.e. taxonomisation. These laws consist of many, to a certain extent, autonomous parts, with their own methods, principles, rules and legislation

(acts, bills and codes) (Ibid. pp. 89-90). The situation in Ukraine is similar as regards the law and doctrine, and one can even find a greater level of intensity in the debate concerning the proper place of corporate law or, more broadly, civil and economic law (Turłukowski, 2008, pp. 77-89). Ukrainian legal doctrine has inherited the debate over the existence of so-called economic law from Soviet doctrine, which should be seen as an attempt to combine elements of private and public law, and which would lead to the marginalisation of private law principles (Ioffe, 1983, pp. 51-52; Bowring, 2013, p. 54). In Ukrainian law, one of the most far-reaching consequences of this approach has been the enactment of a separate economic code alongside the civil code (Economic Code of Ukraine, 2003, p. 144).

At present in Poland, commercial law is quite clearly a part of civil law. There are a number of practical implications that arise from this. In comparison with other countries, Poland has no commercial code, but only a code of commercial companies. This makes a lot of practical sense and it is not just a matter of a formal change of nomenclature. After declaring independence in 1918, Poland was wholly under the influence of the European idea of commercial law as an independent field regulating the establishment, organization, functioning, winding-up, merger, division, and transformation of commercial companies, as well as the execution of commercial contracts and the status of enterprises, etc (Jastrzębski, 2019, p. 25). Practically speaking, the existing rules of civil law could not be applied to commercial relationships according to such an idea.

The first attempt at a doctrinal approach was the First Polish Commercial Code, which was introduced in 1934 (Code of Commerce, 1934). After the Second World War and the start of the socialist transformation of classical commercial relationships in Europe, its importance was severely restricted or it was even forbidden (Włodyka, 2009, pp. 21-22). However, during this period of socialism in Poland, part of the commercial code was in force (Ibid. p. 6). The real resurrection of commercial law, however, took place after 1989, which is the year that the socialist system was overturned (Wyrozumska, 2005, p. 7). The old Commercial Code remained in force for several years (Code of Commerce, 1934), but from the 1st of January 2001, a new code was in effect.

Poland has no commercial code, but only a code of commercial companies. This reflects the dominance of the idea of the unity of civil law. This means that civil law should apply to commercial relationships. This is a reference to the common, or general, first part of the civil code of Poland. The Polish civil code was adopted in 1964 (Civil Code of Poland, 1964). In comparison with other countries from the former Eastern Bloc, the Polish regime was not influenced very deeply by the socialist concept. In 1990, during the widespread reform of the civil code, major changes were made to the core institutions of socialism in order to transition to a market-oriented system (Civil Code of Poland, 1990). At the same time, neither the structure nor the majority of its provisions were reformed. This is the best evidence that Poland's civil code cannot be regarded as a typical product of a socialist system, but instead

that it is an expression of true private law. After the Second World War, despite the implementation of various socialist policies, the codifiers of the new law relied on materials which had been produced by codification commissions before the start of the war.

The situation was fundamentally different in the former Soviet republics, where there were civil codes in force that contained regulations distorted by socialist nationalisation and the notion that classical private institutions should be restricted (Makovsky, 2010, p. 281). This explains the replacement of the old codes with new ones, as occurred, for example, in Ukraine in 2004. Of course, selected provisions concerning company law found their way into the new Civil Code of Ukraine, e.g. norms relating to partnerships and companies. This came into effect in January 2004 following a long period of reform and new economic realities: a completely new code was established to regulate relations under free market conditions.

At present in Poland, there are regular discussions regarding the merits of recodifying the civil law (Radwański, 2006; Stec & Załucki, 2015) but, because the need for a new code is not universally perceived, these discussions are unlikely to lead to new laws. Despite this, the now defunct civil law commission proposed a series of reforms which were never implemented (Flisek, 2009). It may be that, in ten years, Poland will create a new civil code, but a more active debate on this topic has not yet started. The composition of the Polish civil code is simpler than most modern civil codifications in Europe. This was typical of Socialist legal codes, not including family law and private international law. There are only four so-called 'books' in the Polish civil code: General provisions, Ownership and other Real Rights, Obligations, and Succession law.

Another reason why it is still possible to successfully apply the civil code is that there was practically no regulation of commercial companies from the day that it was adopted. Instead, a regulation that could be applied was found in the old commercial law (Code of Commerce, 1934). The easiest way for Poland to revert to a classical market economy was to adopt a separate regime regulating company law without changing the civil code. This emerged from a consensus that a new partnership and company legal framework was needed during the period of reform and this approach was thus prioritized.

In this way, the idea of the unity of the civil law is not only a theoretical idea but a notion that has had a real influence on how the provisions of the Company Code are interpreted. For instance, according to Art. 2 of the Commercial Companies Code, all matters set out in the code which are not regulated by it are governed by the provisions of the Civil Code. Hence, where the nature of the legal relationship of a commercial company so requires, the provisions of the Civil Code apply accordingly (Commercial Companies Code, 2020). Commercial law consists not only of the Companies Code but also of many other acts adopted by Parliament such as the Act on Freedom to Conduct Business (Freedom of Economic Activity Act, 2004). The Company Code can be regarded only as a single, albeit significant, component of the field of company law and not as the entirety of commercial law.

The Ukrainian legal position was incomparable, since after the collapse of the Russian Empire in 1917, and despite strenuous efforts and military sacrifices, the independence of the Ukrainian state could not be preserved (Shemshuchenko, 2004, pp. 191-192). Instead, most Ukrainian territory fell within the borders of the Soviet state. Although it was still possible to find provisions regulating commercial companies in the first civil code of Soviet Ukraine (Civil Code of USSR, 1923) by the early 1930s, centralisation and widespread nationalisation had taken hold, leading to the wholesale repeal of any and all commercial relationships (Belyanevich, 2002, p. 11). Ukraine did not have the tradition of a separate Commercial Code or Commercial Companies Code. As such, it is only possible to speak of a revival of company law from the late 1980s onwards (Turłukowski, 2008, pp. 61-62). Correspondingly, company code reforms took place primarily on the basis of individual laws newly enacted after 1991, all of which was followed by the incorporation of some company regulations into the new Civil Code of Ukraine (article 1264, Civil Code of Ukraine, 2003). In addition, the foundation of the commercial company code comprises several specific provisions on individual types of companies (article 682, Law of Ukraine on Business Associations, 1991). The new Law of Ukraine on joint-stock companies became effective on 1st January 2023 (Law of Ukraine on Joint Stock Companies, 2022).

Companies versus Partnerships

There is a clear division between the regulation of companies and partnerships both in Polish and Ukrainian law. In Polish law, partnerships do not have any legal personality. Polish law, alongside physical and legal persons, has a third category - the quasi-legal person (Lewandowski, 2007, p. 35). All partnerships are quasi-legal persons. In their own name they may acquire rights, including the ownership of real property and other property rights, assume obligations, and sue or be sued. (Lic, 2013, pp. 9-12). Interestingly, Ukrainian law does not recognise a third category at all and adheres to a rather rigid dichotomy, i.e. the division between natural and legal persons, with the exception of business owners who can register without legal personhood. Accordingly, under Ukrainian law, both companies and partnerships have the status of independent legal persons.

From the civil law perspective, there are no fundamental differences between a legal person and a quasi-legal person. A clearer line of division can be found in Polish tax law. The tax rate payable depends on one's legal status. Theoretically, a legal person can act through their specific organs. Thus, a quasi-legal person, as a rule, has no particular organ that can bind them to legal commitments, such as a management board. In partnerships, the decision making can be more relaxed without the formality of a management board. For example, a resolution can be passed either formally or by normal communication channels such as email.

Apart from a few permitted exceptions, every Polish company has the following authorities which are separate from the shareholders:

- A management board
- General meeting
- A supervisory board/an auditors' committee (Lewandowski, 2007, pp. 53-55, pp. 58-62)

These authorities are specifically mandated separate bodies, each with a defined role in respect of the company. Shareholder meetings should be regarded as a separate organ of the entity, even if it has only one shareholder (§ 1 article 173, Commercial Companies Code, 2000). Naturally, a shareholder meeting consists of the shareholders, but it is convened by special rules which are based on the voting rights of the shareholders. The law does not provide for a “meeting of the partners” in such cases. “The running of the external and internal affairs of the general partnership is in the hands of all partners. As a general rule, each partner has the right to represent the general partnership in relation to third parties and to manage internal business affairs” (Lewandowski, 2007, p. 36). On the other hand, members of the management board may be appointed and removed by a resolution of the shareholders (§ 4 article 201 and § 3 article 300⁶², Commercial Companies Code, 2000). In this way, there is clearly a close relationship between the relevant organs with the power to bind the company. As a rule, partnerships do not have a set of organs that are distinct from the partnership and which may commit it to certain actions or take decisions on its behalf. For instance, according to Polish law, in a registered partnership (Ibid., § 1 article 25¹), each partner has the right to represent the partnership (Ibid., § 1 article 29). A partnership deed may provide that a partner has been deprived of this right to represent the partnership, but it is forbidden to disentitle a partner from representing the partnership. There are also some exceptions to the rules described above. Although it is, formally speaking, not a company, a limited joint-stock partnership has the power to appoint a supervisory board and a general meeting of shareholders is obligatory (Ibid., § 1 article 142 and article 145).

There are other features that enable a distinction to be drawn between companies and partnerships which are less important for the purposes of the present study. Nevertheless, they are significant for the preservation of the distinction between the two. It is also important to distinguish the responsibilities of shareholders and partners in respect of the obligations of the company and the partnership. Commonly, each partner is personally liable for the obligations of the partnership without limitation with all his assets jointly and severally with the remaining partners and the partnership (Ibid., § 2 article 22). However, in each type of partnership, there are some modifications of, or exceptions to, this rule. For instance, a partner at a professional partnership is not liable for the partnership's obligations arising in connection with the practicing of a freelance profession within the partnership by the remaining partners, or for obligations that the partnership has resulting from actions or omissions of persons employed by the partnership under an employment

contract or on the basis of a different legal relationship, if those persons reported to another partner when performing services related to the activities of the partnership (Ibid., § 1 article 95).

At a limited partnership, a limited partner is liable for the partnership's obligations towards its creditors only up to the limited liability amount (Ibid., article 111).

At a limited joint-stock partnership, a shareholder is not liable for the obligations of the partnership (Ibid., article 135). However, in a joint-stock partnership, at least one partner (general partner) bears unlimited liability towards creditors for the obligations of the partnership and at least one partner must be a shareholder (Ibid., article 125).

An additional point must be mentioned at this juncture, and that is the profound difference between a partnership and a company with regard to the treatment of property. A partnership does not have share capital. As such, a partnership in Poland has no shareholders but instead, it has partners or members; "Partners are the essence of a partnership. Usually there are only a few of them [...] The activity of a partnership is based on the trust partners have in each other because the interests of a partnership are identical with the interests of its partners." (Wyrozumska, 2005, pp. 250-251) A partnership only has its own assets and liabilities, but the partners are obliged to contribute some assets to the property of the partnership (article 25, Commercial Companies Code, 2000). Despite the fact that a partnership does not have share capital, each partner is required to pledge at least some symbolic asset. According to the Company Code, there is no fixed or specific amount for a partner to contribute. But bearing in mind the partners' unlimited personal responsibility for the partnership's debts, it is not too important whether the partnership has enough assets to cover all of its obligations or not.

Under Polish law, a company always has share capital. For instance, according to Art. 153 of the Company Code, the share capital of a limited liability company is divided into shares of equal or unequal nominal values (Ibid., article 153). The share capital of a joint-stock company is divided into shares of equal nominal values (Ibid., article 302). There are currently ongoing debates between different European legal schools (including Poland) about whether there is any need for radical reform of the institution of share capital as an instrument to incentivise greater investment in companies, and particularly in the case of limited liability companies (Żurek, 2018). The main problem requiring reform is the fact that the system does not effectively protect creditors. This is because there is no correlation between share capital levels and liability. In Europe, the influence of the German concept of the institution of share capital became the foundation that supported the whole idea and regulation of the company. The German concept is based on the idea that shareholders pledge their assets to the company and create share capital and they are freed from liability as shareholder capital becomes the sole guarantee to creditors. The common law system, however, is based on different rules and includes a mechanism for protecting creditors. Practically speaking, it is mainly the influence of common law concepts that should be seen as one of the main

reasons for the current change in thinking regarding the role of share capital. A simple joint-stock company is the first domestic shareholding company under Polish law that does not use the idea of share capital and enables a single board of directors to commit and bind the company, thus replacing the management and supervisory bodies.

A similar situation exists in Ukrainian law, in which also exists the traditional division between partnerships and companies. As indicated above, all companies are legal entities, whether they are general partnerships, limited partnerships, or limited liability companies, additional liability companies or joint-stock companies (article 83, Civil Code of Ukraine, 2003). It should be stressed that the proportions of commercial companies operating in the Ukrainian market vary greatly. There is a relatively small number of limited partnerships (367), additional liability companies (1,504) and general partnerships (1,289), in comparison with the dominant limited liability companies (761,776) and joint-stock companies (7,177) (State Statistics Service of Ukraine, 2023). Limited liability companies are the main form of business vehicle for larger private entities both in terms of the total number of companies and in terms of value. This state of affairs is reflected in legislation, since, in addition to the Modern Civil Code of Ukraine, which entered into force on 1st January 2004 and which regulates the functioning of partnerships, the Law of 19th September 1991 on Economic Incorporations (Law of Ukraine on Business Associations, 1991) is still in force. The 1991 Law also regulates partnerships but not those companies with limited or additional liability. The above-mentioned Act of 1991 is not of high legislative quality. Its passage was hurried and reflected the immaturity of the new system. It should be considered a transformational piece of legislation, one of many that were passed after the fall of Communism. These laws admittedly played an exceptional role during the formation of market legislation, after the demise of the planned economy era. Despite its positive historical significance, it is clear that the current law lags far behind contemporary market realities. The fact that this law is still currently in force might therefore be considered anachronistic (Dovgert, 2000, pp. 142-143). Nevertheless, with the enactment of the new Civil Code, legislators apparently did not consider such a state of affairs as requiring intervention. Perhaps it was thought that the small number of partnerships in the market was relatively stable, being unlikely to grow, and thus did not require urgent reformulation of the law. Therefore, further discussion will focus on how companies are structured and operate through their distinctive organs.

The Polish Dualistic Example

As stated above, both Polish and Ukrainian legislation regulate limited liability companies, which are the most popular type of company chosen by the business community (State Statistics Service of Ukraine, n.d.). The structure of the separate and distinct organs of a Polish limited liability company and a joint-stock company registered under Polish legislation are very similar. The most significant difference in the structure relates to supervisory bodies, which will

be discussed below. It is clear that Polish legislation, with regard to both limited liability companies and joint-stock companies, was constructed to ensure a clear separation of the executive and supervisory spheres. Thus, both of these types of companies are obliged to have a management board that runs and represents the company as a mandatory organ with the power to represent the company. According to § 1-2 art. 201 of the CCC, “the management board shall manage the affairs of the company and represent the company. The management board shall include one or more members” (Commercial Companies Code, 2000). There is an identical provision in § 1-2 of Article 368 of the CCC with regard to the management board of a Polish joint-stock company. In Polish law, the principle of the presumption of competence of the management board is widely accepted, i.e. the management board has the power to commit the company in all respects unless this has been expressly reserved for another body (Ibid., § 1 article 227 and article 393). The shareholder meeting in a limited liability company, and the general meeting consisting of the stockholders in a joint-stock company, are separate organs with similar powers. Traditionally in Polish company law, the share capital of a limited liability company is divided into shares, but the share capital of a joint-stock company is divided into stocks. The legal position of the supervisory authority in a joint-stock company is quite clear - irrespective of the stockholders or the size of the business, a supervisory board must be appointed (Ibid., article 381). The situation with supervision is more complex in the case of a limited liability company. The Polish legislature, provided three possibilities for the company's participants: “The articles of association may create a supervisory board or an audit committee or both. The supervisory board or the audit committee shall be created where the company's share capital exceeds 500,000 zlotys and where there are more than twenty-five shareholders” (Ibid., § 1-2 article 213). In other words, a supervisory authority, or two may be established in any situation, whether required by law or not (it depends on the specifics of each company). According to Polish legislation, it's possible to create both a supervisory board and an audit committee. For instance, a supervisory board and an audit committee could have practically the same range of obligations and separately apply the same instruments of control because of considerations of the obligations among groups of shareholders. The shareholders may want to have reporting about company issues from two separate sources. At the same time, in a company's constitution, there could be a division between the duties of the audit committee and the supervisory board. If the aforementioned prerequisites are satisfied, there should be at least one supervisory authority, e.g. a supervisory board, which in practice is the most popular solution in Poland. The second option would be an auditing committee. On the other hand, if the statutory requirements are not fulfilled, a supervisory authority may not be established, which absolutely does not mean that there is no control over the management board's actions. There are three possibilities here: a supervisory board can be established at any time out of necessity; it can be established when and as the law prescribes; and it can be forgone and never established. In the latter situation, it is obvious that the right to supervise

belongs to the shareholders of a limited liability company. In any case, even if supervisory bodies are established, the shareholders do not automatically lose the right of individual supervision. If a supervisory board is established, the right of individuals to supervise could be curtailed according to art. 213 of the CCC. Having said that, § 3 Article 213 of the CCC stipulates that “If a supervisory board or an audit committee are created, the articles of association may exclude or limit the exercise of individual oversight by the shareholders” (Ibid., article 213). In parallel with the existence of an expanded supervisory body, there is nothing to prevent shareholders from retaining their individual supervisory powers, which could lead to corporate conflicts. This power is given by the code despite the presence of the supervisory board unless it is specifically limited in the corporation’s own governing documents. It should be stressed that any modification of rights (e.g. the addition of further powers to the supervisory board) which would reduce the powers of the management board, is of course possible, but on the condition that it does not disturb the fundamental structure of the company. In the constitution of a particular limited liability company, there may be deferential references to the powers of the controlling bodies, which effectively means that the shareholders have accepted the model proposed by the legislature. Where corporate constitutions do not craft their own rules, they default to the standard in the code. On the other hand, even with far-reaching modifications of the powers and relations between the bodies, the structure remains more or less standard because only the authorities prescribed in the code can be used. At this point, the question arises as to what arguments can be made in favour of a dualistic model when the code already provides flexibility.

The advantage of such a system lies in the independence of the supervisory authority and the possibility of bringing representatives of various groups of owners of shares or stocks into this organ of the company. There are several mechanisms, whether formalised in legislation or not, which can lead to the interests of various groups of share or stock owners being taken into account whereby they elect “their own” representatives to a supervisory authority. Even if the management board is loyal to a majority of the shareholders, some of the members of the supervisory authority can be elected by minority shareholders thanks to a compromise. Of the formal mechanisms enabling this, the so-called “election of members of the supervisory board of a public limited company by groups” can be cited as an example: At the shareholders’ general meeting, the persons representing the portion of shares (in terms of the division of the total number of the represented shares by the number of members of the board) may create a separate group for the purpose of electing one member of the board, and must not participate in the election of the remaining members. According to the law, the board of directors are not subordinate to the supervisory authorities. The supervisory authorities have oversight powers that must be respected by the members of the management board. The existence of two separate bodies allows a distance to be maintained and lowers the risk of personal links between members of the management board and members of the supervisory authorities. This allows, for example,

better supervision of the management board's actions where there is a majority shareholder with a large shareholding block. Besides, there is also the autonomy of the management board (even in relation to shareholders or stockholders), for example, in terms of incurring liability (not only civil but also criminal) for not filing a bankruptcy motion on time (Ibid., article 299 and article 483). In many situations, a board member may have to make their own decisions in order to avoid future personal liability to the company's creditors or criminal liability, despite the position of shareholders or stockholders. Other arguments can be brought to bear in support of the separation of the functions of management of the company from the supervisory function, such as the effectiveness of such a division for economic reasons.

However, the independence of these bodies is a mere fiction when the ownership body is dominant, e.g. when both the management board and the supervisory bodies simply execute the will of the shareholders. In Polish law, a shareholder may also be a member of the management board, in which case their oversight by the supervisory board (appointed at the shareholder meeting) may be illusory. This is particularly evident in the case of so-called municipal companies, where all existing bodies carry out the will of the municipal entity since 100% of the shares belong to the municipality. These companies are public bodies but they abide by the CCC for the purposes of corporate governance.

Simple joint-stock companies under Polish law and Ukrainian joint-stock companies as an example of a mixed system

The new Law of Ukraine on joint-stock companies became effective on 1 January 2023 (Law of Ukraine on Business Associations, 2022). It introduced far-reaching changes into company law relative to both the socialist period and also the later solutions of the first decade of the 2000s. It is a rather large piece of legislation, but even a superficial analysis shows that according to Part 1, Article 4, the governance structure of a company can have one or two tiers (Ibid.,). This means that the founders of a joint-stock company can decide for themselves which model to adopt. This mirrors the similar choice available when selecting what type of joint-stock company it should be - private or public (Ibid., article 6). The choice can only be made in accordance with the solutions proposed by the legislature. In certain situations, the law may mandate the use of one or the other management system (this does not apply to private companies in general (Ibid., article 4). It follows from Part 2, Article 4 that with a single-tier structure, the governing bodies are the general meeting and the board of directors, which may include executive and non-executive directors. The board of directors is merely a group of individuals entrusted with oversight and governance (Ibid., article 4). Moreover, with a monistic structure, there can be an even greater simplification of the structure when it comes to a private joint-stock company. If such a company has no more than 10 shareholders, a single executive may be appointed instead of a board of directors. A rather interesting point that may give rise to controversy is contained in Section 10 of

the Act, which is devoted to the one-person executive body, which carries out the management of the day-to-day business of the company (Ibid.). However, it is additionally stated in the second sentence of Part 1 of Article 81 that the executive body is responsible for all matters relating to the company's day-to-day business unless this has been reserved for the general meeting or the supervisory board. This somewhat ambiguous statement creates the misleading impression that if a one-person executive is appointed, the single-tier structure is abandoned and a supervisory board ought to be appointed. Such an approach appears to be erroneous, since the appointment of a one-person body can take place instead of a supervisory board. In this context, it is interesting that legislation regulating Ukrainian joint-stock companies permits a situation where there is a one-person organ in the company (regardless of the number of shareholders), which is effectively the management board and is overseen by the supervisory board. This does not mean, however, that a single individual cannot fulfill this function in a monistic structure and, of course, this does not require the appointment of any supervisory bodies. Nevertheless, the legislation is fairly new, so controversies in case law may well arise. As for the situation in a classic single-tier structure, functions related to the day-to-day operations of a joint-stock company are carried out by executive directors, while functions related to risk management and control over the entire company are carried out entirely by non-executive directors (Ibid., article 4). Permanent or temporary committees may be set up within the board of directors (Ibid., article 68).

In the case of a two-tier structure, the organs of a joint-stock company with the authority to commit the company legally are: the general meeting (Ibid., article 4), the supervisory board, and the executive body, whether collegial (more than one person) or single-member. Such a system provides for a clear division between operational activities and the internal oversight function carried out by the supervisory board. Such a structure is similar to the system applicable in the case of a Polish limited liability company or joint-stock company. The law may impose restrictions (Ibid., article 4), but in general, a joint-stock company with a single-tier structure may convert to a two-tier structure and vice versa. Deciding to change the structure is not regarded as a reorganisation or transformation of the company (Ibid., article 4). Transformation would require a change in company type.

Comparable solutions have been adopted in Poland in respect of the most recent version of the joint-stock company. A simple joint-stock company is the first type of domestic company that does not apply the idea of share capital (instead of that, new joint stock capital was established) and allows the possibility of appointing only a board of directors without a management and supervisory bodies. Such a possibility has only existed in Polish legislation since 1st July 2021, when the Commercial Companies Code was amended (Act amending the Commercial Companies Code and certain other acts, 2019), and a third shareholding company appeared in legislation alongside the existing two varieties. It follows from § 1 - 2 of Article 300 of the Commercial Companies Code (Ibid.) that either a management board or a board of directors is established in a company. The company's constitution may provide that, in

addition to the establishment of a management board, a supervisory board must also be set up. Accordingly, the company's founders have the power to decide which model of company governance is more suitable for them. If the traditional management board is selected, a supervisory board may be established. In the case of the simple joint-stock company, unlike the Polish limited liability company, legislators have not laid out any requirements according to which a supervisory board must be established. In any case, it is exclusively an independent decision of the company's stakeholders (§ 1-2 of article 300⁶⁸, Commercial Companies Code, 2020). The supervisory board must consist of at least three members, appointed and removed by a resolution of the shareholders, although the corporate constitution may provide for a different method of appointment or removal of supervisory board members (Ibid., § 1-2 of article 300⁶⁹). One of the most important features of this dualistic system is that the supervisory board, despite overseeing the activities of a simple joint-stock company, does not have the right or obligation to give binding instructions to the management board regarding how to conduct the company's business. This is explicitly stated in the legislation (Ibid., § 1-2 of article 300⁶⁹). Of course, after the supervisory board has carried out a review of the activities of the management board, the management board may adjust how the company's affairs are carried out in the future but only after a general meeting of the simple joint-stock company has passed appropriate resolutions.

If the stakeholders in the company opt for the monistic model, a board of directors must be appointed to manage the company's affairs, represent the company and supervise the company's affairs. The board of directors consists of one or more directors (Ibid., § 1-2 of article 300⁷³). This approach allows great flexibility, as it is possible to set up an elaborate structure with several directors in charge of the day-to-day management and representation of the company, while the board of directors operates as a one-person board, enabling all of the functions to be concentrated in the hands of one individual (Polish law only allows natural persons to be appointed to boards or management boards, but shareholders are not so restricted and can also be legal persons (Ibid., article 18). Obviously, in the case of a one-person board of directors, it is difficult to say that this one natural person exercises control over themselves when they represent the company or fulfill a management role. This may give rise to increased risks of self supervision for a simple joint-stock company, but this is counterbalanced by the broad powers of the shareholders, who not only appoint and remove the directors but may, for valid reasons, suspend by resolution any member of the board of directors (Ibid., article 300⁷³). In any case, a director may be removed at any time without stating reasons, which of course does not deprive them of any legal claims they may have as part of the employment relationship or their directorship position in general (Ibid., article 300⁷⁴). In smaller companies which are set up, for example, with the sole purpose of developing a new, innovative product (e.g. as a start-up), it may be neither economically necessary, nor financially feasible, to maintain a supervisory board consisting of several members. In the case of the personal involvement of shareholders in the company's work (which is possible in the

case of a simple joint-stock company), the problem of there being a complete lack of control over the sole member of the board of directors is likely to be a marginal one. When the board of directors is composed of more than one director, the principle of collegiality in the conduct of the company's affairs applies, although this can be changed in the company's constitution or in the rules governing the board of directors. In common law jurisdictions, the institution of a board of directors enables a division between executive and non-executive directors (Lewandowski, 2021). Non-executive directors exercise permanent supervision over the running of the company's affairs, while executive directors run the company's business (article 300⁷⁶, Commercial Companies Code, 2020). It should be noted that it is possible to set up further, more complex structures within the context of the board of directors. For example, an executive committee made up exclusively of executive directors may be established. Likewise, a committee composed of non-executive directors may be set up to exercise ongoing supervision of the company (Ibid., article 300⁷⁶). Although it is not possible to speak of any administrative subordination of particular directors to others, the non-executive directors clearly are equipped with various powers to exercise effective control over the activities of the executive directors. Those powers include requesting access to documents, demanding explanations, and other formal actions (Ibid., article 300⁷⁶). The legislature has endowed company founders with a great deal of freedom, not only in terms of the choice of the company's governance model, but also in terms of shaping the content of the various organs of the company once such a choice has been made. Depending on the company's line of business, and despite making an identical decision to appoint a board of directors, in two particular companies one may find two completely different situations. In one, there may be a single-person board of directors, while in the other there may be a board of directors with an extensive structure and internal committees and legislation governing that structure.

Evaluation of the current solutions

The few selected examples given above clearly show that there has been a shift away from the absolute dominance of the dualistic system. Instead, there is a mixed system, offering a choice. For a number of years, it has been suggested that the Polish rules governing the principles of representation should be modernized to allow for a monistic management system in capital companies, in addition to the existing dualistic system consisting of a management board and a supervisory board (Sołtysiński, 2015, p. X). However, there has never been any intention to eliminate the dualistic system and fully replace it with a monistic one.

For many European continental legal systems, the introduction of the European company was the inspiration for such changes. It is clear that a European company is not, by definition, a domestic company, one registered under Polish law and regulated by the Commercial Companies Code. The European company came into being primarily as a product of European

legislation (Council of the European Union, 2001a; Council of the European Union, 2001b). The main idea behind the *Societas Europaea* (SE, Latin for a ‘European company’) is supranationality and the ability to solve some of the existing cross-border problems of enterprises within the European Union (Bilewska, 2006, p. 17). There is also no doubt that “in principle, the legal form of the SE should primarily serve to facilitate cross-border mergers and to facilitate the creation of international group structures” (Sokołowski, 2003, p. 10). Nevertheless, despite its lack of popularity in practice, it is now part of the legislation in EU member states. Pursuant to Article 38 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company, an SE’s management organs shall comprise:

- (a) a general meeting of shareholders and
- (b) either a supervisory organ and a management organ (two-tier system) or an administrative organ (single-tier system) depending on the form adopted in the statutes (Council of the European Union, 2001a).

It has been rightly pointed out that the 2001 statute, while regulating the monistic system, did not introduce an EU-wide name for the company’s organ, but instead used the term ‘administrative body’. As such, this caused certain terminological difficulties in legal systems such as Poland and Germany where the monistic system was unknown (Bilewska, 2006, pp. 184-185). In the end, the body was called the ‘administrative council’ in Polish domestic law (article 24, European Company and European Economic Interest Grouping Act, 2005) to resolve the initial misunderstanding.

Taking into account the influence of European legislation and the evolution of national practices and legislation, it makes little sense at the moment to maintain, or indeed impose, only one corporate governance system for a particular type of company, when it is always possible to provide the company stakeholders themselves with a choice.

The argument is not that anyone system is better or worse. Instead, it is about the suitability of a particular solution for a particular company, which may be attributable to internal or external reasons and/or unrelated to the balance of interests in the company. This article has set out some examples of new legislation passed in jurisdictions where the dualistic system has traditionally and exclusively been the norm, but it is obvious that both systems have their variations in particular jurisdictions. More often than not, the evolution of approaches adopted and found in monistic systems will lead to similar solutions, albeit within a single, only apparently unified body. On the other hand, the traditional advantages of the monistic system remain strong, viz. easier circulation of, and access to, information or joint decision-making by all directors, and the absence of the problem of the supervisory board being too passive.

The purpose of this article, however, is not to give preference to a particular governance system or to demonstrate their respective weaknesses,

but rather to answer the question of whether we should adopt one of the two systems at the statutory level when drafting legislation, or whether we should provide a choice to those intending to run a business. The latter option would be favorable, i.e. the introduction of a legal choice and the propagation of a mixed system.

Arguments supporting this approach include the following:

First, any prohibition or *jus cogens* should be justified in private law (Tarska, 2012, p. 17). There is no justification in private law which would serve as the basis for establishing an imperative norm or prohibiting the establishment of any type of system. Without prejudging the suitability of either system for the participants in a particular country's commercial activities, it is rather difficult to imagine a situation where one system, either the dualistic or monistic one, ought to be imposed top-down, since the simple existence of the alternative would lead to negative effects on a mass scale. When considering this topic, we should avoid over-generalisations, and instead focus on the suitability of different systems for companies in a range of various situations. As such, it is not possible to draw a single conclusion that applies to all companies, even if we limit ourselves to those registered in one country.

Second, there is no need to shift the burden of choice to legislatures, who will at most propose a model solution which might not be suitable in a specific situation. Although the option of introducing a monistic or dualistic system would be a good move, very often it would only provide a general framework for a particular company. Having the flexibility to choose either a dualistic or monistic system of corporate governance which suits the needs of the business would be more favourable and allow the business to choose the appropriate general framework for corporate management. For example, when choosing the dualistic system, a number of decisions have to be made, such as whether to endow the supervisory board with additional powers or whether to impose an obligation on the management board to obtain the supervisory board's approval for certain resolutions. If it is not advisable for the legislature to interfere too much, it is all the more inadvisable for it to impose a particular corporate governance system on all companies.

Third, the shareholders are free to make their own choice as to whether a particular governance mechanism does or does not suit their purposes in a particular situation, thus avoiding a possible conflict of interest between organs, authorities or shareholders. At this point in the discussion, it is appropriate to refer to one of the cardinal principles of continental private law, namely the principle of freedom of contract (Ibid., p. 15). A company is not simply a manifestation of a private-legal agreement or contract; it is a private-legal organization that comes into being on the basis of a legal constitution. A private legal organization is based on a corporate constitution which is a contract and the freedom-of-contracting principle applies. At the same time, this contract brings a new legal entity into existence. It is true that the legislature can arbitrarily impose, and has imposed, certain structures on all companies but it is important to consider whether freedom of contract should be extended as far

as possible. The objective would be to choose in the contract an option from several proposed by legislators.

Fourth, there is no public interest at stake. State-owned and municipal companies also use private-law constructions and can make the same choice. They can rely on private law when making decisions about their corporate governance structures. However, their decision making would be irrelevant to private companies where no public or state interest exists. Indeed, it is difficult to make any argument about the existence of a legitimate public or state interest in the case of private companies. By definition, the participants in a company act in order to obtain a profit. Private companies exist for this purpose. The state interest in their activities is limited to regulating the sector. The state is not concerned with the operation of the business as long as it meets the standards for regulatory compliance. The same standard should apply to whether a company selects a monistic or dualist system of corporate governance. A state may have a general interest in the proper operation of a business sector, but it is indifferent when it comes to how individual companies perform or groups of businesses perform. Shareholders have some influence on the means of corporate governance by selecting a structure.

There is no rational justification for the fact that it is possible to choose a system of corporate governance in the case of some limited liability companies, but not so in the case of others. Limited companies often have great structural similarities and are even regulated in a confusingly similar way (e.g. the management board in a joint-stock company and the management board in a limited liability company). The question then arises as to why there are more options available to some of these business vehicles, but in the case of others, legislation leaves no choice.

It should be pointed out that the monistic system was historically the first corporate governance system that was made available, as even “the German supervisory board of the late 19th century and early 20th century in fact resembled the Anglo-Saxon board of directors or the French conseil d'administration, and the relationship between the supervisory board and management board resembled that between a board of directors and an officer” (Opalski, 2005, p. 13). As such, we are not dealing with two traditions, which must on no account be mixed. Instead, we are dealing with different approaches that apply in varied circumstances. Nowadays, more flexibility is desirable, and even if particular corporate governance forms are not used by individual market participants, this will not be detrimental to any extent. Even if “the history of the supervisory board is the history of legislatures’ 'breaking' the original model of combining management and oversight functions in one body,” (Lewandowski, 2021) these historical reasons – perhaps relevant in the past in some countries - are now gone.

One of the most compelling arguments for the introduction and preservation of the choice between the dualistic and monistic systems concerns the international connections of business and capital and the ease of registering a company in another jurisdiction. Founders themselves can tailor the company to the needs of foreign investors who come from different common law legal

traditions in their home countries. Without going into unnecessary detail, there are – at least in the European Union - far-reaching opportunities to use company structures from various jurisdictions. Countries with a case law tradition, such as the Republic of Ireland, are part of the European Union. In this case, if domestic companies are not found to be particularly appealing, this will lead not so much to capital flight as to the use of foreign constructions that investors may find more attractive.

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**THE RIGHT TO DEFENSE IN THE CONTEXT OF PENAL
ENFORCEMENT: INTERNATIONAL AND EUROPEAN HUMAN
RIGHTS STANDARDS**

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Abstract

This study analyses the evolution and current standards of the right to defense within the framework of penal enforcement, as developed under international and European human rights law. It examines how the guarantees of legal assistance, access to counsel, and fair treatment of persons deprived of liberty have been shaped by three major legal systems: the United Nations, the Council of Europe – particularly through the jurisprudence of the European Court of Human Rights – and the European Union. The paper identifies the principal legal instruments and case law defining defense rights during imprisonment, including the UNCAT, the Nelson Mandela Rules, the ECHR, and the EU directives on procedural safeguards and legal aid. Special attention is given to the interaction between the ECtHR and the CJEU in harmonizing standards of fair trial and legal assistance. The analysis concludes that the right to defense in penal enforcement represents an evolving and integral component of the rule of law, requiring constant judicial oversight and coherent implementation across international and regional frameworks.

Keywords: *right to defense, prisoners' rights, penal enforcement, legal aid, fair trial, European Court of Human Rights, Court of Justice of the European Union, human rights standards*

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1. INTRODUCTION

Human rights are often described as “the laws of the weakest,” reflecting their essential function of protecting the individual against the potential overreach of state power (Valesco, 2020, p. 72). Their origins can be traced back to the foundational documents of the Anglo-Saxon legal tradition – the Magna Charta Libertatum (1215), the Habeas Corpus Act (1679), and the Bill of Rights (1689) – while the philosophical underpinnings were provided by Enlightenment thinkers such as Beccaria, Grotius, Kant, Montesquieu, Pufendorf, and Rousseau (Trechsel, 2014, p. 99). Over time, the evolution of international human rights treaties and domestic constitutional law has progressively enhanced the protection of individual rights and exerted a growing influence on criminal justice systems worldwide (van Kempen, 2014, p. XI). Within this broader framework, the rights of persons deprived of liberty have been codified and strengthened through a variety of international instruments, including the United Nations Nelson Mandela Rules, the European Prison Rules, and the recommendations of the Committee against Torture (CAT).

The right to defense represents one of the most fundamental guarantees of this human rights architecture. While its relevance during investigation and trial has been extensively discussed, its operation within the context of penal enforcement has received comparatively less scholarly attention. Yet, imprisonment remains a crucial phase of the criminal process, during which the legal position of the individual continues to be subject to state authority. Ensuring access to legal assistance, communication with counsel, and procedural remedies during imprisonment is essential to prevent abuse of power and safeguard human dignity.

The present study therefore seeks to examine how the human rights-based conception of defense and thus to the rights of prisoners has evolved and strengthened within three major legal regimes: the United Nations, the Council of Europe, and the European Union. The research aims to identify the normative foundations, institutional mechanisms, and judicial interpretations that collectively define the scope of the right to defense during penal enforcement. By employing a doctrinal and comparative legal approach, supported by the analysis of international case law and secondary literature, the paper provides a structured account of the existing standards and evaluates their practical implementation. The article is organized into three main sections: the first addresses the universal framework of the United Nations, the second explores the regional framework of the Council of Europe with particular focus on the European Court of Human Rights, and the third considers the contributions of the European Union’s legal order. The conclusion summarizes the principal findings and offers reflections on the future development of the right to defense as a key element of human rights protection in the field of penal enforcement.

2. THE RIGHT TO DEFENSE UNDER THE UNITED NATIONS FRAMEWORK

2.1. Universal foundations of human rights protection

Human rights embody the universal and indivisible principles of human existence and coexistence upon which the United Nations' objectives of peace, development, and justice are founded (Annan, 2002). The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly on 10 December 1948 without a single vote against, proclaims that every human being is entitled to life, liberty, and personal security and shall not be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. As the first universally binding human rights instrument, the UDHR remains the cornerstone of global protection (Oraá, 2009, p. 164).

Under UN auspices, a broad set of rights has been developed to shield individuals from abuses of state authority. Among these, the right to a fair trial ensures equality between the defense and the prosecution, while the prohibition of torture and inhuman treatment applies throughout both criminal proceedings and the enforcement of sentences. Equally important are the rights to an effective remedy and to compensation for violations of fundamental rights. The UN framework further recognizes the immunity and independence of lawyers and secures for everyone the right to legal assistance in criminal proceedings irrespective of financial capacity, thus establishing the principle of state-funded defense counsel. These guarantees are reinforced by the protection of attorney-client privilege, which serves as a foundation for judicial independence.

2.2. United Nations standards on the treatment of prisoners

The Standard Minimum Rules for the Treatment of Prisoners were first adopted in 1955 during the inaugural UN Congress on the Prevention of Crime and the Treatment of Offenders (Juhász, 2006, p. 44). They were later revised and formally endorsed by the UN General Assembly in 2015 as the Nelson Mandela Rules, commemorating the former prisoner and human rights advocate Nelson Mandela, who spent 27 years in detention under number 46664 (Penal Reform International & Human Rights Centre, University of Essex, 2017, p. 5). The revised rules represent the first official update of the UN minimum standard for prison management and human rights protection. Rule 88(2) calls on states to safeguard the civil, social security, and social rights of prisoners that are not affected by their sentence, while Rules 41–57 guarantee the right to remedies and legal assistance, including access to counsel, confidential communication, and judicial review of disciplinary sanctions.

The primary guardians of rules concerning incarcerated persons are international human rights treaties and the international organizations associated with them. Several examples may be cited in this regard. In its

Report on the Use of Pretrial Detention in the Americas, the Commission concluded that “the excessive and non-exceptional use of pretrial detention is one of the most serious and widespread problems that the OAS member States face when it comes to respecting and ensuring the rights of persons deprived of liberty” (IACHR, 2017, p. 20). Similarly, in *Vélez Loor v. Panama*, the Commission requested the Court “to order the State to ensure that Panamanian prisons meet minimum standards that are compatible with humane treatment and a life with dignity for those deprived of their liberty” (2010, § 273).

The activities of these organizations, both individually and cumulatively, strengthen the rights of incarcerated persons and the rights of defense. Such reinforcement is particularly necessary because domestic courts are not always capable of preventing states from weakening human rights protections. The development of human rights is not a linear or one-directional process; in some states, regressions can also be observed. This phenomenon is evident even in the United States, where in *Furman v. Georgia* the Supreme Court imposed a temporary moratorium on the death penalty. Subsequently, following changes in death penalty regulations, the Court itself declared the procedure for imposing capital punishment constitutionally acceptable in *Gregg v. Georgia*.

In Germany, an attempt was made to address the same issue through the so-called eternity clause, whereby the unamendable protection of human dignity constitutes the strongest barrier to the reintroduction of the death penalty, as it is considered incompatible with human dignity. By contrast, in Tanzania, within the theoretical legal debate surrounding the case of *Mbushuu alias Dominic Mnyaroje & Kalai Sangula v. The Republic* – in which the death penalty was ultimately not declared unconstitutional – the conditions of detention of incarcerated persons raised the question of whether the execution of the death penalty could be regarded as a form of “appropriate reward” for the convicted individual (Gaitan & Kuschnik, 2009, pp. 470–471, 476).

2.3. Core international covenants and the prohibition of torture

The International Covenant on Civil and Political Rights (ICCPR, 1966) codifies many of these safeguards. Article 14 enshrines the right to a fair trial as a fundamental legal principle, forming the normative basis of the right to defense. Under Article 2(3), state parties must ensure that any person whose rights are violated has access to an effective remedy determined by competent administrative or judicial authorities. Article 7 expressly prohibits torture and cruel, inhuman, or degrading treatment or punishment, establishing a binding standard that defines the lawful limits of penal enforcement. Article 9(5) provides for the right to compensation not only in cases of unlawful detention but also for damage caused by the unlawful execution of a lawful sentence.

The International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) complements these guarantees by recognizing rights essential to the

human dignity of persons in detention, including the right to the highest attainable standard of physical and mental health, access to education, and participation in cultural life. State parties have undertaken to restrict these rights only to the extent compatible with their nature and with Article 4 of the Covenant. The enforcement of sentences must therefore not nullify the enjoyment of rights under the ICESCR; it is the legislature's duty to define proportionate limitations, and the prison administration's responsibility to ensure their effective application.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT, 1984) elaborates the definition of torture and explicitly excludes any exceptional circumstances – such as war or public emergency – as justification for its use. Articles 13 and 14 guarantee victims the right to complain, to legal protection, and to compensation. To supervise implementation, the Committee against Torture (CAT) was established, and the Optional Protocol to the Convention against Torture (OPCAT, 2002) created the Subcommittee on Prevention of Torture, composed of independent experts authorized to conduct unannounced visits to places of detention.

2.4. Lawyers, legal aid, and procedural guarantees

The Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 1990), underscore the essential role of lawyers in ensuring justice. They affirm that all persons have the right to the assistance of counsel at all stages of criminal proceedings and that governments must provide adequate funding for legal representation of those unable to afford it. If justice so requires, the state must appoint competent defense lawyers free of charge. Detainees must be able to consult their lawyers without delay – at the latest within 48 hours of detention – and in full confidentiality, free from surveillance or censorship (United Nations, 1991, p. 120). Lawyers are entitled to carry out their professional duties without intimidation, interference, or sanctions, and enjoy civil and criminal immunity for statements made in good faith during professional duties (United Nations, 1991, p. 122).

In 2012, the UN General Assembly adopted the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (A/Res/67/187), the first international instrument devoted exclusively to the right to legal aid. Building on the 1990 Principles on the Role of Lawyers, it defines legal aid as an essential component of a fair, humane, and efficient criminal justice system (UNODC, 2012, pp. 2, 8–11). The first principle establishes the right to legal aid; the second affirms state responsibility to ensure access; and the third specifies that free legal assistance must be provided when justified by the urgency, complexity, or gravity of the case (Willems, 2014, p. 196). Guideline 6 requires states to guarantee access to legal aid for all detained persons and for children deprived of liberty, including in matters

concerning the conditions of detention, disciplinary procedures, pardons, and parole requests. Although these principles are not legally binding, they represent a significant political acknowledgment of access to justice as a universal right (Willems, 2014, pp. 195–196).

2.5. Remedies and implementation

The Nelson Mandela Rules further detail the remedies available to prisoners. Rules 41–57 establish the right to submit complaints to prison authorities, oversight bodies, or judicial institutions, and to receive timely and reasoned responses. The Essex Group’s interpretative commentary emphasizes that access to legal advice must be ensured in all detention facilities and in languages understood by prisoners, including in accessible formats such as Braille (Penal Reform International & Human Rights Centre, University of Essex, 2017, pp. 50–52). Prisons must provide confidential spaces for consultations and ensure that no prisoner is required to disclose the intention to meet with legal counsel, as this could undermine the effectiveness of remedies.

2.6. Synthesis

Together, these instruments form a coherent framework that extends the right to defense beyond the courtroom into the realm of penal enforcement. They impose upon states the dual obligation to respect and to facilitate legal assistance for all persons deprived of liberty. Although much of this framework operates through soft law, its cumulative effect has been to articulate a global consensus: the right to defense is integral to human dignity and the rule of law.

3. THE RIGHT TO DEFENSE UNDER THE COUNCIL OF EUROPE FRAMEWORK

3.1. Normative foundations and scope

Within the Council of Europe, the European Convention on Human Rights (ECHR) provides the primary normative basis for safeguarding defense rights throughout criminal proceedings and during penal enforcement. Article 3 prohibits torture and inhuman or degrading treatment; Article 5 enshrines the right to liberty and security and requires prompt and effective judicial review of detention; Article 6 guarantees the right to a fair trial and to defense; and Article 13 secures the right to an effective remedy, including against violations by public officials (Nagy, 1999, p. 68; Rozsnyai & Koósné, 2021, para. 169). The European Court of Human Rights (ECtHR) in Strasbourg not only adjudicates individual cases but also develops the Convention’s guarantees through authoritative interpretation, thereby shaping common European standards (*Ireland v. the United Kingdom*, 1978, §154; *Jeronovičs v. Latvia*, 2016, §109; Garajszki, 2022, p. 423).

3.2. Access to counsel and legal aid

Early case law underscored that imprisonment does not entail a loss of Convention rights (*Ilse Koch v. FRG*; Balogh, 2002, p. 78). In *Engel and Others v. the Netherlands*, the Court clarified that all forms of deprivation of liberty fall under Article 5 irrespective of procedural labels (Bán, 1991, pp. 42–43). The right to self-representation is not absolute; states retain a margin of appreciation to require representation when the interests of justice so demand, as confirmed in *Philis v. Greece* (1992, §59) and *Correia de Matos v. Portugal* (2001, §66). Conversely, when an accused person is unable to retain a lawyer, free legal assistance may be required depending on offense seriousness and potential sanction (ECHR, 2025, p. 92). The Court held in *Benham v. the United Kingdom* (1996, §§60–61) that the risk of imprisonment triggers a duty to provide legal aid; *Quaranta v. Switzerland* (1991, §33) extended this to cases where custody is the only thing at stake; *Zdravko Stanev v. Bulgaria* (2012, §38) recognized necessity even absent an executable sentence; and *Twalib v. Greece* (1998, §53) found a violation given cassation complexity, mandatory representation, and linguistic disadvantages. Echoing *Artico v. Italy* (1980, §33), the Court emphasizes that Convention rights must be “practical and effective,” not “theoretical or illusory,” and in *Beuze v. Belgium* (2018, §136) it assessed the overall quality of assistance, including preparation, evidence gathering, interview support, and monitoring of detention conditions.

3.3. Prisoners’ access to courts and confidential communications

In *Golder v. the United Kingdom* (1975, §35), the ECtHR derived a right of access to a court from Article 6(1), a principle applied to prisoners seeking legal remedies. Interference with access to a lawyer simultaneously undermines access to court, as held in *Silver and Others v. the United Kingdom* (1983, §§81–82) (Kabódi, 1994, pp. 4, 8–9). The Court has strictly protected confidential lawyer-client correspondence: *Schönenberger & Durmaz v. Switzerland* (1988, §28) and *Campbell & Fell v. the United Kingdom* (1984, §110) held that letters may be opened only on compelling grounds incapable of detection by other means (Balogh, 2002, p. 84).

3.4. Preventive standards of the CPT

Beyond adjudication, the Council of Europe established the European Committee for the Prevention of Torture (CPT) under the European Convention for the Prevention of Torture. Through visits and reports, the CPT advances preventive standards, highlighting from the outset of custody three core safeguards: notification of a third party, access to a lawyer, and medical examination (Koósne et al., 2017, p. 253; González, 2009, p. 769). In its 21st General Report, the CPT urged that access to a lawyer must be available from the very outset of deprivation of liberty, even in legally ambiguous situations, given the heightened risk of ill-treatment; personal, confidential meetings are

indispensable to assess physical and mental state (CPT, 2011, pp. 17–19). The CPT also recognizes that indigence must not bar access to a lawyer, a view echoed in the Essex Group’s commentary (Penal Reform International & Human Rights Centre, University of Essex, 2017, pp. 50–51).

3.5. European Prison Rules

The European Prison Rules (EPR), first adopted in 1987 and comprehensively revised in Rec(2006)2, synthesize ECtHR jurisprudence and CPT practice (Juhász, 2006, p. 44). The revised Rules emphasize dignity, minimal necessary restrictions, normalization, reintegration, staff professionalism, and external oversight (Juhász, 2006, pp. 45–46). Substantively, the EPR guarantee access to legal advice in criminal and civil matters, confidential consultations subject to only exceptional, reasoned limitations, and information about eligibility for legal aid (Rule 23.3) (Juhász, 2006, p. 48). The complaints regime prohibits reprisals (Rule 70.4) yet limits third-party complaints absent prisoner consent (Rule 70.6) and allows legal assistance in complaint procedures only where “the interests of justice so require” (Rule 70.7), a formulation that risks diluting effective access to defense. For remand detainees, Part VIII mandates information on the right to legal advice and conditions enabling effective defense, including private meetings with counsel (Rules 98.1–98.2) (Juhász, 2006, p. 57).

3.6. Derogations and national security

Counter-terrorism has tested access-to-lawyer guarantees. While Article 15 ECHR permits derogations in emergencies, they must remain strictly required by the exigencies of the situation (Cassel, 2008, pp. 827–828). The Court invalidated four and a half days of detention without judicial control in *Brogan and Others v. the United Kingdom* (1988, §62), accepted a derogation in *Brannigan and McBride v. the United Kingdom* (1993, §66) where consultation with counsel was allowed within 48 hours, and condemned 14 days without judicial control in *Aksoy v. Turkey* (1996, §78). While *Schiesser v. Switzerland* (1979, §36) did not require counsel’s presence at a hearing, *Lebedev v. Russia* (2007, §91) found that excluding counsel impaired defense rights.

3.7. Protection of lawyers and the integrity of proceedings

The ECtHR scrutinizes state pressure on lawyers as a distinct Convention concern. In *Khodorkovskiy & Lebedev v. Russia* (2013, §§924–933), authorities’ obstruction – hindering contacts, denying visas, financial probes, disqualification attempts – violated Article 34. *Kurt v. Turkey* (1998, §§160, 164) barred threats of criminal proceedings against applicants’ representatives; *McShane v. the United Kingdom* (2002, §§147–151) warned that sanctioning lawyers chills individual petition. *Şarli v. Turkey* (2001, §§85–86) found a violation where criminal proceedings were brought against a lawyer for

preparing a Strasbourg petition. *Leotsakos v. Greece* (2018, §38), relying on *Elçi and Others v. Turkey* (2003, §669), reaffirmed the pivotal role of lawyers for the rule of law. The Court closely examines searches and arrests of lawyers, protecting professional premises under Article 8, as in *Niemietz v. Germany* (1992, §37). Free and unimpeded lawyer-client communication is essential to Article 34; any direct or indirect pressure violates the Convention (*Fedorova v. Russia*, 2006, §§45–52). In pre-trial detention review, *Černák v. Slovakia* (2013, §78) required an adversarial procedure and equality of arms enabling meaningful assistance by counsel.

3.8. Equality of arms and access to evidence

Fairness requires an adversarial process and genuine equality of arms: both parties must know and comment on the evidence (*Rowe and Davis v. the United Kingdom*, 2014, §70; *Brandstetter v. Austria*, 1991, §§66–67; *Edwards v. the United Kingdom*, 1992, §89). Defense access to the case file and relevant documents is essential (*Beraru v. Romania*, 2014, §70; *Öcalan v. Turkey*, 2005, §140). Withholding evidence can breach equality of arms (*Kuopila v. Finland*, 2000, §38), though the Court has accepted requirements for concrete justification of access (*Matanović v. Croatia*, 2017, §177). Restrictions may be permissible to protect national security or witnesses, but only if strictly necessary and offset by counterbalancing procedural safeguards (*Leas v. Estonia*, 2012, §§78, 80–81; *Van Mechelen and Others v. the Netherlands*, 1997, §§54, 58). Fairness is assessed in light of the proceedings as a whole, including how evidence was obtained (*Bykov v. Russia*, 2009, §89). Where earlier defects are remedied later, no violation may be found (Nagy, 2011, p. 33).

3.9. Supervision of execution and systemic impact

Since the 1990s, the Court has increasingly used public international law sources to inform the Convention's interpretation (Seatzu & Fanni, 2015, p. 32). The Committee of Ministers oversees execution of judgments, verifying payment of just satisfaction and adoption of individual and general measures; cases remain under supervision until full compliance (FRA, 2010, p. 53). This mechanism fosters convergence in European human rights protection and steers the long-term direction of legal development across member states (Bán, 1999, p. 8). The Council of Europe framework thus provides the most comprehensive regional articulation of the right to defense, combining judicial oversight with preventive monitoring mechanisms. Building upon these achievements, the European Union has progressively integrated comparable safeguards into its *acquis*, translating human rights standards into concrete procedural norms. The next section explores this evolution within the EU's legal system.

4. THE RIGHT TO DEFENSE WITHIN THE EUROPEAN UNION'S LEGAL ORDER

4.1. *Integration of defense rights in EU law*

Building upon the human rights developments within the United Nations and the Council of Europe, the European Union (EU) has gradually incorporated key defense guarantees into its own legal framework. These include the right to defense, the right to legal counsel and assistance, access to free legal aid, confidential lawyer-client communication, the right to effective judicial protection, fair trial, equality of arms, and the right to be present at procedural acts.

The institutional foundations of the EU emerged parallel to the international human rights system – through the European Coal and Steel Community, EURATOM, and the European Economic Community (Békés, 2010, p. 152). Criminal justice cooperation was initially outside the *acquis communautaire*, but over time became integral to it. Although Member States were reluctant to transfer criminal jurisdiction, Community law began to influence national systems (Vókó, 2006, p. 60). Early case law – such as *Commission v. France* (1980), concerning advertising restrictions breaching Article 30 EEC (Szüts, 2004, p. 534), and *Commission v. Greece* (1989), which affirmed the duty to protect Community interests (Karsai, 2002, p. 81) – illustrated this growing impact. Yet Guerrino Casati (1981) confirmed that the founding treaties did not themselves regulate substantive criminal law (Holé, 2003, p. 72).

The *Treaty of Maastricht* introduced the obligation to combat fraud affecting the EU's financial interests with the same vigor as national offenses, while the *Treaty of Amsterdam* reinforced the human rights dimension of EU law by enabling a determination of persistent violations of the Union's fundamental values (Lakatos, 2002, p. 51). The 2004 Proposal for a Framework Decision on procedural rights – though not adopted – provided a conceptual foundation for subsequent directives, particularly concerning access to counsel, the right to communicate with a lawyer without supervision, and procedural safeguards for suspects (Blaskó & Budaházi, 2019, pp. 151–152). The harmonization of defense rights advanced slowly but accelerated after the *Treaty of Lisbon*, which placed the principle of mutual recognition at the core of judicial cooperation in criminal matters (Farkas, 2012, p. 156). Despite these advances, persistent divergences among national systems and lack of mutual trust still hinder uniform application (Bárd, 2021, p. 45).

4.2. *The Charter of Fundamental Rights of the European Union*

The Charter of Fundamental Rights of the European Union (2016/C 202/02) did not create new rights but consolidated those already guaranteed by international conventions and national constitutions (Weller, 2001, p. 34). The

Charter explicitly extends to issues of criminal justice and detention under the protection of the EU Agency for Fundamental Rights (FRA). Article 47 guarantees the right to a fair hearing, and Article 48(2) enshrines respect for the rights of the defense. According to Article 52, these rights may only be restricted by law, in compliance with the essence of the right, and when proportionate and necessary to protect public interest or the rights of others.

The Court of Justice of the European Union (CJEU) has consistently held that Article 47 also encompasses the principles of equality of arms and procedural fairness, as affirmed in *Direcția Generală Regională a Finanțelor Publice Brașov v. Toma* (2016, §47) and *Sánchez Morcillo & Abril García v. Banco Bilbao Vizcaya Argentaria* (2014, §49). However, the right to self-representation is not absolute, paralleling ECtHR jurisprudence (*Stefano Melloni v. Ministerio Fiscal*, 2013, §§49–52).

4.3. Institutional initiatives and legislative framework

EU institutions primarily rely on political instruments to promote compliance with Council of Europe standards. The European Parliament's Declaration of 14 February 2011 (European Commission, 2011) called upon the European Commission to develop minimum rules on detention and to establish independent national monitoring mechanisms in line with the Optional Protocol to the Convention against Torture (OPCAT) of 2002.

The Council Roadmap of 30 November 2009 (Council of the European Union, 2009) on strengthening procedural rights of suspects and accused persons identified early access to legal advice and effective legal aid as preconditions for a fair trial. This roadmap served as the basis for a series of directives establishing a coherent framework for defense rights within the EU.

4.4. The Directive 2012/13/EU on the right to information in criminal proceedings

Directive 2012/13/EU mandates early and effective access to a lawyer, encompassing the right to confidential consultation and, where appropriate, the right to free legal representation. It applies both to criminal proceedings and to procedures under the European Arrest Warrant (EAW). The directive ensures that persons deprived of liberty can meet and consult with a lawyer without undue delay and before questioning. Moreover, suspects have the right to appoint a lawyer in the issuing Member State who may cooperate with the lawyer in the executing state to safeguard the suspect's rights effectively.

The directive explicitly requires that the conditions of deprivation of liberty comply with the ECHR, the EU Charter, and ECtHR case law. Confidentiality of lawyer-client communications is a core guarantee of the right to defense, from which no derogation is permissible. Member States may introduce

technical controls solely for security purposes and only if these do not enable access to the content of communications. National security operations lawfully authorized under EU treaties remain unaffected.

The directive further stipulates that access to legal counsel must be granted at the earliest possible stage: before interrogation, during investigative acts, immediately following deprivation of liberty, and before court appearances. The right includes private communication, the lawyer's presence during questioning, and participation in identification procedures, confrontations, or reconstructions (Blaskó & Budaházi, 2019, p. 155). Member States must guarantee the practical effectiveness of these rights unless the suspect voluntarily waives them.

4.5. Special protection for minors and vulnerable persons

Directive 2016/800/EU provides enhanced safeguards for children, mandating legal assistance during both detention proceedings and the entire period of custody. Authorities must postpone interviews or evidence-taking if no lawyer is present. The CPT has equally stressed the necessity of mandatory representation for juveniles (CPT, 2015, p. 2).

4.6. Directive 2016/1919/EU on legal aid

Directive 2016/1919/EU codifies the right to legal aid to ensure that suspects and detainees can effectively exercise the right to defense, particularly during investigative and evidentiary stages (Kanev, 2018, p. 7). It reinforces the primacy of justice over financial considerations, guaranteeing that access to defense does not depend on material means. However, its dual requirement – that both indigence and the “interests of justice” be met – has been criticized as discriminatory, since wealthier defendants may always secure counsel, whereas indigent defendants qualify only when public interests so demand (Kanev, 2018, pp. 7, 22). Article 3(4) allows Member States to assess either financial need, merits, or both; Article 4(4) identifies situations where legal aid must be provided, such as pretrial detention hearings or ongoing detention. Nonetheless, the directive excludes minor offenses that do not entail deprivation of liberty.

4.7. Interaction between the CJEU and the ECtHR

The relationship between the CJEU and the ECtHR remains complex, as the EU has not acceded to the ECHR, despite prior institutional support (Kovács, 2001, p. 94). Over time, the CJEU has recognized the Convention's relevance: in *Internationale Handelsgesellschaft* (1970), it acknowledged fundamental rights as general principles of EU law; in *Nold* (1974), it referred to international conventions; and in *Rutili* (1975), it explicitly invoked the ECHR (Szüts, 2004, p. 540). More recently, *Åkerberg Fransson* (2013) and *Melloni* (2013) confirmed that the ECHR functions as a primary source of EU

fundamental rights protection. The Court emphasized that while the Convention provides a higher standard of protection, national constitutional safeguards cannot undermine the primacy or uniformity of EU law, particularly regarding fair trial and defense rights (Kaiafa-Gbandi, 2019, p. 58).

5. CONCLUSION

Human rights are founded on the universal principles of human dignity, liberty, and equality, regardless of an individual's origin, social status, or belief. The United Nations played a pivotal role in codifying these rights through the Universal Declaration of Human Rights (UDHR), which proclaimed the rights to life, liberty, and personal security, and prohibited torture and inhuman treatment. Subsequent UN treaties – most notably the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – established detailed procedural and substantive guarantees, including the right to a fair trial, access to remedies, and legal assistance. The Convention against Torture (UNCAT) and the Nelson Mandela Rules further refined the standards of detention, emphasizing unrestricted access to legal counsel and independent oversight of prison conditions.

Within the Council of Europe, the European Convention on Human Rights (ECHR) became the cornerstone of the continent's human rights protection. The jurisprudence of the European Court of Human Rights (ECtHR) – in cases such as *Engel and Others v. the Netherlands*, *Benham v. the United Kingdom*, *Artico v. Italy*, and *Beuze v. Belgium* – has been instrumental in defining the scope and substance of fair trial and defense rights. The Court has consistently held that the right to legal assistance must be not merely theoretical or illusory but practical and effective, particularly when a custodial sentence is at stake. In *Edwards v. the United Kingdom*, the Court affirmed that fairness requires full defense access to evidence, thus ensuring equality of arms as a procedural cornerstone.

In the European Union, criminal law initially lay outside the competences of the Community. Over time, however, the Union's legal order increasingly shaped national systems. Following *Commission v. Greece* and the *Treaty of Maastricht*, the protection of the EU's financial interests acquired a quasi-criminal dimension. The *Treaty of Lisbon* elevated mutual recognition as the foundation of judicial cooperation in criminal matters, while the Charter of Fundamental Rights enshrined the right to a fair trial (Article 47) and the rights of the defense (Article 48). Subsequent directives strengthened these principles in concrete procedural contexts: Directive 2013/48/EU ensured suspects' and accused persons' rights to access a lawyer and to communicate confidentially; Directive 2016/800/EU established mandatory legal representation for children; and Directive 2016/1919/EU set the conditions for legal aid. Yet, by coupling eligibility for free legal assistance to both indigence and the "interests

of justice,” the latter directive risks disadvantaging poorer defendants whose effective access to defense remains conditional.

The relationship between the ECtHR and the Court of Justice of the European Union (CJEU) remains complex. Although the EU has not acceded to the ECHR, the CJEU – through landmark rulings such as *Internationale Handelsgesellschaft* (1970), *Nold* (1974), *Rutili* (1975), *Åkerberg Fransson* (2013), and *Melloni* (2013) – has acknowledged the Convention as part of the Union’s general principles of law. The Court has also recognized that national constitutional safeguards cannot override EU law where they obstruct the realization of fundamental Union principles, particularly the right to a fair trial and the right of defense.

Taken together, the evolution of defense rights from the UN through the Council of Europe to the EU demonstrates a progressive constitutionalization of human rights in the field of criminal justice. These overlapping frameworks, while diverse in legal force, converge on a shared commitment: that justice must remain accessible, impartial, and humane – even for those whose liberty has been curtailed.

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**SMART INFERENCE-DRIVEN RISKS: LEGAL CHALLENGES
UNDER THE GDPR AND THE EGYPTIAN PDPL**

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Abstract

This paper examines the legal dilemma surrounding inferences about sensitive data and how the EU General Data Protection Regulation (GDPR) and the Egyptian Personal Data Protection Law (PDPL) treat such inferences as sensitive data. Using doctrinal research supported by a review of the jurisprudence of the Court of Justice of the European Union (CJEU)², this study explores how both frameworks address the protection of inferred data. This analysis reveals significant overlap in the definitions of personal and sensitive data, confusion over consent requirements in Egypt, and heightened risks of discrimination arising from inferred data. Moreover, the existing risk assessment mechanism is insufficient to produce a protection for the inferred data and indicates the necessity for an impact assessment akin to that of the GDPR. This study addresses a proposed framework for the Egyptian legislature and courts for the inferred data that could be assessed through the risk criterion, the data subject's rights with inferences, and the controller and processor's transparency obligation. Furthermore, the paper argues that recognition of such inferences as sensitive data is globally essential for ensuring stronger safeguards in the era of AI and big data and addresses global lessons for other jurisdictions that have not yet recognized sensitive data.

Keywords: *Privacy, Personal Dana, Sensitive Dana, Inferences, GDPR, PDPL, Egypt*

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² Case C-394/23 (2025), C-252/21 (2023), C-446-21 (2024), C-184/20 (2022), C-21/23 (2024), C-667/21 (2023), and C-136/17 (2019).

1. Introduction

All privacy laws deal with “personal data” due to a natural person’s fundamental right to privacy and protection during the processing of data (*GDPR*, 2016), which is required for big data (*EU Data Act*, 2023), whether involving personal data or sensitive data, throughout the various phases (Kumar et al., 2024, pp. 18- 22; Soria-Comas & Domingo-Ferrer, 2016, p. 22) until the data is published or shared (Jain et al., 2016, p. 2; Wanjale et al., 2021, p. 103). This right is also required during the entire lifecycle of the AI system in accordance with its non-binding ethical principles (*EU AI Act*, 2024).

Due to uncertainty and the definitional overlap about when data is personal and when it is not (Rupp & Von Grafenstein, 2024, p. 105933), inferred data, or inferences about sensitive data, require a high level of protection as sensitive data. Furthermore, personal data could lead to the revelation of special data, the disclosing of which could lead to a significant risk to the data subject and his/her fundamental rights.

The CJEU concludes that inferences derived from personal data should be considered sensitive data; however, the Egyptian PDPL (*PDPL*, 2020) does not explicitly recognize inferences. In the author’s view, inferred data should receive the same level of protection as sensitive data based on the risk criterion.

It is the author’s belief that Egypt’s forthcoming executive regulations—which have not been enacted to date—should recognize inferences as sensitive data where they reveal sensitive information, and other special data, which are not classified as sensitive but the revealing of which could cause serious harm to individuals, should be protected as sensitive data.

The author presents the gap in the Egyptian law, as the law does not provide protection for inferences about sensitive data, and how Egypt’s forthcoming executive regulations and courts should address inferences, and which should be assessed upon the risk criterion. With the risk criterion, the author addresses the PDPL’s risk assessment. Furthermore, the author presents how sensitive data and inferences are not globally recognized in all jurisdictions, highlighting a manifested imbalance in data protection laws.

This paper will explore both laws, GDPR and PDPL; the definition of personal and sensitive data; how the legislatures create confusion through their drafting of laws; how relevant judgments of the CJEU deal with these inferences; and how Egypt and other jurisdictions regulate such inferences.

2. Research Methodology

This research primarily adopts the doctrinal, comparative, and jurisprudential methods in legal studies, which rely on literature interpreting the General Data Protection Regulation (EU GDPR), the Egyptian Personal Data Protection Law (Egyptian PDPL), and other related legal sources such as the guidelines of Article 29 of the Data Protection Working Party and interpretations of the Egyptian PDPL by scholars and other secondary textual sources.

This study adopts the comparative approach and the statutory analytical approach by comparing the laws of the European Union with those of Egypt and focusing on the boundaries of personal and sensitive data, the requirement of consent for lawful processing, the treatment of inferred data, and children's data. This leads to the author's proposals for Egypt regarding a new boundary based on the risk criterion of data and a new framework for inferences. Finally, the research adopts a jurisprudential analysis and reviews relevant judgments issued by the Court of Justice of the European Union (CJEU) (Nguyen et al., 2025, p. 19; Snyder, 2019, p. 334).

Table 1 Legal Sources Examined in This Study and Axes of Comparison

Source: The author

Sources examined	Axes of Comparison	Comparative Analysis	Proposal for Egypt's PDPL
<ul style="list-style-type: none"> • Primary sources ⇒ (Legislative Texts: (GDPR, PDPL). ⇒ Regulatory & Jurisprudential Sources: (Art. 29 (WP), EDPB Guidelines, CJEU case law). • Secondary sources ⇒ Academic Commentary. 	<ul style="list-style-type: none"> • Definition of personal and sensitive data. • Lawfulness of data processing. • Treatment of inferences. • Children's data. 	<ul style="list-style-type: none"> • EU GDPR • Egypt's PDPL 	<p>The boundary between personal and sensitive data</p> <p>Risk criterion</p>

3. Research Results and Discussion

3.1 Personal and Sensitive Data in the GDPR

While the GDPR uses the terms “personal data” and “special categories of personal data,” the United States named them “personal information” and “sensitive data” in the CCPA (*CCPA, 2018*) and the CPRA (*CPRA, 2020*; Widjaja, 2024, p. 789), taking into account that the terms “personal data” and “sensitive data” might differ within federal and state laws. (Solove, 2023, p. 1085, fn. 4; Solove & Schwartz, 2019, p. 1255).

Although the GDPR is considered the most protective regulation in the field of data protection (Voss, 2021, p. 7), the GDPR’s basis of such classification of data relies on the nature of the data, in contrast to the CJEU, which ruled in C-667/21 that “EU legislature assumes ... processing of personal data may be a source of risk ...” (*Medizinischer Dienst der Krankenversicherung Nordrhein*, 2023, para. 98), which aligns with the author’s belief that the base of these classifications should be the risk and is supported by recitals 75 and 77, which provide that “The risk ... may result from personal data processing ... lead to physical or non-material damage”

A. Definition of personal data:

a) *Data relating to an “identified or identifiable” individual*

GDPR defines personal data in Art. 4 (1) as “Any information” that relates to an identified or unknown identifiable natural person, making that person identifiable, either directly or indirectly, when accompanied with other data. And this marks the beginning of recognizing the power of inferences.

b) *Types of personal data*

The term “any information” is a flexible term that could include a wide range of information that could be linked to a natural person, such as the data subject’s name, an online identifier such as an email address, or a financial account (*CPRA, 2020, Section 140*), and other factors that make his/her identity “identified or identifiable.”

For example, IP addresses are considered personal data in C-582/14 when it declared that “... only the internet service provider could connect the IP address to an identified subscriber.” (*Patrick Breyer v Bundesrepublik Deutschland*, 2016, para 20, 21; *Directive of 95/46/EC of 1995, 1995*).

B. Lawfulness of Processing Personal Data:

a) *Consent*

The data subject’s consent, which is an acceptance of an invitation directed to people to accept a data processing operation (*EDPB, 2020, p. 5, n. 5*), considers a requirement for the lawfulness of the processing of his/her data for one or more specific purposes, according to Art. 6 (1) (a), recital 32 and 40, and Art.

4 (11), and such consent must present a freely indication of will and his/her wishes and as held in C-252/21 that such acceptance may be presented through clicking on the sign up button “ ... users of the social network Facebook ... when they click on the “sign up” button ...” (*Meta Platforms and Others (General Terms of Use of a Social Network)*, 2023, para 28; Gupta et al., 2024, p. 20 –27) is considered a declaration of consent.

The GDPR does not require a specific form for obtaining consent, and the handwritten signature may constitute a valid expression of consent/acceptance to processing. However, according to case C-200/23, consent can not serve as a valid legal basis where there is a clear imbalance of power between the parties, particularly when the controller is a public authority, as the court held that “... Consent should not provide a valid legal ground ... where there is a clear imbalance ... in particular where that controller is a public authority.” (*Agentsia po vpisvaniyata v Ol*, 2024, para 100).

b) Exceptions

Although lawfulness of data processing basically requires the data subject’s consent, the GDPR provides that processing is considered lawful in specific cases, such as where processing is for the performance of a contract, compliance with an obligation, protection of the data subject’s vital interests, performance of a task for the benefit of public interest or in the exercise of official authority, and purposes of legitimate interests, Art. 6 (1) (b) to (f).

C. Definition of Sensitive Data:

a) Sensitive due to their nature or risk

The sensitive data provided in Recitals 10 and 51 and Art. 9 is specified data that requires a high level of protection. The GDPR provides restrictions for the processing of such data because this could result in significant risks to the fundamental rights and freedoms of individuals.

Historically, the non-binding guidelines of the Organization for Economic Cooperation and Development (OECD) on the protection of privacy and trans-border flows of personal data (Mesarčik, 2020, p. 82), provide that “it is probably not possible to define a set of data that are universally regarded as being sensitive” (Quinn & Malgieri, 2020, p. 5).

Unlike the OECD’s guidelines, the Council of Europe’s binding Convention no. 108 for the protection of individuals with regard to the processing of personal data which is listed as sensitive data (Quinn & Malgieri, 2020, p. 5; Kovalenko, 2022, p. 39; Turnšek & Kraljić, 2024, p. 187). An opinion suggests that the idea of sensitive data almost focuses on preventing discrimination and risks against individuals (Citron & Solove, 2021, p. 826).

One of the sensitive data debates is whether to be in an open or a closed list, which means whether to allow new types of sensitive data to be added or not. Unlike the OECD, which adopted an open list, the EU Directive 95/46/EC of 1995 (DPD) adopted a minimum open list of seven categories (*Directive of 95/46/EC of 1995*, 1995) and provided seven exceptions to such rules, and countries were able to add more types to such list.

With the GDPR, member states cannot add new categories to such a list, but according to Art. 9 (4), member states can introduce more conditions and limitations regarding the processing of specific data, which are genetic data, biometric data, or data concerning health (Solove, 2023, p. 1089).

b) The GDPR's closed list

The GDPR defines “sensitive data” in Art. 9 (1) with a closed list that determines the nature of data that its revealing is a disclosure of sensitive data and includes racial or ethnic origin, political opinions, trade-union membership, health, sex life or sexual orientation, genetic data, and biometric data.

This list indicates that although the GDPR in Art. 10 permits processing of criminal convictions and offenses under the control of official authority, “criminal records” are not listed in the GDPR’s list, but they require a higher level of protection due to their legal effects on reputational status, as mentioned in C-136/17, and might lead to risks of discrimination due to their “sensitive nature” and risk of “... serious interferences with the fundamental rights ...” (*GC and Others v Commission Nationale de l’informatique et des libertés*, 2019, para. 44).

In the author’s view, the court combines both criteria when it declared that “... excluded ... the activity of a search engine from ... those provisions for processing relating to the special categories of data referred to there would run counter to the purpose of those provisions ... because of the particular sensitivity of the data, is liable to constitute ... serious interference with the fundamental rights ...” (*GC and Others v Commission Nationale de l’informatique et des libertés*, 2019, para. 44).

D. Lawfulness of Processing Sensitive Data:

a) General Prohibition

Article 9 (1) of the GDPR provides a “General Prohibition” on processing of sensitive data that reveals the aforementioned specified data.

b) Exceptions

Processing of sensitive data shall be considered lawful, according to Art. 9 (2), where the data subject provides his/her explicit consent to the processing, especially when there is an automated decision-making based on sensitive data (Solove, 2022, p. 1030), for carrying out obligations, to protect vital interests, for legitimate activities, where data is made public by the data subject, for a defense of a legal claim, for substantial public interest, for medical and health matters, for purposes of assessment of the working capacity of the employee, for public interests in the area of public health, and for archiving purposes.

E. Dilemma: Inferences about Sensitive Data:

A dilemma can take two main forms:

a) When the processing of personal data is based on the data subject's consent

The processing shall entitle the data subject to the right to use his fundamental rights and to withdraw his consent when processing reveals inferences about sensitive data.

b) When the processing of personal data is lawful regardless of the data subject's consent

In the author's opinion, the inferred data should be considered sensitive, as follows:

- Art. 29 (WP)

Which provides that any personal data that can reveal specified types of data should be considered sensitive data. Furthermore, the term "revealing" combines both information that is sensitive by its nature and information concerning an individual that could be inferred and that considers inference. (*Article 29 Data Protection Working Party*, 2011, p. 6).

- The GDPR

The law explicitly considers photos as personal data, but Recital 51 provides that processing of photos should be considered processing of sensitive data where the processing involves specific technical means that disclose the unique identity of a natural person, which leads to inference about sensitive data.

- The CJEU

The court, as being the authorized authority for the interpretation of EU laws, declared in many cases (Hoofnagle et al., 2019, p. 71 fn 63, 82) that personal data could result in inferences about sensitive data, which implies a higher level of protection as sensitive data, as follows:

I. Gender Identity:

Although the CJEU does not explicitly classify gender identity as ‘Mr.’ or ‘Ms.’ as sensitive data, the CJEU held in Case C-394/23 that this identity could indirectly disclose sensitive data, as the processing of personal data relating to the title “male or female” of the customers could reveal the risk of discrimination on grounds of gender identity (*Mousse v Commission nationale de l’informatique et des libertés (CNIL) and SNCF Connect*, 2025, paras 13 & 71 (1) (point 2 & 5)).

II. Social Media Account:

CJEU held in C-252/21 that “... processing of personal data from visits to websites or apps ...” (*Meta Platforms and Others (General Terms of Use of a Social Network)*, 2023, para 73), which are collected by an online social network, are considered personal data if the data could make the user’s identity identified or identifiable. When one or more types of sensitive data are related to these visits or apps, the processing of such data from visits to these websites, linking that data with the user, must be regarded as sensitive data “... where that data processing allows information falling within one of those categories to be revealed ...” (*Meta Platforms and Others (General Terms of Use of a Social Network)*, 2023, para 155 (2)).

III. Processing a data subject’s other data obtained via third-party websites and apps:

CJEU held in C-446/21 that although the data subject “... made a statement about his/her sexual orientation in a discussion open to the public, does not authorize the operator ... to process other data relating to the person’s sexual orientation, obtained ... outside the Meta platform using third-party websites and apps ...” (*Maximilian Schrems v Meta Platforms Ireland Ltd*, 2024, Para 84 (2)), as the collection of these other data results in inferences “... which could be drawn from his friend list ...” (*Maximilian Schrems v Meta Platforms Ireland Ltd*, 2024, Para. 24) with other sensitive data.

IV. Content of Declarations of Private Interests:

CJEU declares in C-184/20 that the publication on the website of the public authority of some personal data, such as the names of public officials’ spouses or partners, could indirectly reveal sensitive information, such as sexual orientation, that could lead to serious inferences about sensitive data: “... are liable to disclose indirectly the sexual orientation ... constitutes processing of special categories ...” (*OT v Vyriausioji tarnybinės etikos komisija (Lithuania)*, 2022, para. 129 (2)).

V. Customer's Information when Ordering Medicinal Products Online:

CJEU held in C-21/23 that "... where the data on purchases of medicinal products allow conclusions to be drawn as to the health status ... they must be regarded as data concerning health." (*ND v DR*, 2024, para 87). As "... for personal data to be classified as data concerning health, ... are capable of revealing information about the health status of the data subject by ... collation or deduction" (*ND v DR*, 2024, para. 83), and the identity of the data subject becomes identified or identifiable, allowing the deduction of his/her health status.

F. Definitional overlap in other global jurisdictions:

Other jurisdictions vary in regulating data, from recognizing inferences from personal data to not distinguishing between personal and sensitive data, as follows:

a) In the United Kingdom:

The UK's Data (Use and Access) Act (DUAA) 2025 (*Data Use and Access*, 2025) does not define sensitive data, contrary to the Data Protection Act 2018 (*UK Government*, 2018), the UK GDPR, and the highly persuasive, though non-binding, guidance of the Information Commissioner's Office (ICO). The ICO guidance recognizes sensitive data as either "factual or inferred" information about a person and affirms that inferred data requires the same high level of protection as directly collected sensitive data. Furthermore, the guidance clarifies that where there is an intent to infer or to act differently based on inferences, the inferred data should be considered sensitive data (*UK*, 2024a; *UK*, 2024b; *UK*, 2024c).

b) In the USA:

Both the California Consumer Privacy Act (CCPA) (*CCPA*, 2018) and the California Privacy Rights Act (CPRA) (*CPRA*, 2020) explicitly, in Section 14, §§798.140 (V)(1)(K), recognize the notion of inferences as a form of personal data, which provides that "inferences," or "derived data," means information derived from the consumer's other personal data reflecting the consumer's preferences, characteristics, behavior, or attribute, and it would be inconsistent for California law to recognize inferences about personal data but not recognize inferences about sensitive data (Solove, 2023, p. 1102).

Moreover, the Colorado Privacy Act (CPA) 2023 (*CPA*, 2023) explicitly, in §904-3-2.02, defines "sensitive data inferences" as inferred data collected by a controller—based on personal data, either alone or in combination with other data—and used to indicate sensitive data about an individual and treats such inferred data as directly collected as sensitive data.

c) In India:

The Digital Personal Data Protection Act (DPDPA) 2023, (*DPDPA, 2023*) in Section 2 (t), defines personal data to mean any information that can directly or indirectly identify an individual and does not distinguish between personal data and sensitive data. However, the law does not introduce special data named “sensitive data” and does not explicitly recognize the notion of inferences (Kohli, 2023).

d) In Canada:

The Digital Charter Implementation Act (DCIA) 2022 (Bill C-27) (*Digital Charter Implementation Act, 2022*), which includes the Consumer Privacy Protection Act (CPPA), recognizes inferences from personal data and treats them as personal data in Part 1 Section 9 (2). However, both laws do not explicitly define sensitive data or inferences; the law requires the organizations to consider the volume and sensitive nature of the personal data under their control. Moreover, the Office of the Privacy Commissioner (OPC), in its non-binding recommendations n. 7 & 8, defines sensitive data and suggests that the definition of personal data should explicitly include inferred data, “inferences” of personal data (*Digital Charter Implementation Act, 2020*).

3.2 Personal and Sensitive Data in the Egyptian PDPL

While the Egyptian PDPL is struggling with the lack of personal and sensitive data boundaries, the confusion is raised more where the PDPL provides that “personal data may not be ... processed ... except with the explicit consent ... or where otherwise permitted by law,” Art. 2 (*PDPL, 2020*) in writing where required, for processing of personal and sensitive data, and because the executive regulations, which are supposed to clarify the distinction between the two forms of required consent for processing, have not yet been enacted, in addition to the absence of relevant case law in this area until now.

A. Definition of Personal Data:

The PDPL defines personal data with a general rule, “Any data” that relates to a natural person and makes him/her identified or identifiable, and determines types of such data, such as a person’s voice and picture. The data subject’s geographical location is a new identification element in the UAE PDPL (*UAE Federal Decree No. (45) of 2021 Concerning the Protection of Personal Data, 2021*).

B. Lawfulness of Processing Personal Data:

a) Explicit Consent in the PDPL

Although the data subject’s explicit consent is a requirement for the lawfulness of processing, the law does not provide manners in which the data subject

should present such consent (Eldomiatty, 2022, p. 31; Mahdy, 2025, p. 4312). Using analogy with provisions of the Egyptian Civil Law (*Egyptian Civil Law No. 131 of 1948*, 1948), which define valid consent (whether explicit or implied) for the formation of contracts in Art. 89 and Art. 90, the required explicit consent in the PDPL implies that the data subject should present his desire/wish or acceptance to establish the determined legal effect, which is to process his data.

Presenting such explicit consent, or “digital consent” (Mahmoud, 2024, p. 1444; Mahdy, 2025, p. 4308), could be oral, written, or by any means from which a holistic assessment of which and with the individual circumstances must find its way to constitute an acceptance (Wiedemann, 2020, p. 458) and shall eliminate implied consent, other passive forms of consent, silence, and inactivity.

b) Explicit consent in the GDPR

Using the analogy with the GDPR, which requires “explicit consent” for processing of sensitive data and does not differentiate between the nature of consent required for processing personal and sensitive data (Solove, 2023, p. 1097). “Explicit consent” in Art. 4 (11) and recital 32 of the GDPR means any freely given and unambiguous indication of the data subjects’ wishes indicating “acceptance,” either by written statement, including by electronic means, or an oral statement, and could include ticking a box when visiting an internet website.

C. Definition of Sensitive Data:

a) Sensitive due to their nature or risk

Although the PDPL does not provide a clear definition for sensitive data, it prohibits the processing of any personal data that reveals the listed determined data which is considered, by law, sensitive data. The PDPL provides those data with a higher level of protection, as the legislator requires in Art. 12 that “... the controller or processor must obtain the explicit written consent ...” for its processing. The rationale behind that is that the misuse of such data could have risky consequences on an individual’s privacy and fundamental rights.

b) The PDPL’s closed list

The PDPL adopts a closed list of sensitive data, such as health, religious, and financial data, and provides a clear statement that the child’s data is considered sensitive data. Sensitive data is not “sensitive” because it is sensitive information by nature, but because it will reveal what the legislator considers to be sensitive data. The author believes that such data may be inherently sensitive by nature, or non-sensitive by nature, but the disclosing of it could result in inferences about other sensitive data.

Moreover, the legislator does not provide any criteria for what constitutes a “sensitivity element” in these data, which is supposed to gather them in the designated list. Unlike the PDPL, another data protection law in Africa defines sensitive data as information that is particularly sensitive to an individual, such as health data (Staunton et al., 2025, p. 7).

Egyptian authors conclude that a closed list for sensitive data is an unproductive idea, as the legislator did not clarify why they are considered sensitive data (Ali, 2025, p. 4075). It is the author’s belief that the definition of sensitive data should be redefined to include personal data or even non-personal data resulting from inferences about sensitive data. Judges should obtain wider discretion authority regarding these data that are supposed to be protected as sensitive data, especially where those data lead to an individual’s serious danger and risk. (Rashad, 2024, pp. 1061, 1063, 1088, 1089, 1098).

This conclusion is supported by Art. 29 (WP), which states that individuals’ photos should be considered sensitive data because they can be used to infer religious beliefs or health-related information, even though photos are not inherently classified as sensitive data. (*Article 29 Data Protection Working Party*, 2011, p. 6).

D. Lawfulness of Processing Sensitive Data:

a) General Prohibition

The PDPL in Art. 12 provides a general prohibition on controllers and processors for processing or disclosing sensitive data and processing a child’s data.

b) Exceptions

The law provides the following exceptions in Art. 12 that permit sensitive data processing in specified circumstances:

- “The controllers and processors ... are prohibited ... except by virtue of a license issued from the Center,” as the Personal Data Protection Center (PDPC), according to Art. 19 and 26 (6), is responsible for regulating personal data processing and is authorized to issue licenses for processing.
- In special determined “cases authorized by law.”
- Where the “controller or processor ... obtains the explicit written consent of the data subject.”
- Where “... activities in relation to children’s data, the guardian’s consent must be obtained.”

E. Dilemma: Inferences about Sensitive Data:

a) Definitional Overlap in the PDPL

The PDPL in Art. 1 considers a person's health, psychological, and financial status once as personal data and another as sensitive data, as personal data means "any data which determines the psychological, health, economic, ... identity ..." while sensitive data refers to "data which discloses psychological, mental, or physical health or genetic ... or financial data ...," indicating that there is no clear boundary between personal and sensitive data and resulting in further confusion regarding when processing should require explicit or written consent.

It is the author's belief that health data differs from a simple cold to serious data about illnesses, which means information differs in its degree of risk, as according to Art. 29 (WP), "Health data is the most complex area of sensitive data," (*Article 29 Data Protection Working Party*, 2011, p. 8, 10), and the CJEU in its *Bodil Lindqvist* decision in C-101/01 adopted a "wide interpretation" for sensitive data where Lindqvist published on her personal internet page personal details about her colleagues, such as their names and work duties, "with reference to one of them who has an injured foot and is on half-time due to medical grounds," (*Bodil Lindqvist*, 2003, paras 50, 30, 49, 51) and which constitutes personal data concerning health.

In the author's view, the legislator should consider health data, such as a simple cold, to be protected as personal data, but when personal data discloses an individual's personal data about his/her serious health status, then it should be protected as sensitive data. Sensitive data, including health data, should only be classified as sensitive data based on the potential risk to the individual that may arise from the disclosure of this data.

The author suggests another definition for sensitive data: sensitive data refers to any personal data whose disclosure could reveal information that may pose a risk to the data subject's fundamental rights and freedoms, such as the addresses of judges or victims, and it requires a higher level of protection, such as the previously mentioned closed list of sensitive data in the GDPR and the PDPL.

b) The author's proposed framework for inferences to the PDPL and courts

Although the PDPL has no relevant case law in this area until now, the author frames how Egypt's forthcoming executive regulations and courts should address inferences about sensitive data as follows:

Where processing is based on the data subject's explicit consent

The data subject should be entitled to the right to use his fundamental rights to restrict or limit new inferences outside the specific purpose, such as his/her political opinions, or even to withdraw his consent.

Where processing is lawful regardless of the data subject's consent

When processing is lawful without the data subject's consent in allowed cases according to Art. 2 "... where otherwise permitted by law," and could reveal inferences about sensitive data, the data subject is entitled to use his rights as to object to the processing. Moreover, each of the controller and the processor are obligated to demonstrate the transparency of the logic used in making inferences.

Inferences could be classified as follows:

I. Inferences from personal data that result in revealing sensitive data

Although everyone could purchase the same product of food, it would be for a particular person, identified or identifiable, and when such product is linked to other identification elements, it could reveal sensitive data about his health or financial status. Moreover, inferred data from photos, such as an individual's skin tone or his clothes, could lead to inferences about his religious beliefs (Solove, 2023, pp. 1100, 1123).

II. Inferences from personal data that result in serious risk to the individual

Although addresses are considered personal data, they must be considered sensitive data for particular individuals, such as judges and victims, where revealing such data could result in a serious risk to their privacy (Solove, 2023, p. 1118).

III. Inferences drawn from special data can lead to the revelation of sensitive information

Although personality type or information about personality discloses a person's uniqueness and values, identification of these goals and values, which are not classified as personal or sensitive data, could result in inferences about sensitive data and individuals being classified as religious or political persons (Solove, 2023, p. 1120).

IV. Inferences from collected data or unknown data

Data collected during big data gathering, and the identification of their subjects are impossible, is referred to as collected or unknown data. If the identification

of the data subject becomes possible in any way, either directly or indirectly, those data could result in inferences about sensitive data and must be covered by a high level of protection.

c) The PDPL's Risk Assessment

The risk criterion would face significant enforcement challenges under the PDPL and the Personal Data Protection Center (PDPC), as the law currently lacks a risk assessment mechanism similar to the GDPR's (DPIA), and there is, to date, an absence of relevant case law in this area. Moreover, the PDPC struggles with a weak compliance culture among controllers and processors, combined with ineffective mechanisms for assessing and addressing inferential risks arising from processing. The author suggests the use of analogies and international practices that would guide the legislator and courts in framing an effective risk assessment under the PDPL.

As the data protection officer (DPO) obliges, according to Art. 9 (1), to "... perform a regular evaluation and inspection of the personal data systems and avoid infringement ...," which in the author's belief should be of a flexible scope to include a wider assessment in accordance with the processor's obligation, in Art. 5 (8), to "... not to cause any direct or indirect harm to the data subject," which implies assessing risks to individuals' rights, "risk criterion," prior to the processing.

Accordingly, both the processor and the controller must, prior to the processing of personal data, carry out a risk assessment of the impact of that processing to determine whether the processing is likely to lead to inferences that could pose a risk to individuals' rights and freedoms.

3.3 Children's data privacy

Various jurisdictions vary in their protection of children's privacy, including as follows:

A. In the Egyptian PDPL:

The Egyptian PDPL (Arts. 1 and 12) considers child data sensitive in all circumstances, regardless of the child's age, due to their limited awareness of the risks and the consequences of the processing of their data. PDPL requires the legal guardian's consent for processing or disclosing a child's personal data.

Furthermore, Art. 12 provides that when a child participates in a game, competition, or any other activity, the child's data should not be submitted beyond what is necessary for such participation. Accordingly, the author

considers that inferences about the submitted child's data should be considered and protected as sensitive data.

Although the PDPL does not regulate profiling, automated decision-making, educational platforms, or targeted advertising, as the GDPR's Art. 22, the author considers that, in our daily life, these platforms collect data from children at schools or through children's "educational" applications (apps), such as email, IP addresses, etc., and raise significant inferential risks, requiring a high level of protection for inferences about children's data to prevent targeted advertising and profiling.

Profiling may generate sensitive inferences not directly provided by the child or his/her parents, creating inferential risks. Therefore, such processing of children's data or inferences about them should be considered sensitive and protected.

In accordance with the risk criterion, children's data is only protected when the disclosure of it could lead to inferential risks. Nevertheless, the author considers that the PDPL's tendency to protect children's data in all circumstances is more favorable due to children's limited awareness of the consequences of processing their data.

B. In the GDPR and the COPPA:

The GDPR in Art. 8 differentiates between the lawfulness of data processing for children at least 16 years old based on their consent and for children below the age of 16 years old based on their parental or guardian's consent, and that is applied where an 'information society service' is offered directly to the child. However, Art. 8 (1) does not apply where such services are offered by an intermediary (Caglar, 2021, pp. 21-22, 26).

The USA Children's Online Privacy Protection Act (COPPA) (*Children's Online Privacy Protection Rule, COPPA*, 1998) provides parents with control over their children under 13 years old and their data.

While the GDPR's absolute ban provided in Art. 22 does not distinguish between automated decision-making, including profiling concerning adults or children, and does not explicitly prohibit profiling of children, recital 71 provides that automated processing should not apply to children's data, and controllers should not rely on exemptions to justify it. However, WP251 clarifies that this does not present an absolute prohibition (*WP251rev.01*, 2018, p. 19, 28).

Consequently, profiling children's data, particularly in educational platforms, may generate inferences that pose risks to children, and the child's data requires

a high level of protection. Such as Google, which used to collect users' personal data and then target them with advertisements (Krutka et al., 2021, p. 421).

4. Conclusion

Globally, imbalance in global data protection laws is driven by the definitional overlap of personal and sensitive data embedding inferences, as while the Colorado Privacy Act explicitly adopts and recognizes the sensitive nature criterion to protect sensitive data inferences, other jurisdictions such as the aforementioned Indian and Canadian laws do not recognize the terms "sensitive data" or "inferences," which results in a manifested imbalance.

The author attributes that to the lack of personal and sensitive data boundaries and results in an urgent requirement for recognition of the risk criterion instead of the sensitive nature to protect data, which the reveal of could cause serious damage to individuals' rights. This imbalance addresses global lessons for existing and other jurisdictions, which are gathered in:

- Legislators should determine an explicit criterion to distinguish between personal and sensitive data.
- Legislators should explicitly recognize sensitive data and inferences as sensitive data that require a higher level of protection.
- Legislators should provide that "Regarding inferences, the data subject shall have the right to know, review, and access or obtain his/her own inferred data, which is in the possession of any holder, controller, or processor, and shall have the right to correct, edit, and delete his/her deduced data as personal data."
- Data controllers should be required to provide transparency around inferences.

Table 2 Proposed Model for the Egyptian PDPL

Source: The author

Inferred data's criteria	GDPR's Model (Recitals & Articles & CJEU)	Proposed Model Wording for the PDPL & Courts
<p>Sensitive Nature criterion:</p> <ul style="list-style-type: none"> • inferences from personal data revealing sensitive data such as health data, religious beliefs, ... sexual orientation. 	<p>Art. 9, recital 51, and CJEU cases</p> <ul style="list-style-type: none"> • Case C-394/23. • Case C-252/21. • Case C-446/21. • Case C-184/20. • Case C-21/23. 	<p><u>Definitional boundary</u></p> <ul style="list-style-type: none"> • Personal data means any information that relates to an identified or identifiable natural person, such as name ... etc • Sensitive data refers to any personal data whose disclosure could reveal of information that may pose a risk to the data subject's fundamental rights and freedoms, such as the addresses of judges or victims, and it requires a higher level of protection. <p><u>Consent:</u> Processing of inferred data shall be subject to the data subject's explicit written consent where such data reveals risk to the data subject's rights.</p> <p><u>Transparency:</u> Each of the processor and the controller is required to comply with transparency obligations.</p> <p><u>Data subject's rights with inferences:</u></p>

		<p>The data subject is entitled to the right to access, correct, and delete his/her inferred data.</p>
<p>Risk criterion: inferences that reveal information the disclosure of which may result in significant harm, risk, or discrimination for individual's rights and freedoms</p>	<ul style="list-style-type: none"> • Case C- 667/21. • Case C- 136/17. 	<p><u>Enforcement challenges regarding Risk Assessment:</u> The PDPC is the authorized authority to issue licenses for data processing but lacks a risk assessment mechanism.</p> <ul style="list-style-type: none"> • <i>Suggested solutions:</i> The data protection officer (DPO) obliges to perform a regular evaluation and inspection of the personal data. <p>Each of the processor and the controller shall, prior to the processing of personal data, carry out a risk assessment of the impact of that processing to determine whether the processing is likely to result in a risk to the individuals' rights and freedoms.</p>

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POLITICS AND SOCIETY

**KOSOVAN STATEHOOD AS A PRETEXT FOR CATALAN
INDEPENDENCE? BETWEEN DOMESTIC PREFERENCES AND
EXTERNAL CONSIDERATIONS**

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Abstract

The Catalan bid for independence has partly drawn inspiration from Kosovo's 2008 unilateral proclamation of independence from Serbia. This seemingly convenient resemblance has its limitations, especially when domestic political and social aspects, as well as the extent of international support are considered. Thus, apart from considerations involving specific settings and accompanying differences in terms of economic development, the analysis of the two cases underscores the crucial role of foreign stakeholders' decision to offer assistance so that the process of attainment of statehood and international recognition can proceed. Unlike Kosovo, whose leadership garnered backing from key Western capitals, the Catalan movement was left with minimal external advocacy, which at no point gave the green light to border alterations of a state found in a complex geopolitical situation.

Keywords: *Catalonia, Kosovo, domestic setting, external engagement, independence*

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Introduction

The most recent iteration of the Catalan independence movement kicked off in 2012, following a failed attempt by the Catalan government to decentralize the Spanish tax system. As suggested by Dowling (2018: 100), “the new Catalan movement is reformist, peaceful, non-violent whilst also highly innovative. It has not adopted any strategy of passive or active resistance or civil disobedience. In spite of rhetorical claims, the only rupture evident is with Spanish legality.” To defend their ambition, the Catalans often invoked cases linked to the dissolution of the Yugoslav state as a credible parallel – the case of Slovenia, which declared independence in 1991 and joined the EU and NATO in 2004, and the case of Kosovo, which proclaimed independence in 2008 and has secured international recognition by more than a hundred UN member states, including the major Western players (*La Vanguardia* 2016; 2018a; Lo Cascio 2017; Turp et al. 2017: 30).

However, the Catalan evocations of the Yugoslav cases overlooked the particularities of the then state disintegration, including their socioeconomic roots, the composition of their ruling classes, and the international context in which they developed. More specifically, while the cases of Slovenia and Kosovo are best understood in their respective contexts – the post-Cold War promotion of freedom and the need to expand the Euro-Atlantic security complex, either through economic liberalization or humanitarian intervention (Cox 2008: 43–46; also González-Villa 2019; Radeljić 2012; Woodward 1995) – the Catalan case is best understood in the context of the 2008 financial crisis and the consequent emergence of populism in Western Europe (Veiga et al. 2019: 184–187). The prospect of Catalan independence, if realized, was poised to materialize amidst the crisis of the European integrationist project process (including Brexit), and the resurgence of China and Russia as notable global powers with major stakes on the European continent (González-Villa and Radeljić 2023).

Indeed, the question of secession and realization of statehood has been approached from a range of perspectives since the end of the Cold War, when the issue ceased to be primarily related to the process of decolonization (Buchanan 1997: 33). Given that the new secessionism in Europe – resulting from the Yugoslav and Soviet dissolutions – did not reflect previous occurrences and the applicable international law, fresh explanations and theoretical frameworks proved essential. A large portion of scholarly inquiry has focused on the search of common guiding principles, including discussions about legitimacy and remedial approaches to secession (by looking at specific offenses and injustices suffered by a particular group) and primary theoretical contextualization, which sees the drive towards secession as a right concomitant of the existence of the group (Bolton and Visoka 2010; Brando

and Morales-Gálvez 2019; Seymour 2007). Other explanations, while eschewing possible moralistic prejudices, have focused on secession as a political option (Sanjaume-Calvet 2020; Sorens 2012). A notable gap in this picture is that of international aspects. With the exception of the state-building approach – in which the study of the involvement of international actors has been prominent (Woodward, Kostovicova and Bojicic-Dzelilovic 2012), most of the literature on secessionism has focused on the internal aspects of the creation of new states, which “risks falsely attributing to domestic politics what is driven by international affairs and world politics” (Siroky 2011: 60). The conflict in Georgia in 2008 and, even more so, the uprisings in Eastern Ukraine and Russia’s takeover of Crimea following the Euromaidan protests in 2013–2014, have problematized secessionism in light of international developments, insofar as the great powers have used military power to advance their positions through unilateral secessionist bids (Pavkovic 2020: 88). This has also been incorporated into the scholarship concerned with legal issues, insofar as the Russian intervention in Ukraine has made use of the normative legacy that once justified the Yugoslav dissolution (Roth 2015).

In the Catalan case, the Advisory Council for National Transition (CATN), established in early 2013, was tasked with legitimizing the independence process that would eventually lead to a secession referendum. The council argued that the prevailing political and legal situation in Catalonia, together with the proposed consultation, aligned with the tradition of referendums conducted in various EU states to decide on significant constitutional matters and, in some cases, the formation of new states. To support this claim, it cited examples such as those of the Baltic states, Slovenia, Macedonia, Montenegro, and Bosnia and Herzegovina (CATN 2013: 45–46). As pointed out by Lo Cascio (2017), these examples were strategically chosen to align with the interests of the Catalan secessionist leadership, despite some of them displaying contradictory characteristics.

Methodologically, this study explores different examples to see how working with other countries affects the paths of those trying to break away. Kosovo and Catalonia were chosen because they both used similar ideas and arguments to justify their attempts at becoming independent, but their results were very different. The comparison is based on three things: (a) when the attempts to break away happened – after the Cold War and after the financial crisis (Cox, 2008; Veiga et al., 2019); (b) the political and economic settings within the countries in question (Clark, 2000; Dowling, 2018); and (c) the extent of other countries’ involvement (Woodward, Kostovicova & Bojicic-Dzelilovic, 2012). Instead of trying to separate causes in a controlled way, like some scientific methods do, this research uses a way of thinking that focuses on understanding how different causes work together in specific situations

(Jackson, 2010: 137–141). Even though Kosovo and Catalonia are different – Kosovo was a place recovering from war under international control, and Catalonia is a region in a country that is an EU member – comparing them makes sense because what other countries do is important in deciding if these attempts to break away succeed or fail (Siroky, 2011). It is understood that these two cases are not exactly the same: laws, history, and what is at risk politically are different, which means we cannot make broad statements based only on these two examples. Instead of advancing general claims, the present analysis seeks to demonstrate how developments and policy preferences in certain countries intersect with domestic dynamics in others, and how these interactions shape potential outcomes when one party elects to secede.

Similar to the comparison involving Slovenia and Catalonia (González-Villa and Radeljić 2023), an analysis of the secessionist cases of Kosovo and Catalonia suggests that it is the combination of the timing of the secessionist process and the dominant international trend that determines the chances of success of secessionist processes in the post-Cold War period, and not the composition of the ruling classes or state-society relations. While examining the distinctiveness and temporal-spatial background of two cases, we shed light on diverse historical contexts. The success of statehood bids in Kosovo and Catalonia is evaluated based on their particular institutional, ideological, and socioeconomic coherence. With this in mind, the role of international backing, even if limited, as seen in Kosovo’s case, emerges as pivotal in determining the effectiveness of a secessionist approach.

The failed Kosovan reflector

The Catalan process began in 2012, after the International Court of Justice’s 2010 advisory opinion on Kosovo’s proclamation of independence in February 2008. Although the court did not give a definitive answer concerning the final status of the territory, which, in practice, left the subject a matter of negotiation between the Serbian and Kosovo Albanian parties (Hannum 2011), successive Catalan governments interpreted the Kosovan case as a precedent to legitimize the holding of a referendum (*Público* 2012), and an eventual unilateral act of secession (*La Vanguardia* 2016). However, as maintained by some legal scholars, while in the case of Kosovo, “the court determined that Serbia had been exerting an unlawful use of force on the people of Kosovo in a way that violated their rights,” in the case of Catalan separatists, “they cannot simply declare their independence nor do they qualify to invoke the right to self-determination, with or without territorial integrity,” and therefore “Catalonia’s attempt to hold both unofficial and official referendums to achieve secession

would not succeed based upon the ICJ opinion on Kosovo” (Hayes 2019: 279, 287).

This section operationalizes the three comparative criteria – temporal context, domestic configuration, and international involvement – by situating Kosovo’s bid for independence within the post-Cold War restructuring of Europe. The analysis begins by tracing how socioeconomic fragility and institutional erosion created a permissive environment for nationalist mobilization, before examining the catalytic role of external actors whose intervention transformed a marginal separatist claim into an internationally recognized statehood project. Anticipating the discussion that follows, the case illustrates how timing and geopolitical alignments amplified local agency, revealing the contingent nature of success in secessionist processes.

Economic deprivation and political exclusion in Kosovo

In the case of Kosovo, Yugoslavia’s poorest region, already by the late 1960s the native communist leadership, numerous intellectuals, and illegal movements had fully embraced the idea of national liberation. Later, the 1974 constitution, while resembling a confederal rather than a federal model, seemed to offer some settlement of disputes across the Yugoslav state. Even though the new set of circumstances apparently provided the Kosovo authorities with an opportunity to improve the province’s standing in terms of socioeconomic development, the success of their efforts was limited, if not fully suppressed by the leadership of the Republic of Serbia (Çeku 2016: 127). By this point, Kosovo had become trapped between the mismanaged aid provided by a federal fund for development of disadvantaged regions, the highest unemployment rate in the country (27.5%, comparing to Slovenia’s 2%) and the steady erosion of the per capita income, with Albanians making less money than members of other ethnic groups (Mertus 1999: 22–23). In fact, the 1981 confrontations between Albanian students and local police forces – mainly inspired by economic difficulties and the demand to see Kosovo’s status upgraded to that of a republic – suggested that the Albanian section of the population was awakening; it had grown into a more compact and united body that was determined to challenge the state command. In response, the Yugoslav manifesto for Kosovo was produced, which sought to justify the need for a state of emergency and the sealing of Kosovo’s borders without really considering Albanian demands and expectations (Çeku 2016: 144–150).

The Kosovo Albanian community was additionally alarmed in 1987, when Milošević, then leader of the Serbian branch of the League of Communists of Yugoslavia, travelled to Kosovo and called for the “defense of

the sacred rights of the Serbs” in the province (cited in Malcolm 1998: 346). Concerned about the ultimate purpose of Serbian nationalistic discourse, the economically impoverished Albanians continued to organize and become all the more proactive. The new rounds of tensions climaxed with the Serbian takeover of Kosovo’s institutions in 1989 (which, in reality, meant suspension of Kosovo’s autonomy), with many Kosovo Albanian professionals being forced out of employment. For example, a motion of the European Parliament (1991a) placed the blame on the Serbian leadership and offered rather precise numbers of the ones subjected to human rights abuses: three secondary schools and one primary school were closed, 350 teachers and 7,000 pupils expelled, the Albanian theatre and library in Kosovo shut and the local archives confiscated by the Serbian authorities, numerous doctors and nurses fired and replaced with Serbs, about 50,000 Albanian workers dismissed and so on. As consequently assessed, “[t]he Serbian regime has begun a process of economic and cultural genocide” in Kosovo, which prompted some European officials to insist that “[h]uman rights are inseparable from the people’s rights and the right to self-determination,” leaving an impression that independence of the province of Kosovo could become an option at some point (European Parliament 1991b).

Given the circumstances, a group of Albanian intellectuals established the separatist Democratic League of Kosovo (LDK) and, in line with their orientation and financial backing from the Albanian diaspora community, pursued the policy of peaceful resistance by forming unofficial parallel institutions. Following the outbreak of the Yugoslav state crisis and Slovenia and Croatia’s declarations of independence in mid-1991, the Kosovo Albanians decided to hold an unofficial referendum in September, to secure their own independence, and unofficial elections in May 1992, leading to the proclamation of the Republic of Kosovo (Krieger 2001: 522). However, these efforts were completely ignored by the international community.

Throughout the 1990s, political distancing from Serbia could, in no way, imply improvements in terms of economic performance. The Serbian leadership sought to control public enterprises and Albanians’ hard currency accounts, leaving many members of the local community highly dependent on diaspora support and small family businesses; still, as summarized by Clark (2000: 115), “[while] private enterprise had brought a form of stability, a *modus operandi* without war, [it] could not define what economic strategies would serve the goal of self-determination, what economic relations with Serbia would best serve to undermine the regime’s domination of Kosovo and what economic programs would best serve Kosovo’s own development.” In such a context, the LDK’s pacifist doctrine lost credibility and paved the way for the militarist Kosovo Liberation Army to take over the Kosovo question. The culmination of confrontations between the army and Serbian troops in early

1999 prompted a NATO-led humanitarian intervention, aimed at preventing the Serbian authorities from conducting ethnic cleansing and imposing full control over Kosovo's territory. Once terminated, some three months later, the two sides were to be presented with a number of initiatives, altogether exposing their own as well as other stakeholders' unpreparedness to resolve the Kosovo status (Radeljić 2014). However, as none of the proposals were capable of pleasing both sides, the Kosovo Albanian leadership took a major step in early 2008 by proclaiming independence from Serbia. In the view of the overwhelmingly united Albanians, this long-awaited moment firmly cemented their common goal of national interest.

Kosovo between local and international blessings

The process of Kosovo's attainment of statehood has been accompanied by numerous obstacles and disapproval, both locally (due to the strong Serbian factor) and internationally (due to disagreements between some key players). By the early 1990s, even though the situation in the province had often appeared uncontrollable and at the brink of civil war, and the Kosovo Albanian population was strongly in favor of independence and international recognition as the only solution to their position in the post-Yugoslav context, the question of Kosovo was marginal for the international community (Caplan 2005: 139). Even though policymakers kept discussing the situation and condemning violations of human rights, neither the 1992 recognitions nor the 1995 Dayton Peace Accords which officially put an end to the war in Bosnia and Herzegovina, were deemed suitable occasions to address the autonomous status of Kosovo (Radeljić 2016a). Still, in the view of various Western officials, its independence was the only way forward; for example, Willem van Eekelen, a Dutch senator, while criticizing the West for "making the mistake of saying it prefers to keep the remainder of Yugoslavia together," and acknowledging that "the proliferation of small, perhaps unviable states is not an attractive prospect," went on to question as to "why make a difference in principle between, say, Slovenia and Kosovo when fundamental human rights are being crushed" (van Eekelen 1998). The pro-independence stance was also tabled by some non-profit organizations, such as the Public International Law and Policy Group which proposed to begin with an intermediate sovereignty and gradually progress towards a referendum on independence and finish with a pursuit of international recognition (Radeljić 2016a: 138).

However, the intensified confrontation between local Albanians and Serbian forces, which culminated in January 1999 with the (often-contested) Račak massacre, increased the level of international alertness (Johnstone 2002: 240–243; Kritsiotis 2000). As maintained by NATO allies, external action and consequent post-interventionist initiatives were required to stop repression and

protect human rights, although their eventual success has proved limited. The consequent NATO military intervention was subject to numerous criticisms, mainly that it occurred without a proper strategy, explicit authorization by the UN Security Council, and that it had nothing to do with humanitarian impulses (Bellamy 2000; Henriksen 2008; Roberts 1999; Wheeler 2000), but was largely about defending the West's geopolitical interests in the region, as well as about pushing United States power right up to the borders of Russia (Radeljić 2016b; Radeljić 2017). In the words of Baranovsky (2000: 455), "the Kosovo phenomenon" managed to influence Russia's understanding of its own position and its relations with the rest of the world; the fact that NATO nevertheless decided to get involved militarily in FRY – an approach strongly opposed by the Russians – was understood as a "manifestation of insulting disregard towards Russia and as one more attempt to disassociate it from crucial European issues. The air strikes against Yugoslavia, as viewed by Russia, were the most convincing justification for its negativity with respect to the prospect of establishing a NATO-centered Europe."

Once the intervention had terminated, the United Nations Security Council Resolution 1244, passed on 10 June 1999, established the UN Interim Administration Mission (UNMIK), exercising full executive, legislative and judicial role. The resolution declared the "establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations. The interim administration was to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo" (UN 1999). However, neither UNMIK nor the NATO-led peacekeeping Kosovo Force (KFOR) was capable of preventing violations of human rights in the areas comprising the remaining Serbs and other non-Albanian population. Thus, in contrast to the initial situation when international involvement was needed to protect the Kosovo Albanians from Serbian oppression, now the foreign presence was expected to protect the Serbs from the Kosovo Albanians. As explained by Hughes (2013: 1005), "NATO's insistence on a marginal Russian military presence undoubtedly contributed to the ethnic cleansing of Serbs from Kosovo, as a stronger Russian contingent would have been more productive than NATO forces in defending Serb areas."

Apart from failing to please the Kosovo Albanians with speedy independence and international recognition, the foreign involvement has also failed to protect minorities as evident by the creation of Serbian enclaves that are politically and economically integrated with Serbia. The internationals welcomed the so-called standards before status approach, according to which Kosovo's attainment of statehood would be conditioned by its capacity to meet certain standards in relation to public administration, development of market

economy, protection of the rights of all ethnic communities, and so on (Ante 2010: 149–151). Kosovo’s incapacity to meet the 2002 UN-prescribed standards was replaced with the Standards Implementation Plan and the infamous Vienna talks, altogether focusing on the economy, safety of minorities, institutions and the rule of law, and dialogue between Belgrade and Priština. As the overall progress was slow and unsatisfactory, with the Kosovo Albanian leadership having become frustrated by the lack of united support (from EU and Security Council members), the ruling elite opted for a unilateral declaration of independence in February 2008, with the Constitution of the Republic of Kosovo to be fully enacted in April. Such a move, in their view, “marked the end of the dissolution of the former Yugoslavia” (*BBC* 2008).

The process was boycotted by the Serb minority and, in response, the Serbian National Assembly stated that Kosovo’s declaration of independence was an illegal act and therefore null and void. Prime Minister Vojislav Koštunica, supported by the Russian Federation, referred to Kosovo as a “false state,” arguing that it was largely backed by the United States and that the whole process actually represented a “humiliation” for the European Union (cited in Bilefsky 2008). Moreover, the Serbian leadership decided to approach the International Court of Justice for an advisory opinion as to whether or not Kosovo’s proclamation of independence was in accordance with international law. By the time of the verdict (ICJ 2010), more than sixty states (including some of the most influential Western governments) had already recognized Kosovo, making the court’s decision – according to which Kosovo’s adoption of the declaration of independence did not violate international law – look somewhat redundant, if not even more discouraging for the Serbian side and more encouraging for the Albanian side. As one account put it, “[t]he Kosovo opinion has seemingly had little impact in terms of increasing recognition for Kosovo; had the opinion explicitly said Kosovo’s declaration was illegal, one can be skeptical that any State that had previously recognized Kosovo would have withdrawn its recognition” (Borgen 2010: 1033).

In the case of Kosovo, its second attempt to secure statehood, despite the fact that it has been more successful than the previous one, has been far from straightforward. For example, China and Russia, who had strongly objected to the NATO intervention – viewed as the US way to reinforce its global supremacy (Sakaguchi and Mayama 2002) – have remained Serbia’s close allies and continued to side with Belgrade. In the EU, five members’ determination not to recognize Kosovo’s independence has been analyzed in the context of their own problems (as in the case of Spain), even though the relevance of the Kosovo case has repeatedly been downplayed. Apart from the individual position of EU member states, the Brussels administration – regardless of the efforts of the European Union Rule of Law Mission in Kosovo (EULEX), established in 2008, with one of its tasks being to investigate cases of war crimes and inter-ethnic crimes (Borger 2014; de Wet 2009; Greiçevci

2011; Radin 2014), or the 2010 advisory opinion of the International Court of Justice (Falk 2011; Hilpold 2012; Pippan 2010; Vidmar 2011) – continued to identify problematic issues, but also to suggest that any substantial progress could largely depend on further recognition of Kosovo, including the possibility to secure seat in the UN and the Council of Europe.

On the other hand, the position of the Russian Federation was in stark contrast to the one adopted by the dominant Western powers. Its Ministry of Foreign Affairs reacted immediately, stating that the UDI “violat[ed] the sovereignty of the Republic of Serbia, the Charter of the United Nations, UNSCR 1244, the principles of the Helsinki Final Act, Kosovo’s Constitutional Framework and the high-level Contact Group accords,” and warning the international community of “the risk of an escalation of tension and inter-ethnic violence in the province and of new conflict in the Balkans” (MFA Russian Federation 2008). Similar messages were delivered by individual statesmen, ranging from Putin, for whom “[t]he precedent of Kosovo is a terrible precedent, which will de facto blow apart the whole system of international relations” (*Sunday Morning Herald*, 2008) to Russia’s next president Dmitry Medvedev, who after his visit to Belgrade, when he supported Serbia’s determination to fight against Kosovo’s independence (*Aljazeera* 2008), went as far as to state that “[f]or the EU, Kosovo is almost what Iraq is to the United States, [being] the latest example of the undermining of international law” (*ABC News* 2008). In the words of Oeter (2015: 71–72), the West’s need to label Kosovo’s unilateral secession as a “‘unique’ case that creates no precedent... seems more than doubtful. There exist quite a number of voices in international legal discourse (and also in state practice) that do just the opposite, by using Kosovo as a precedent for making legal claims in other cases ... [T]he Kosovo case thus unfortunately constitutes a precedent, although a very unhappy one.” In fact, many critics have interpreted the insistence on uniqueness of the Kosovo case in terms of the West’s own hypocrisy due to its readiness to apply double standards in front of secessionist requests, with such an exposure being particularly relevant for discussions concerning policy preferences in the cases of Crimea and Catalonia.

In Kosovo, as reported by national institutions, such as Anti-Corruption Agency, Central Election Commission, Independent Media Commission, Ombudsperson Institution in Kosovo, Constitutional and Supreme Court of Kosovo, as well as international stakeholders, such as OSCE, UN-led bodies, Council of Europe, EU Rule of Law Mission, different foundations and non-governmental organizations, the state leadership has been expected to show a much stronger commitment and a more effective implementation of standards regulating human rights, the fight against organized crime and corruption, and the consolidation of the judiciary and prosecutorial system (Radeljić 2016a: 140). However, while primarily concerned with their own interests in the region, the Brussels and Washington administrations have turned a blind eye,

abandoned the standards before status policy, and welcomed semi-authoritarian elites whose focus has been on power and wealth maximization through clientelist exchanges, rather than on reforms and democratic transformation of the young, fragile state. For example, looking at the outcome of the 2010 parliamentary elections, Ulrike Lunacek, Member of the European Parliament and a strong advocate of Kosovo's independence, observed that "[t]he relative weakness of the Kosovo government, after fraudulent elections and a prolonged process for the voting and inauguration of the new president and the formation of government ... do not give Prime Minister Hashim Thaçi the argumentative standing and power that he would need in order to show the necessary strength in the diplomatic arena and at home" (Lunacek 2012: 151).

Similarly, the subsequent rounds of elections have confirmed the existence of institutional weaknesses preventing Kosovo's consolidation, as evident from Prime Minister Albin Kurti's statement that his government's project was to "liberate our state from within" (cited in *The Economist* 2020). Such a standpoint goes hand in hand with Kosovo's refusal to be used as a justification for Catalan independence; while seeing the analogy as "meaningless," some policymakers have insisted that Kosovo "will never recognize the independence of Catalonia" since doing otherwise "would mean 'denying history or misinterpreting it' because Kosovo 'fought for democracy, but above all, for human rights', which is not the case with Catalonia" (*Kosovo Online* 2023). Most recently, by recognizing Kosovo passports (Istrefi 2024), Spain (as well as other EU non-recognizers) has prompted a new round of questions about the continuation of the actual position vis-à-vis Kosovo's statehood and independence.

The Catalan failure

The unsuccessful Catalan endeavor for independence has traversed several significant events, which when taken together, expose disagreements among secessionist factions, the lack of a social consensus on secession, and socioeconomic shifts within Catalan society following the 2008 global financial crisis. On that basis, a robust political and social movement was built, but one that was unable to prevail over Spanish institutions. For example, neither of the two referendums convened by the Catalan authorities (in 2014 and 2017) secured the necessary approval from the Spanish government. Even though the Spanish state is the only authority to convene referendums, which meant that the outcome of the Catalan referendums would be declared unconstitutional and rejected for procedural reasons, Catalan president Carles Puigdemont nevertheless declared independence on 10 October 2017. However, aware of the issues, the decision was promptly suspended, all with the hope of triggering a dialogue with the Spanish government. The pro-independence leadership was clearly disappointed with international reactions, and specially the absence of

EU reaction in front of “the Spanish clampdown” and the suspension of Catalan autonomy (Bremberg and Gillespie 2022: 64). As it would turn out, the insufficient intervention of external stakeholders would prove a key element in the conflict’s outcome. Later on, successive regional elections have resulted in nationalist majorities and, paradoxically, less capacity for agreement between secessionist parties due to the increasingly divergent strategies of Esquerra Republicana de Catalunya (Republican Left of Catalonia, ERC) and Junts Per Catalunya, the party led from exile by Carles Puigdemont (Pallarés 2023, 15).

This section applies the same comparative lens to a different setting – a sovereignty movement emerging in the aftermath of the Eurozone crisis within a consolidated EU member state. The analysis first explores how economic grievances and the fragmentation of Catalonia’s social coalition reframed autonomy demands into a secessionist agenda, then turns to the absence of external endorsement as a structural constraint that shaped the failure of internationalization strategies. By foregrounding these dynamics, the case anticipates a broader argument: that in the absence of geopolitical leverage, even highly institutionalized movements remain vulnerable to domestic contradictions and external indifference.

The (dis)united Catalan middle-class

The Catalan independence process has its roots in the decomposition of the social coalition that gave stability to the nationalist governments of Jordi Pujol (1980–2003), with the coalition *Convergència i Unió* (Convergence and Unity, CiU), and the tripartite governments of the *Partit dels Socialistes de Catalunya* (Socialists’ Party of Catalonia, PSC), ERC, and the ecosocialists of *Iniciativa per Catalunya Verds* (Initiative for Catalonia Greens, ICV), between 2003 and 2010. Despite all having a political agenda aimed at greater autonomy, none of these governments had a secessionist character.

The 2008 economic downturn was a key point regarding the question of the Catalan class structure. Talking about its breakdown, scholars note that the crisis implied a transition “from an industrial society to a post-industrial one” (Sarasa et al. 2013: 81). The post-industrial landscape – characterized by a diminishing significance of the secondary sector and significant decline of industrial labor (from 23% to 16% between 2006 and 2011) – witnessed a decline in job prospects, particularly in the construction sector. On the other hand, the state witnessed an erosion of living standards (less income and social protection), as well as job insecurity, higher rates of poverty, and a more pronounced inequality. Bearing in mind the skepticism as to what extent the financial crisis might have been responsible for the consolidation of the pro-

independence sentiment (McRoberts 2022: 197–199), it is fair to conclude that “[it] has become increasingly framed as a north/south issue within Spain. What has been interpreted as the relentless siphoning off of Catalan wealth to Madrid and then its wasteful disposal in the south has emerged as a key political theme. In this way, economic grievances rose in importance and an economic crisis became a state territorial crisis” (Dowling 2018: 132).

In such a setting, those most in favor of Catalan independence were primarily individuals with vested financial interests, including people with well-remunerated positions whose household income had remained stable, if not improved. Put differently, “[t]he nationalist vote in Catalonia is located in the rural districts, which are overrepresented, and in the wealthy districts of Barcelona, and other large cities” (Tortella 2017: 296). On the other hand, those against independence were primarily people earning less than 1,200 euros per month or had already experienced declining household income, if not a proper job loss, themselves or by their friends or relatives (Centre d’Estudis d’Opinió 2017: 32–33, 38). The trade unions failed to adequately address this apparent contradiction. While abstaining from a clear-cut stance on the issue of independence, they nevertheless supported the secessionists’ insistence on the “right to decide” on self-determination through a proper debate with the state authorities (Pérez 2017). Such an ambivalent attitude reflected a crisis of representation, insofar as unions had reduced working class visibility, especially that of the most precarious factions of society, which were precisely those that had recently grown the most.

According to media reports, most of the traditional families of the Catalan high-bourgeoisie adopted a clear position against secession (Bustamante 2017; Leal 2018). As witnessed, after the proclamation of independence in October 2017, major Catalan corporations, including Abertis, La Caixa, Gas Natural, and Banco Sabadell, moved their headquarters from Catalonia, with more than 4,000 companies doing so by May 2018, fearful of the economic consequences of political uncertainty (Segovia 2018; Zaar and García Ávila 2019). Otherwise, there was a visible fragmentation at the level of employers’ organizations, which had been on the verge of rupture on several occasions. This was due to the divergence between Foment del Treball (the Catalan branch of the Spanish Confederation of Employers’ Organizations), which opposed independence, and the organizations CECOT and FEPIME, which represented small and medium-sized enterprises, whose members were largely in favor of secession (McRoberts 2022: 27; *Vozpópuli* 2017).

Internal disunity

In 2010, after having spent seven years in opposition, the center-right coalition CiU, known for its alignment with the interests of the Catalan bourgeoisie

(Girón Garrote 2018: 128), returned to power in the regional government. Previously, center-left coalitions aimed at enacting a new statute of autonomy. This legal reform would accentuate disparities between autonomous communities and reshape the Spanish autonomic system through a reform of the Spanish constitution (Cramer 2014; Cruz Villalón 2006; Gillespie 2020). However, upon assuming office, CiU recognized that progressive parties had steered the traditional Catalan discourse toward the left. This was confirmed in 2011, when the new conservative national government was confronted by the Indignados Movement because of its privatization and austerity policies. The Madrid-originating anti-austerity Indignados Movement (15-M) quickly spread to Barcelona, triggering a crisis that ended up questioning the Spanish territorial model. At one point, thousands of demonstrators surrounded the regional parliament, where the chamber was about to discuss the yearly budget proposal; the regional president himself had to enter the building by helicopter and several members of government and parliament were harassed outside by the protesters (*La Vanguardia* 2011).

The tensions sparked a surge of separatist Catalan nationalism. From the perspective of Catalan authorities, the new Indignados Movement represented a threat to their dominance. Concurrently, the nationalist movement capitalized on social discontent, rallying opposition against the Spanish Constitutional Court's 2010 decision to limit Catalonia's statute of autonomy. This paved the way to a massive demonstration on 11 September 2012, Catalonia's National Day, meticulously orchestrated to galvanize nationalist sentiment in response to the Indignados Movement (Amat 2017: 74). As noted by Kraus (2017: 99–100), bearing in mind the breadth of public protests and disappointment with Madrid's standpoint, “[f]rom the Catalan perspective, independence has become the only viable option to overcome the shortcomings of an autonomy regime that, because of the structural inertia of Spain's institutional system, does not respond to the aspirations of a collectivity which is conceived of by many of its members as a subjugated nation.”

Subsequently, populist rhetoric and social mobilization served to polarize Catalan society and increase support for more autonomy and even secession (Canal 2018: 161; also Barrio et al. 2020; Bel 2015; Cuadras-Morató 2016). However, even though the nationalist president Artur Mas promoted the secessionist agenda, his true objective was to negotiate a new financial and tax arrangement and infrastructural investments with the Spanish state, presenting them in Catalonia as a political triumph (García 2018: 25). The central government resisted, which made pro-independence actors escalate their pressure. As the result of 2013 and 2014 pro-independence mobilizations, the Catalan assembly proclaimed the “sovereignty and right to decide of the Catalan people” (23 January 2013) and launched a “participatory process” (9

November 2014), which was a response to the Spanish Constitutional Court's decision to suspend a referendum. All these moves reflected the search for an impossible balance between controlling radical secessionist actors, continuing neoliberal policies, and preserving the relationship with the Spanish government. The tensions led to early regional election in September 2015.

Secessionists attributed to this election a “plebiscitary” character, thus imagining it as a referendum. The transversal coalition *Junts pel Sí* (Together for Yes) – largely represented by civil society figures, but politically influenced by the Republican Left of Catalonia and the Democratic Convergence of Catalonia (formerly part of CiU, dissolved in 2015) – aimed to secure secession. However, *Junts pel Sí* faced disappointment as the election results fell short of expectations, with ten seats shy of an absolute majority. Those ten seats were won by the far-left and Popular Unity Candidacy (CUP), which were crucial even though the combined votes of secessionist options were below 50%. Apart from losing his position due to corruption allegations on his party, Mas made another mistake by appointing Puigdemont as his successor, then mayor of Girona and a staunch proponent of independence, which was in contrast with Mas's pragmatic agenda (García 2018: 26).

Going forward, during 2016 and 2017, Catalan politics was characterized by the continuity of the political coalition of secessionist parties, despite insufficient political and social backing for undertaking significant actions, such as the establishment of a new state. On the other hand, the Spanish Constitutional Court kept halting Catalan initiatives including the adoption of the November 2015 resolution by the Parliament of Catalonia, which formally declared the beginning of the sovereignty process, the creation of designated state structures, and the formation of a commission for the organization of a constituent process. The limits of the secessionist aspirations were also confirmed in 2017, when the Catalan government, in response to the rejection of the 2016 budget proposal, arranged for a referendum hoping to subsequently declare unilateral independence. The day of the referendum (October 1, 2017) was characterized by police brutality, which was condemned by different EU officials and international organizations (McRoberts 2022: 222–224). Moreover, President Puigdemont's decision to “suspend” the Declaration of Independence and his admission that the state was ready to employ all means including military mobilization to prevent secession, indirectly pointed out that substantial groundwork required for the establishment of a new state had not actually been done (Vila 2018: 23).

Thus, in the context of their vulnerability, it was also key that the Spanish government possessed ample maneuvering space to suspend Catalan autonomy and assert its authority. In the words of García Oliva and Hall (2023: 144), “the government effectively weaponized the [Constitutional] Court in a

bid to block an independence referendum that authorities in Catalonia wished to hold, and this appropriation of judicial power for a political end has jeopardized the role of the Court going forward.” In addition, the central government’s agenda was facilitated by the unreserved approval from the general Spanish population (*El País* 2017), endorsement from the Brussels administration (Emmott 2017), and weak resistance from local civil servants (Juliana 2018). Indeed, in the December 2017 regional elections, which followed the suspension of Catalan autonomy, the nationalist Quim Torra, who also served as a proxy for Puigdemont who had fled to Brussels after facing charges of rebellion, came to the forefront. Understandably, the following year, attention centered on steps necessary for a unilateral pursuit of independence and the status of imprisoned government members facing rebellion charges. After being convicted in October 2019 for various crimes, including sedition, embezzlement of public funds and disobedience, they were pardoned by the coalition government in Madrid, led by social democrat Pedro Sánchez. The formation of a new government in 2023 required the support of Catalan nationalists in exchange for a general amnesty, which included secessionist leaders who had not been prosecuted because they are fugitives from justice abroad, as is the case of the current MEP Carles Puigdemont.

The internationalization strategy employed as part of the Catalan independence process implied significant expenditure on lobbying on the part of European governments and activities targeting international public opinion (Cardenal 2020, position 1.231). Despite these efforts, the alliances forged during this process proved insufficient. While Slovenia displayed the most visible sympathies within the EU, these sympathies lacked official endorsement (*ARA* 2017; *El Mundo* 2018). Looking at the EU overall, some political backing came from the European Parliament through the informal EU-Catalonia Dialogue Platform, which attracted regionalist and nationalist parties on the left and right. Even though the Catalan cause gained prominence within the EU following the police intervention during the October 2017 referendum, prompting a European Parliament plenary session to consider a mediation process between the Spanish central government and the Catalan autonomous government (Cardenal 2020, position 1.155), the European Commission ultimately sided with the Madrid leadership.

In the context of the overall expectations, scholars have also argued that despite being open to recognition of unilateral secessions outside the EU, the Brussels authorities found themselves somewhat trapped in front of the Catalan case: “There simply was no precedent of a region within a member state becoming an EU member state on its own and EU officials were not disposed to facilitate one in the case of Catalonia” (McRoberts 2022: 245; also Bourne 2021: 187–189). Authorities in Madrid did count and receive EU

support back in 2017, and afterwards, when some key Catalan politicians found themselves in exile and different EU stakeholders acknowledged “that a political problem existed and had been exacerbated by the way the Spanish authorities had responded to it” (Bremberg and Gillespie 2022: 63). In the end, the central insistence on the constitutional provisions and the conveniences of the international legal system served to discredit Catalan plans. As Wesslau (2017) predicted, given that “[n]o state has expressed support for Catalonia’s separatists or even hinted that recognition is a possibility,” it is reasonable to believe that “Catalonia’s declaration of independence will remain worth little more than the paper it was written on.”

Conclusion

As widely acknowledged in the literature, statehood is not contingent upon universal recognition but upon the fulfilment of objective criteria, while recognition remains a political act (Crawford 2006). As warned by Vrbetic (2013: 308), “[b]esides creating a troublesome legal precedent, the recognition of Kosovo represents a bad model for international conflict management. The issues of concern are the viability of future interim settlements, good faith negotiations and the legitimacy and guarantees provided by the international involvement, including the authority of the UN Security Council.” In the case of Catalonia, analogies with previous secession cases were a vehicle for independence through which they sought to compensate at the ideological level for the practical deficiencies of the process, which, in the light of Kosovo, can be viewed through political, socioeconomic, and international dimensions, with the latter being the key one. Accordingly, their examination points out that drawing parallels, while admittedly sometimes useful, has inherent limitations when confronted with actual circumstances. Moreover, while some accounts maintain that “[t]he main problem Spain has with Kosovo is related to the ‘procedure’ by which it declared independence, i.e. the Unilateral Declaration of Independence” (Ferrero-Turrión 2021: 357), others have gone even further to argue that “[t]he decision not to recognize Kosovo based on the situation in Catalonia and the Basque Country helped form a faulty analogy between the two cases” (Vila Sarría and Demjaha 2019: 86).

In Kosovo, the declaration of independence was accompanied by episodes of unrest in the Serb-dominated north Kosovo (Tran 2008), and also in Serbia, Montenegro, and Bosnia and Herzegovina. For example, in Belgrade, a group of protesters set fire to the United States embassy, while others chanted “Stop US terror!” and “Kosovo is Serbia!” (*The Guardian* 2008). Finally, in the case of Catalonia, a massive anti-independence demonstration, organized by Societat Civil Catalana (an anti-independence group) took place on 8 October

2017, just two days before the failed declaration of independence. Internal divisions could also be seen through the clashes between pro-independence activists, who demonstrated against a Spanish far-right gathering in Girona, and the Catalan anti-riot police, which caused internal controversies within the Catalan government concerning the extent to which police should tolerate political violence (*La Vanguardia* 2018b).

The Catalan comparisons with Kosovo underscore political, socioeconomic, and international dimensions, with the latter being particularly crucial. However, while in the Kosovan case internal actors enjoyed a determined, albeit partial, support of international actors, Catalan actors did not receive any relevant support. In this vein, the analogies selected by the Catalan leadership are based on a biased self-referential analysis of a series of transcendental events, and not on the actual similarities with chosen cases. While both in Kosovo and Catalonia, nationalist movements emerged as vehicles for sociopolitical coalitions in critical stages, the chances of success for each of them depended on their capacity to engage with international actors in their respective contexts. In Kosovo, political and economic contradictions have been at least partially compensated for by international intervention, whereas in Catalonia, the decomposition of the social bloc has only been erratically addressed by local policymakers.

With regard to the critical question of internationalization, Kosovo of the early 1990s was neither sufficiently developed nor sufficiently homogeneous; back then, the situation in Kosovo was not relevant to generate any major reaction to the referendum held in September, let alone international recognition. However, the escalation of internal struggles and insertion in internationalization dynamics in the region made Kosovo a fertile ground for cross-examination of policy preferences in the international system. Therefore, regardless of the Serb and Kosovo Albanian failure to come up with a common position, the Kosovan statehood process has very much depended on the contractual relationship between Kosovo and other governments, due to their power to dictate the pace of developments, either by acting as firm supporters of Kosovo's independence or by insisting that Kosovo is actually a quasi-state. In the case of Catalonia, the Brussels administration adopted a radically different position. It decided not to give any kind of legitimacy to the October 2017 declaration of independence; on the contrary, EU leaders insisted that for them nothing had changed and that "Spain remains our only interlocutor" (*New Europe* 2017). In this context, the Spanish government seems to have won the hand despite having applied a purely bureaucratic approach and not having lifted a finger on the international public opinion front.

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**THE RUSSIAN - UKRAINIAN WAR AND THE STRENGTHENING OF
IRREDENTIST NARRATIVE IN THE CENTRAL AND EASTERN
EUROPEAN COUNTRIES AT THE BEGINNING OF THE XXI CENTURY**

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Abstract

This article will analyze the reasons for the intensification of irredentist rhetoric in Central and Eastern Europe, including those caused by the impact of the Russian-Ukrainian war. Through the prism of different approaches, the essence of irredentism is revealed, and its transformation is shown depending on changes in the system of international relations, from the idea of national unification to an instrument of expansion. At the present stage, irredentism is expansionist in nature, due to the implementation of the Russian Federation's aggressive policy towards Ukraine. The authors analyze the ideological justification of the irredentist policy of the Russian Federation, which is carried out, among other things, under such irredentist slogans as “one nation”, “protection of compatriots”, “restoration of historical justice”. The indecision and inconsistency of international organizations in condemning the actions of the aggressor state, in particular, the occupation of Crimea in 2014, contribute to the intensification of irredentist rhetoric in Central and Eastern Europe. The article analyzes the statements of Romanian and Hungarian politicians, which show the presence of irredentist slogans regarding the territory of Ukraine. The irredentist component is contained in the programs of the right-wing radical

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political parties Greater Romania, Fidesz, and Jobbik (For a Better Hungary). Several explanations are given for the reasons for the actualization of irredentist rhetoric, which, despite international law norms regarding the inviolability of state borders, persists in political discourse. Among the reasons identified are the popularity of the idea of a “Great State” and the strengthening of populism against the backdrop of the identity crisis in Central and Eastern Europe, which is driven by fears of losing sovereignty and traditional values in the context of European integration processes. Finally, the authors emphasize the weak reaction of the world to the aggressive policy of the Russian Federation as a significant contributing factor.

Keywords: *irredentism, irredentist narrative, Central and Eastern Europe, Russian-Ukrainian war, populism.*

1. Introduction

The history of irredentism dates back to the 19th century, when the process of uniting the Italian principalities into one state raised the question of “terre irredente” – unliberated lands, which, it was believed, should be included in the composition of the Italian state. Since then, irredentism has undergone an evolution, which was driven by changes in the system of international relations: from unification in the 19th century to expansionism at the beginning of the 21st century. The implementation of an aggressive policy by the Russian Federation at the beginning of the 21st century brought the question of the influence of the irredentist factor on international political relations to the fore. The revival of expansionist irredentism was nonsense *per se*, because it proved a gross disregard for the norms of international law regarding the territorial integrity of Ukraine as a sovereign state and the inviolability of its borders, that is, the levelling of all international legal norms and treaties established in the 20th century. Against this background, irredentist narratives on the part of right-wing radical circles in other European countries intensified. The analysis of the reasons for the activation of irredentist politics has an important scientific, theoretical and practical significance for understanding the trends of its evolution in the conditions of the crisis of the post-bipolar system of international relations and the possibility of forecasting its further development.

The aim of the study is to analyze the impact of the Russian-Ukrainian war on the intensification of irredentist rhetoric in the states of Central and Eastern Europe at the beginning of the 21st century. To achieve this objective, the following research tasks have been identified: to provide a theoretical conceptualization of irredentism, based on the analysis of scholarly literature and the interpretation of irredentist practices; to investigate the transformation of irredentism within the context of evolving international relations systems

and, consequently, to identify specific types (models) of irredentism; to examine the ideological justification behind the Russian Federation's irredentist policy as a manifestation of expansionist irredentism; to elucidate the complex set of factors contributing to the intensification of irredentist rhetoric in Central and Eastern European countries under contemporary conditions.

The research hypothesis posits that the Russian-Ukrainian war and the weak response of the international community to the Russian Federation's expansionism served as significant catalysts for the strengthening of irredentist rhetoric in Central and Eastern Europe, but they were not the sole determining factors. The authors assume that the activation of irredentist themes on the political agenda of Central and Eastern European countries was also significantly influenced by domestic political phenomena and processes unfolding within the context of European integration. In particular, this refers to the identity crisis, which has driven the growing popularity of the "Great State" idea in public discourse as a compensatory mechanism for preserving national identity, as well as the activity of right-wing radical parties that utilize populist slogans and appeal to traditional values to mobilize electoral support.

2. Materials and methods

The empirical basis of the study comprises regulatory acts and official documents of international organizations, notably the United Nations and NATO, political party programs, and statistical data from the All-Ukrainian Population Census.

The methodological framework is constructed through a synthesis of systemic, rational, and conflict-based approaches, which facilitates a comprehensive exploration of the research subject. The systemic approach enables the interpretation of irredentism as a complex interaction system within a defined triad: "national minority/irredenta – kin (irredentist) state – host (polyethnic) state". Through the lens of the rational approach, irredentist rhetoric is analyzed as an instrumental tool employed by political actors to achieve pragmatic objectives, including electoral mobilization, the enhancement of political status, and the legitimation of power ambitions. The application of a conflict-based approach is necessitated by the specific nature of the research object within the context of the Russian-Ukrainian war. This approach allows for the analysis of irredentism as a primary source of regional security destabilization and a factor exacerbating interstate contradictions amidst the current crisis of the international relations system.

To address specific research objectives, a set of specialized methods was employed. The comparative method and modeling were utilized to identify typical models of irredentist policy. The integration of historical and logical methods permitted an investigation into the genesis and transformation of irredentism throughout the evolution of international relations system. This methodological synthesis ensures the examination of the research subject both in statics (models of irredentist policy) and in dynamics (historical

development).

Furthermore, the research toolkit includes general logical methods such as analysis and synthesis, generalization, and abstraction, ensuring the validity of the theoretical findings. The conceptual framework unifying these methods is the assertion regarding the decisive role of the "Great State" idea in shaping and justifying modern irredentist policy.

3. Irredentism as a category of scientific analysis

Research interest in irredentism increased in the second half of the 20th century, due to active state-building processes in various regions of the world, the beginning of decolonization, democratic transformations, and especially the collapse of the countries of the socialist camp in Eastern Europe in the 1990s, when the problem of the separation of nations became acute. D. Conversi (2000) notes that the study of separation really began to grow after the collapse of the former communist states, "creating a real industry". Specific manifestations of irredentist movements in the modern world have differences that do not always fit into already known schemes, which force scientists to study each case of irredentism in detail, paying attention to its root causes and unique features.

To date, there is no single conventional definition of the concept of irredentism that would satisfy the entire scientific community. N. Chazan believes that, although irredentism is conceptually different from ethnicity, separatism, pan-cultural movements and border clashes, in fact it acts as an active mixture of all these ingredients, and it is the consideration of this multifaceted approach that characterizes the phenomenon in the best way (Chazan, 1991, p. 141). In addition, there are many other forms of ethnopolitical behaviour that have some features in common with irredentism, which inclines scholars to identify them, for example, irredentism and unionism, irredentism and pan-movements. J.C. Fuzesi (2006) notes that the lack of a convention means that most cases of irredentism are not labelled and analysed as such, for example, German reunification, the Irish republican movement, and Somalia's protracted conflicts with neighbouring countries are labelled simply as post-colonial wars, albeit in neighbouring countries and many ethnic relatives of Somalis live there. Instead, the author notes, Zionism is mistakenly called a "classic case of irredentism", even though it mainly concerns diaspora groups.

Irredentism is defined as a kind of ethno-political movement, characteristic of the so-called "divided peoples", whose territory of compact residence is divided by state or administrative borders. The purpose of this movement is to "gather" the parts of the divided people and the territories of their residence within the borders of one state. D. Horowitz defines irredentism as an attempt to separate the territory or population of one state with the aim of joining another, and as an attempt to separate the territory or population divided between more than one state, with the aim of further uniting them into a single newly formed state (Horowitz, 1991, p. 10). According to D. Conversi,

irredentism is a phenomenon that emphasizes the territorial reunification of ethnic relatives in one homeland (Conversi, 2000, p. 334). G. Kim defines irredentism as political attempts to unify ethnically related parts, that is, the population living in two or more different neighbouring states (Kim, 2016, pp. 89, 90).

The unification of separated ethnic groups is possible due to the purposeful policy of the irredentist state, which is why irredentism is defined as the political course and direction of the state's foreign policy, as any territorial claims made by one sovereign state to another (Mayall, 1990, p. 57; Heubaum, 2009, p. 79; Kornprobst, 2008, p. 9; Chazan, 1991, p. 140). Close to this is the definition of H. Ben-Israel (1991, p. 33), who considers irredentism as a manifestation of expansionism, which is based on atavistic feelings towards the territory and towards relatives and friends. In his opinion, this is an eternal phenomenon, because even before the emergence of nationalist ideologies, many states justified expansionist policies, using the argument of returning territories or liberating their brothers. Very often, these intentions are masked by the desire to protect ethnically or culturally related groups (Landau, 1991; Tranca, 2006, p. 508).

It should be noted that attempts to define irredentism by absolutizing only one side of it are inappropriate, because irredentism acts as an umbrella term that is quite ambiguous. Definitions that seek to cover all its aspects and take into account both the historical and ethnic factors are more accurate. For example, “irredentism is a nationalist belief that the territory being part of another country should be returned for ethnic or historical reasons” (Zaragoza, Ochoa, Medina&Espinoza, 2015).

Irredentist policy possesses a robust ideological underpinning. J. Nagle (2025) investigates the ideological basis of irredentist movements and delineates three key frames employed by segments of the kin-state to legitimize their assertions of proprietary rights over a specific territory and its populace (“proprietary claims”). These frames are identified as: Myth of Ancient Statehood, Sacred Lands and Causes, and The National Family. J. Nagle posits that the mere presence of irredentist frames does not necessarily culminate in the implementation of irredentist policy; rather, irredentist elites can deploy exclusivist ethnonationalist versions of history to legitimate their own domestic interests (Nagle, 2025, p. 9).

There are several varieties of irredentism. According to the status of the participants of the movement, the following types of irredentism are distinguished: 1) one part of the divided nation has already created its own state, while the other/others live compactly on the adjacent territory of the neighbouring state. For example, D. Yagcioglu (1996) connects irredentism with the fact of tense relations between the national minority in the state, on the one hand, and the dominant ethno-cultural group, on the other. This situation leads to the intervention of another neighbouring state, which seeks not only to protect the rights and interests of minorities, but also tries to openly annex the territory of another state; 2) no parts of the divided nation have their own states. S. Saideman and W. Ayres (2000, p. 1127) believe that the desire of several

“stateless” related ethnic groups to unite for the purpose of forming a new state is also irredentist and call this phenomenon the “Kurdish style of irredentism”; 3) two parts of the nation have their own states (Federal Republic of Germany and the German Democratic Republic, which united in 1990).

In order to systematize ideas about irredentism according to the “status of unification members” criterion, we offer a table:

Table 1. Status of unification members

Status of unification members	Examples
The irredentist state and related minorities	The unification of Italy and Germany in the second half of the 19th century, the implementation of the Greek “Megali Idea” at the beginning of the 20th century
Several related minorities deprived of their own statehood (“Kurdish style of irredentism”)	Unification aspirations of the Kurds of Syria, Turkey, and Iran
Two states	The reunification of Germany at the end of the 20th century

Source: developed by the authors, 2025

N. Chazan described three types of irredentism, each of which has its own subjects and initiators: 1) the initiator is an ethnic group that seeks to join the state where the ethnically related group is the majority; 2) the initiator is a state that seeks to annex a part of the territory of a neighbouring state where an ethnically related group lives; 3) initiators – several ethnic groups, which are minorities in two or more countries, try to become the majority in some territory (Chazan, 1991, p. 140).

When summarizing the mentioned approaches, we can conclude that the representatives of different scientific schools are united in that the term irredentism reveals the movement, ideology, and strategy of ethnic groups of a divided nation, which are aimed at their reunification within the borders of one state. Modern political science continues both the theoretical conceptualization of irredentism and the analysis of its individual cases in different regions.

4. Transformation of irredentism in the context of changes in international relations systems

Irredentism changed according to the transformation of ideas about the principles of nation-building and state-building and the power balance in the world political arena. This issue is addressed by T. Ambrosio (2001), offering a structural explanation of irredentism, which takes into account the influence of the international or regional context, and which depends on whether the irredentist project will arise and how it will develop.

The question that has to be answered is why did irredentism arise no earlier than in the 19th century? This is explained by the fact that in the 19th

century there were great social and worldview changes caused by the American and French revolutions. It is during this period that national liberation movements are activated and new national states emerge, which try to realize national interests, focusing on the principle of “one state – one nation”. One can see why the 19th century is called the golden age of nationalism.

During a long historical period, the state-centric Westphalian system of international relations, formed in 1648, was designed to protect state interests. The core of the Westphalian system was the idea of state sovereignty, which provided for the supremacy of state power over the entire territory and established the principle of non-interference in the internal affairs of other states. However, each state actively pursued an aggressive policy in order to realize its interests.

After the Napoleonic Wars, in 1815, the Vienna system of international relations, or the Concert of Europe, appeared. At the Congress of Vienna, the leading European states consolidated the territorial and political status quo in the region, including making the decision to engage in diplomatic consultations on territorial or other issues. In fact, the era of the domination of empires had come, but at the turn of the 19th and 20th centuries, a crisis of imperial influence can already be observed. E. Gellner associated the period 1815-1918 with such a stage of the formation of national states as “nationalist irredentism”, which is characterized by the emergence of the nationalist idea as a political principle. At this stage, the formula “one culture – one state” is implemented (Gellner, 1998). The goal of national irredentism was the coincidence of cultural and linguistic boundaries with political ones. It was during this period that the unification of Germany and Italy took place. These are textbook examples of the implementation of the irredentist policy, but irredentism was also formed in other nations of Europe. In all national states born between the 19th and 20th centuries, political movements developed that fought to annex other territories located near their borders. This necessity was justified by the linguistic or ethnic similarity between the inhabitants of the nation-state and the desired territories, or by historical reasons (Pitassio, 2015).

International relations became complicated during the imperialist era at the turn of the 19th and 20th centuries, when the world was divided. However, at this stage in achieving irredentist goals, the states were limited by the interests of partners in a political coalition, as, for example, Italy at the end of the 19th and the beginning of the 20th centuries changed its territorial claims and first took into account the position of its partners in the Tripartite Alliance, then in the Entente. After the First World War, the interwar Versailles-Washington system emerged as a result of the signing of the Versailles Peace Treaty in 1919 and the agreements of the Washington Conference of 1921-1922. Its feature took into account the interests of the victorious states and neglected the interests of other states, including those that emerged on the ruins of empires. It is with the interwar system that the next stage in the formation of national states is connected, which E. Gellner called the triumph and defeat of national irredentism (Gellner, 1998). Multinational empires are disintegrating, a number of smaller states are emerging, each of which implements its own

project of nation building. The defeat of national irredentism is connected with the emergence of the problem of national minorities in new political units, which now sought protection from the mother state.

A demonstrative example of the triumph and defeat of irredentism can be the situation with the Hungarian ethnic group, which in 1920, according to the Treaty of Trianon, was divided, because more than two-thirds of Hungarians ended up outside the borders of Hungary, as part of other states. The duality of the situation is that, on the one hand, an independent state was formed, and on the other hand, the Hungarians received the so-called “Trianon trauma”. Hence the increased interest in the life of related groups abroad.

At this time, irredentist sentiments are intensifying in other European countries with irredentism being seen as a means of completing the formation of a national state. It was during the existence of the Versailles-Washington system that the origins of a large number of modern irredentist conflicts were formed, because the very fact of the formation of new states in the multi-ethnic old Europe exacerbated the problem of divided nations and formed many territorial claims between states. In addition, the declared intentions to solve the issue of ethnic division actually served as a cover for plans for territorial gains, and therefore it can be argued that in this way irredentism legitimized territorial claims in Europe. In this context, the action of Lord G. Rothermere regarding the revision of the Treaty of Trianon should be mentioned. In 1926-1928, he led a campaign that helped support Hungary's revanchist plans in Europe. The so-called “Rothermere Action” was aimed at comprehensively supporting the territorial claims of this state regarding Transcarpathia and was condemned by the vast majority of Ukrainian political figures and parties of Transcarpathia (Hyria, 2010, p. 18).

World War II testified to the crisis of the Versailles-Washington system. The leaders of the victorious states signed treaties, starting the Yalta-Potsdam system of international relations. For several decades, a bipolar system of the world order was established, which broke down with the collapse of the USSR. The second half of the 20th century was characterized by unstable international relations. Many international conflicts during this period had a distinct irredentist component, and the foundation of many territorial disputes was laid by the decisions of the victorious states. Despite this fact, open irredentist confrontations were avoided in the second half of the 20th century. It is necessary to take into account the specifics of socialist countries, in which interstate territorial disputes had a latent nature. Since ideological unity was declared more important than ethnic unity, the countries' belonging to one camp (socialist) somewhat obscured the very problem of divided nations. (Horlo, 2017, p. 190).

In general, compared to the period of the end of the 19th and the first half of the 20th centuries, the number of irredentist conflicts decreased. M. Kornprobst (2008) believes that European states resolved their differences through peaceful recognition of the territorial *status quo* since the end of the Second World War. He came to this conclusion based on an analysis of German and Irish cases of irredentism.

During the second half of the 20th and the beginning of the 21st centuries, the UN and its institutions, primarily the Security Council and the International Court of Justice, acted as an important arbiter in resolving interstate conflicts. During this period, international legal documents were formed to consolidate the basic principles of modern world politics, including the principle of territorial integrity of states, the principle of non-interference in the affairs of sovereign states, and the right of peoples to self-determination. The UN Charter (1945), the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the Conference on Security and Cooperation in Europe Final Act (Helsinki Final Act, 1975) and other documents are the basis that regulates modern international relations. Though the principles of territorial integrity of states and self-determination of peoples are still considered inconsistent. States defending their sovereignty appeal to the principle of the inviolability of state borders, while separatists refer to the right of peoples/nations to self-determination, interpreting it in their favour. By its essence, the principle of territorial integrity of the state should make any territorial claims and disputes impossible, but that is no longer an absolute imperative.

The issue of irredentism reached a new stage at the end of the 20th century, when the countries of the socialist camp suffered an ideological defeat in the “Cold War”. It was then that multinational states collapsed and many new political units appeared. Since the beginning of the 1990s, we can talk about the existence of a new system, a post-bipolar or “post-Cold War” system. This period is characterized by a gradual transition to a post-bipolar, polycentric world.

The post-bipolar world is witnessing a kind of renaissance of nationalism and irredentism. At the end of the 20th century, there was a revival of nationalism instead of the expected decline of national states. There is a “related series” of modern forms of nationalism: “nationalizing” – nationalism of titular nations of new or reformed states; cross-border, conducted by a foreign national homeland; and nationalism of national minorities (Brubaker, 1996, pp. 4, 5). These nationalisms interact and conflict, causing intrastate and interstate conflicts.

In the newly formed states, the problem of national minorities intensified, which forced these states to solve a large set of problems, including satisfying the interests of minorities and preventing the emergence of separatist attitudes, establishing partnership relations with neighbouring states that are related to national minorities. Nevertheless, history shows that conflicts and wars with an irredentist component could not be avoided, especially in the countries that emerged after the breakup of Yugoslavia, where several big ideas collided, in particular, political projects for the revival of “Greater Serbia” and “Greater Croatia”. Periodically, long-term irredentist conflicts in different parts of the world entered the active stage, such as, the Nagorno-Karabakh conflict.

At the beginning of the 21st century, irredentism does not disappear from the agenda. As M. Diriba (2021) emphasizes, irredentism reflects the tangled consequences of nationalism, geopolitics, interstate war, state

sovereignty, and territorial integrity, all of which are crucial in setting and promoting agendas for the global political spectrum. Even if territorial claims are not put forward by states at the official level, they are often present in the programs of radical political parties that call for the revival of the “Great Power”, seeing it within the boundaries that this state entity had at the time of its greatest power. This could potentially strain interstate relations, as the slogan of “protecting compatriots abroad” is not neutral and has dangerous potential, as demonstrated by Russian irredentism.

The issue of resolving irredentist disputes in the context of European integration processes deserves special attention. On the one hand, the creation of a single European space supposedly alleviates the acuteness of the separation problem. On the other hand, one should not forget that ethnic identity always remains important for an individual, and in the conditions of large-scale processes such as regional integration or globalization, it also acts as a guarantee of preserving identity. Therefore, it can become an important resource for the political mobilization of individuals to support nationalist projects. However, in our opinion, the European security system itself stands guard over the territorial integrity of states. EU and NATO member states, in accordance with the norms of these organizations, must refrain from any territorial claims.

The peculiarities of irredentism during the existence of various systems of international relations are depicted in the table:

Table 2. International system – Type of irredentism

International system	Type of irredentism	Examples
Vienna	Unifying	Greece, Italy, Germany
Versailles-Washington	Expansionist	Germany
Yalta-Potsdam	Latent	Countries of Europe, Asia
Post-bipolar	Moderate	Hungary, Romania, Serbia
	Revival of expansionist irredentism	Russian Federation

Source: developed by the authors, 2025

Taking into account the radicalization of nationalist sentiments in European countries and given the signs of a crisis in the international security system, it is quite possible that territorial disputes will move from a latent to an open stage and new irredentist conflicts will occur. In order to limit Russian irredentism from becoming a precedent, the world's leading states and international organizations need to develop a joint, unambiguous position in assessing irredentism and improve the means of resisting aggressive expansionist policies.

5. Ideological substantiation of the irredentist policy of the Russian Federation

The Russian Federation demonstrated the revival of expansionist irredentism, accompanying its policy with an eclectic mix of goals and slogans, among which are “the special civilizational mission of the Russian people in the confrontation with Western influence” and the great-power narrative of the revival of the empire as the “Third Rome”, and also “the return of historical lands” and the mythical idea of “one nation”. Aggressive politics with an irredentist component was formed over a relatively long period, starting from the 1990s. According to C. Alexander (Alexander, 2020), after the collapse of the Soviet Union, Russia was a centre of irredentism. In the years immediately before and after 1991, Moscow began seizing and occupying territory again – this time in the form of enclaves within several non-Russian Soviet republics that became independent states in the early 1990s. This refers to the support of separatist forces in Georgia (Abkhazia, South Ossetia) and Moldova (Transnistria). At that time, the world community's reaction to Russia's aggressive actions, including in Georgia in 2008, was not decisive enough. And the weak international response in Syria in 2011 convinced Putin that his hands were free (Alexander, 2020, p. 5). The occupation of the Crimean Peninsula in 2014 did not provoke decisive action on the part of the international community, which led to the escalation of the war in the form of full-scale Russian aggression against Ukraine in 2022.

At the end of 2013 and the beginning of 2014, the Revolution of Dignity took place in Ukraine, which led to the fall of the cronyism regime of V. Yanukovich. The revolution became an important step in the formation of civil society in Ukraine and contributed to the strengthening of collective solidarity. However, the separatist movements in Crimea and Donbas, which developed according to the Russian scenario, immediately intensified. For a long time, these regions were in the field of view of Russian politicians, as they were considered as parts of the “Russian world”, which, as a result of “historical injustice”, became parts of Ukraine. As a result of the Russian information influence on the population of these regions, their residents gradually formed a desire for “reunification with the historical homeland”. As for the representation of groups of divided people in Ukraine, the numerical predominance of Russians can be said only in relation to Crimea, although here the share of Russians among all residents of the republic decreased from 65.6% in 1989 to 58.3% in 2001 (Pro kilkist ta sklad naseleennia Ukrainy, 2001), and in Donbas, the share of Russians in the ethnic composition of the region's population amounted to 38.1% in 2001 (Skliar, 2005).

At this point, the higher state leadership of the Russian Federation used the difficult political situation in Ukraine to prepare for the annexation of Crimea. With the support of the Russian authorities and under the control of the Russian military, on March 16, 2014, a so-called “referendum” was held in Crimea on the status of the Autonomous Republic of Crimea, which resulted in the illegal incorporation of this region into Russia. At the meetings of the State Duma of the Russian Federation, where the results of the Crimean

“referendum” were considered, the deputies expressed admiration for the annexation of Crimea, using vivid irredentist vocabulary, such as “reunification of a divided people”, “historical justice restored” or “we do not betray our own” (Stenogramma zasedaniya, 2014). At the same time, separatists in Donbas became more active, which led to the formation of terrorist organizations “DPR” and “LPR”, which for a long time received significant support in terms of military power and weapons from the Russian authorities. Yet if in the Crimean variant of separatism the irredentist goal was obvious, then for the Donbas separatists it was rather vague at first.

In February 2022, with the support of the Russian Federation, the so-called “independence” of the DPR and LPR was declared. On February 24, 2022, Russia launched a full-scale invasion of the territory of Ukraine and occupied part of its territory. In September 2023, a “pseudo-referendum” was held in the temporarily occupied territories, as a result of which the Russian Federation announced the “inclusion” of “new regions” into its composition. The UN strongly condemned the actions of the Russian Federation.

The irredentist component is an integral part of the foreign policy of the Russian Federation, strangely combined with other appeals. In Russia, over the past two decades, nationalist sentiments have grown significantly, as nationalism has practically become a state ideology. Nationalist notes appear even in the programs of political parties of a liberal (at least in name) direction. For example, the Practical Program of the Liberal Democratic Party of Russia (2011) states that “Russians are the most numerous divided nation. What is needed now is the ideology of returning Russia to its historical territories, to which the Russian people have a historical and moral right”. In fact, this is a reflection of the concept of “Russian world” as fundamental to Russia's foreign policy. In its essence, the concept of “Russian world” is a neo-imperial idea, as it has distinct signs of assembling an empire. O. Shevchenko (2014, p. 67) calls the regime existing in Russia a typical fundamentalist project, which has the following characteristics: rejection of the liberal values of material well-being and democracy as a political analogue of this value, consistent anti-Westernism, the great role of religion in the ideological basis of Russian fundamentalism, military ideology, deep psychopathological features, lack of rational components, because the project “cannot be understood as a rational ‘protection of interests’ and therefore, by and large, it has not so much a geopolitical as a mystical nature”.

Russia's foreign policy, which is based on the idea of “Russian peace”, has acquired an imperial character and is actually aimed at reconstructing the image of a powerful state, which was the Russian Empire, and later the USSR. The Great Power idea can be formed in those societies that are nostalgic for the era of the greatest prosperity, and become the basis of the policy of irredentism. While the idea of the “Great Power” are shared by many European nations, it is another matter that, at this stage, they are only projects reflected in the programs of radical parties, although they find favour with a part of the population. In Russia, this idea motivates an aggressive foreign policy in relation to Ukrainian territories, but it is veiled by intentions to protect

compatriots abroad.

This poses the question of what is more important in the irredentist policy of the Russian Federation: ethnic or territorial factor? Considering the way the Russian Federation destroys Ukrainian cities and villages, destroying everything living there, and also organizes the genocide of the Ukrainian people in the occupied territories, the territorial factor certainly dominates. M. Toft in his work "Territory and War" (2014) holds the idea that the territory was and will remain the main problem in explaining the beginning and escalation of the war, and it is the characteristics of the territory that affect how the conflict develops and ends, as well as the nature of the future peace. L. Freedman (2014) believes that unlimited ambitions and aggressive plans to seize territories are consistent with the Russian strategy aimed at intimidating the world.

In fact, the conflict between the two states was inevitable, because deep contradictions between them regarding civilizational development paths had been brewing for a long time, but Ukraine chose the European integration vector for itself, and the difficult domestic political situation in Ukraine only acted as a catalyst for an open clash of interests. This situation following the Revolution of Dignity was characterized by multidirectional processes: on the one hand, the strengthening of civil society and collective solidarity, and on the other, the activation of separatist movements in Crimea and Donbas.

6. The influence of the Russian-Ukrainian war on the strengthening of irredentist narrative in Europe

Russia's war against Ukraine, which has been ongoing since 2014, has revealed weaknesses in the system of international relations, as evidenced by the indecision and inconsistency of international organizations in condemning the aggressor. Although international organizations (UN, IAEA and others) condemn the actions of the aggressor country, there are no mechanisms of effective influence on it. Moreover, the Russian Federation remains a member of the UN Security Council. This is a holdover from the bipolar era and would be very difficult to rectify. Many countries of the Global South still listen to Russia and try to establish partnership relations with it, which is facilitated by energy and food dependence on the Russian Federation. It is against this background that irredentist narrative is intensifying in the countries of Central and Eastern Europe.

In the spring of 2023, Romanian senator and leader of the SOS party, Diana Șoșoacă, presented a legislative proposal entitled "Law on Amendments to Law No. 129/1997 on the Ratification of the Treaty on Good Neighbourly Relations and Cooperation between Romania and Ukraine", in which she argued that Romania should "annex historical territories" that once belonged to the Romanian state and now belong to Ukraine. In particular, "Romania annexes the historical territories that belonged to it, namely North Bucovina, Hertsa region, Bugeacul (Cahul, Bolgrad, Izmail), historical Maramureș and the island of Serpilor". The statement states that "with this approach, we want to restore the cultural identity, traditions, customs and religion of the Romanian

population, which numbers approximately 1 million Romanians, including mixed families” (Senatoarea Șoșoacă, 2023).

At the beginning of 2024, the leaders of the right-wing radical Hungarian and Romanian parties made statements of an irredentist nature. Thus, on January 27, 2024, at the congress of the far-right Hungarian party “Our Fatherland”, its leader László Toroczkai said that if the state of Ukraine ceases to exist as a result of the war, this state will claim Transcarpathia (Hungary far-right, 2024). And on January 28, 2024, the leader of the Romanian far-right party “Alliance for the Unification of Romanians”, Claudiu Târziu, called for the “reintegration” of the Romanian state in its “natural borders”, declaring at a speech in Iași that “Northern Bukovyna cannot be forgotten! Southern Bessarabia cannot be forgotten! The Hertsa region, Transcarpathia, everything that was and is the Romanian people must return to the borders of the same state!” (Shcho stoit za pretenziiamy ultrapravykh, 2024). We see typical statements of the irredentist direction, because irredentism is primarily based on the idea of some “unliberated lands” that must be included in the state. Irredentists resort to various arguments to justify their intentions: protection of a related minority from oppression – real or imagined; protection of the rights of people who speak the same language; restoration of historical rights to the territory and, more broadly, “restoration of historical justice” in any interpretation.

These statements should not be considered situational, because the irredentist component is contained in the programs of these and other radical political parties. At the end of the 1990s, the “Great Romania” party emerged, the program of which states: “As can be seen from its name, Great Romania stands for the peaceful realization of Great Romania, within its historical borders” (Statutul Partidului România Mare). It is noted that the party pursues the ideals of national unity, territorial integrity, sovereignty and independence. In November 2000, the leader of the “Greater Romania” party, Corneliu Vadim Tudor, entered the second round of the presidential elections, and, in the parliamentary elections of the same year, this party received part of the mandates. Great-power sentiments in Romania regarding Moldova, Northern Bukovyna (Chernivtsi region) and part of Bessarabia (Khotyn district of Chernivtsi region and the southern part of Odesa region) developed especially during the presidency of Traian Băsescu (2004-2014).

In Hungary, Great Power ideas are promoted by the Fidesz party, whose representative is the Prime Minister of Hungary, Viktor Orbán. Within the country, Fidesz has been in the lead in parliamentary and local elections for a long time. In particular, the party won the parliamentary elections in 2014, 2018 and 2022. The ideas of irredentism are also promoted by the party “Jobbik” (“For a better Hungary”). The work of the Jobbik party with the Hungarians of Transcarpathia became more active on the eve of the parliamentary elections in Hungary (spring 2014), but even after becoming a parliamentary party, Jobbik continued its radical appeals. At the April session of PACE (2014), a delegate from this political power declared that Crimea is Russian territory, and Transcarpathia is Hungarian (Potikha, 2014, p. 40). At

today's stage, the Jobbik party has changed its ideology and turned from far-right pro-Russian nationalists into champions of liberal Europe. Moreover, it is an opponent of the Fidesz party.

The very fact that the statements made at the beginning of 2024 may seem illogical against the background of the fact that both Hungary and Romania are members of the EU and NATO, and therefore, according to the norms of these organizations, they must refrain from any territorial claims. An important condition for joining NATO and the EU is the absence of ethnic or territorial disputes. The Alliance's New Strategic Concept (1991) states that "risks to Allied security are less likely to result from calculated aggression against Allied territory, but rather from the adverse effects of instability that may result from severe economic, social and political difficulties, including ethnic rivalries and territorial disputes, which are faced by many countries of Central and Eastern Europe" (The Alliance's New Strategic Concept, 1991). And at the meeting of the European Council in Copenhagen on June 21-22, 1993, the conditions for joining the EU (Copenhagen criteria) were adopted, which established, among others, the requirement to settle territorial, ethnic and other conflicts on the basis of international legal norms (European Council, 1993, p. 2).

Given the above, armed aggression by these countries would seem impossible, but such statements are actually very harmful. First, the promotion of territorial disintegration of Ukraine harms these states themselves, because the Russian Federation's entry into their borders would mean having an aggressor neighbour next to them, which, of course, is not a desirable prospect. Thus, at a joint briefing of the leaders of the Czech Republic, Poland, Slovakia and Hungary after the Visegrad Four summit in Prague in February 2024, the Prime Minister of Hungary V. Orban stated that it is in the interests of Hungary, and this is the most important problem of the country's national security, not to have a common border with Russia, because Hungarians have bad memories of it (Hungary's most, 2024). Secondly, statements of irredentist content cause aggravation of the relations of these countries with Ukraine, because they call into question the territorial integrity of Ukraine.

Despite this, statements, sometimes from representatives of parliamentary parties, were heard and received considerable resonance both among society and among international political circles. We will give several explanations regarding the reasons for the actualization of irredentist narrative.

First, the idea of a "Great Power" is quite popular in Hungary and Romania, the content of which is a call to restore the lost territorial power of a once great state by including in its composition the territories to which it is believed that there is a certain "historical right" to possess. In Hungary, this idea is supplemented by ideas that the division of the people associated with the so-called "Trianon trauma". And, although there are no official territorial claims to Ukraine on the part of the higher political elites of Hungary and Romania, the great-power narrative has many supporters, and the idea itself lives in the socio-political discourse. S. Saideman and W. Ayres, researching two types of irredentist disputes between the states of Eastern Europe,

determined that in some the initiators are pit bulls who actively seek to implement their territorial claims, such as Serbia and Croatia in the early 1990s, and in others there are so-called quiet dogs that do not bark, like Hungary or Romania (Saideman&Ayres, 2008). However, sometimes even high-ranking politicians allow themselves to demonstrate their commitment to the great-power idea, as Hungarian Prime Minister V. Orbán did, by appearing in November 2022 at a football match of the Hungarian national team with a scarf depicting a map of “Greater Hungary” with parts of neighbouring states in its composition.

Secondly, the popularity of the great-power narrative is closely related to the identity crisis that is taking place in the countries of Central and Eastern Europe, which in the early 1990s faced the fact that integration processes pose new challenges to European states and may even provoke crisis. The ruling elites of Poland and Hungary constantly emphasize the threat of loss of national identity, which is presented to the public as an urgent problem. Firstly, the identity crisis exacerbates due to the contradiction between new European and traditional national values. Secondly, there is an asymmetry in the formulation and implementation of EU policy towards less developed countries, which calls into question their subjectivity and sovereignty compared to more developed countries (Khorishko&Horlo, 2021, p. 15). Emphasis is placed on finding ways to solve the problem of the identity crisis, which will help preserve the traditions of state formation and prevent the loss of sovereignty in the context of deepening European integration processes. In our opinion, in this case, the popularity of the great-power narrative plays the role of a kind of compensatory mechanism for society.

Thirdly, the intensification of irredentist narrative at the current stage is undoubtedly related to the influence of the foreign political situation, because the statements of the leaders of the right-wing radical parties were made against the background of the escalation of the Russian-Ukrainian war and Russia's occupation of part of the territory of Ukraine. The occupation of the Crimean Peninsula in 2014 did not provoke decisive action on the part of the international community, which, in fact, to a large extent led to the escalation of the war in the form of full-scale Russian aggression against Ukraine in 2022. Against this background, radical Hungarian and Romanian politicians seek to seize the moment and declare their own intentions.

Fourth, irredentist slogans are expressed by the political forces of the far-right wing of the party spectrum, which have distinct nationalist rhetoric and resort to populist statements and try to form a target audience. Given the high public interest in the great-power narrative, these parties receive the support of a part of the electorate. This is a pragmatic calculation to increase the rating of the party and get a higher level of electoral support. P. Carter and G. Pop-Eleches (2024) assert that the electoral success of right-wing populist parties is significantly determined by the electorate's attitudes towards historical territorial losses and the presence of a backward-looking victimization framing. This conclusion is substantiated by the analysis of empirical studies conducted in 2020-2021 in Romania, Hungary, Germany, and

Turkey. According to the latest poll, 18% of Romanians are ready to vote for AUR (Alliance for the Unification of Romanians), 6% for SOS. That is, every fourth Romanian is ready to vote for politicians who propose the revival of Greater Romania (Shcho stoit za pretenziiamy ultrapravykh, 2024). G. Pop-Eleches analyzed the determinants of electorate support for radical-right populist (PRR) parties in the December 2024 parliamentary elections in Romania and concluded that the electorate's political attitudes matched key elements of the PRR parties' electoral ideological appeal, including anti-Western orientation, ethnic intolerance, social conservatism, irredentism, and an embrace of a populist victimization discourse (Pop-Eleches, 2025, p. 389). Conversely, pure protest voting played only a modest role in the electoral success of these parties.

The strengthening of right-wing political parties and movements in the countries of Central and Eastern Europe is also related to the identity crisis. Considering the objective difficulties and problems on the way to European integration and the vision of integration as a threat to national sovereignty and national identity, these parties try to gain advantages in the existing situation and introduce right-wing populist ideas that emphasize the unity of society and the revival of traditional values (Khorishko&Horlo, 2021, p. 15). The influence of statements with an irredentist component should not be underestimated, because populism affects a democratic society and, most likely, will change the style and content of public discourse, even if it does not become ruling power or does not seek to change the constitution (Urbinati, 2019, p. 114). Indeed, today irredentist narrative can become a tool of “soft power” and a means of influencing the politics of other states where related ethnic groups live. Most often, this tool is used by Hungary, declaring the oppression of the rights of the ethnic Hungarian population in Ukraine.

7. Conclusions

Irredentism is a political process that exerts a noticeable influence on the nature of international relations, starting from the 19th century and up to today. The perception of “unliberated” territories and their population is a powerful driver of the state's foreign policy course. Irredentism has evolved since its inception, as each system of international relations established new foundations for the world order; from the 19th century to the beginning of the 21st century, the reorientation of irredentism from purely unifying goals to expansionist goals takes place.

At the beginning of the 21st century, the Russian Federation began to implement an irredentist policy. Under the slogans of protecting the related population, it occupied Crimea and Donbas, and in February 2022, it launched a full-scale invasion of Ukraine and occupied a significant territory. This proved the relevance of irredentism at the current stage of the development of international relations.

Despite the consolidation of the principles of territorial integrity and the inviolability of state borders in international law, irredentist narrative still

has a place in modern European political practice in the countries of Central and Eastern Europe, because, on the one hand, as a result of the existence of the great-power idea in the public discourse, there is a demand for irredentist slogans from society, and on the other hand, there are dangerous precedents of implementation of the irredentist policy by the Russian Federation, the reaction to which was not decisive enough on the part of the world community. The spread of ideas of irredentism is also taking place in the wake of the strengthening of populism positions in Europe, caused, among other things, by the identity crisis that has gripped the countries of Central and Eastern Europe in the context of European integration processes and which is associated with fears of the loss of traditional values and sovereignty.

The research hypothesis has been confirmed: the intensification of irredentist rhetoric in the countries of Central and Eastern Europe occurred partly under the influence of the expansionism of the Russian Federation, which did not receive a firm response from the international community in 2014, and partly as a result of an identity crisis within the context of European integration. This combination of factors contributed to the popularization of the “Great State” idea and to the strengthening of the influence of right-wing populist parties.

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**MEDIA
AND
COMMUNICATION**

MEDIA ETHICS AND AI-GENERATED IMAGERY

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Abstract

The impact of artificial intelligence (AI) on human society is indisputable. This paper explores AI's influence on the media industry, with a particular focus on understanding the effects and implications of generative imagery and other AI integrations across various dimensions of the media landscape. A methodical literature review highlights key themes, including content creation, curation, visual media, privacy concerns, and evolving media ethics. The findings demonstrate that AI-generated imagery serves as a powerful creative tool, yet remains in constant evolution and demands a well-defined legal and ethical framework for responsible use in journalism and media. The results also emphasize the need for professional guidance, continuous skill development, and the implementation of ethical AI practices within the industry.

Keywords: *artificial intelligence, media, ethics, AI-generated images, journalism*

Introduction

In the era of technological development where technology is advancing rapidly, media ethics has become a critical area of study, especially with the use of AI and the display of images created by it. Media ethics focuses on the principles and standards that guide responsible and fair practices in the media industry, such as journalism, advertising, entertainment, and other forms of communication. As artificial intelligence becomes a powerful tool for creating and manipulating visual content, it raises profound ethical questions about authenticity, copyright, representation, and social impact.

AI-generated images refer to visual images produced or captured using artificial intelligence techniques, such that they can modify the content of the visual image and create other content for the audience. These can range from realistic portraits of people to completely fabricated landscapes or alterations of existing

photographs. Technologies such as generative adversarial networks (GANs) underpin much of this innovation, enabling AI to create images that are nearly indistinguishable from real photographs.

While these advances offer exciting opportunities in creativity, education, and design, they also present significant ethical challenges, including:

Authenticity and misinformation: AI can generate highly realistic fake images that can be used to spread misinformation or propaganda. The consequent difficulty in distinguishing truth from falsehood undermines trust in the media. It also makes it even more difficult to distinguish which of these images is real and which media can be trusted.

Consent and privacy: Using AI to generate images based on existing photos without permission may violate privacy and individual rights, i.e. violate copyright.

Cultural and social bias: AI systems trained on biased datasets risk perpetuating stereotypes or excluding underrepresented groups, raising concerns about fairness and inclusion.

Liability: Determining liability for the consequences of AI-generated images—whether developers, users, or distributors are the responsible party—remains a contentious issue. The integration of AI into visual media requires a reassessment of ethical frameworks. It calls for collaboration among technologists, ethicists, policymakers, and media professionals to establish guidelines that balance innovation with social responsibility. Addressing these challenges effectively is essential to maintaining trust and integrity in an increasingly AI-driven media landscape.

Reassessing ethical frameworks for online media is essential in the era of rapid technological advances, especially with the integration of AI, augmented reality and immersive technologies. A summary of the main considerations and strategies for a comprehensive ethical reassessment includes the requirement of collaborative efforts. Public institutions, technology companies, academia and civil society must work together in creating adaptable ethical standards. Regularly updating frameworks to keep pace with technological innovations. Public engagement also plays a very important role, for instance the incorporation of public data to ensure that frameworks match social values and expectations. The re-evaluation of the ethical frameworks in the media, and especially in the online media, is a continuous process that requires balancing innovation with the protection of human rights and social well-being.

In this context, it is very important to research and address issues that are sensitive and require immediate solutions from those responsible, both institutionally and from the industry, because the advancement in the use of AI puts the professionalism of many journalists in an unfavorable position of

feeling threatened by their colleagues who use AI to create generative images, thus affecting the speed and veracity of images and information.

Theoretical framework

Ethical issues in artificial images

Respecting journalistic principles and norms is a challenge for journalists and media operators for many reasons. For one technology and the opportunities offered by AI have made journalistic content quite attractive and productive both in terms of volume and quality. The media industry, which has historically and traditionally relied on human creativity, i.e. the human side of story content and information transmission is visible, is experiencing a seismic upheaval as a result of the integration of AI technology, (Khan, 2023). This raises concerns about adherence to codes of ethics. The integration of ethical codes and frameworks is essential and inevitable to assess the moral dilemmas faced by AI in the media sector (Hagendorf, 2020). Generative image platforms have the ability to design unique and original illustrations, acting as tools to facilitate artistic creation and the development of creative strategies and their modification as if they were real (Verosky, 2023). The collection of data and its use in the modification and production of generative images can acquire the identity of a person without the right to use the image (Bolter, 2023). The lack of transparency and limited public understanding have resulted in significant ethical concerns. As Li (2023, p. 2) notes, “AI systems, which are capable of amplifying biases and privacy concerns, present complex ethical challenges. Issues related to transparency, debates over job displacement, and global disparities in AI development exacerbate these ethical dilemmas”. However, “regardless of how much data and computing power is available to machines, there are tasks that are still difficult for machines to perform but remain too easy for humans. When the audience shifted online in the age of social media and platformization, the gulf amongst journalists on what constitutes news today grew (Saliu, Çipuri & Izmaku, 2024).

Visual media are complex and shape collective memory by describing how the world is experienced. The representation of reality in the media must be comprehensive and reflect the full context of an event’s development. It should not marginalize or omit any part of that reality. Since media images often present an idealized portrayal of events, they inherently carry ethical implications. Therefore, the principle of inclusiveness of all parties involved in a news report must be upheld (Gasnier, 2024). In journalism, and especially in online media, the use of images, particularly real photographs, created to illustrate articles is politically attractive for online newspapers as it serves informative purposes, supporting textual narratives and contributing to the description of past or future events (Schröter, 2023). The ethical concern behind fabricated realistic images in journalism is to depict authentic situations that

may mislead information. In addition to realistic design connotations, the data used (origin of resources, image rights and copyright issues) in generating images also raises ethical dilemmas because the public is not informed that the image is processed for informational or illustrative purposes (Brantner & Saurwein, 2021). The impact of generative AI models extends beyond image publishing, with applications in areas such as text-to-image production, where these models excel at producing authentic, realistic images based on textual data, but the impact of these images is even wider. They have a part in creating awareness and collective attitudes about a given event, and consequently can determine the actions of the public, which are actually based on generative images, and not on real images (Liu et al., 2021). Even more concerning is that, through image generation and various AI tools, individuals can be depicted as performing actions they never actually carried out. Such fabricated visuals shape what audiences perceive and can significantly influence their understanding of reality. Generating realistic images based on textual descriptions is an important advance in increasing user intelligence. "Visual mental imagery, or 'seeing with the mind's eye', plays a crucial role in various cognitive processes such as learning, memory retention and logical reasoning" (Yadav et al., p.1 2024). The ability to create a system that understands the relationship between vision and language and can produce images that convey the meaning of textual descriptions has great potential for revolutionizing many industries, including image editing and image content. AI generative technology is a type of generative technology that allows us to create images with nothing more than a few words. The AI engine takes each word in a text description as an instruction and builds the image based on the combination of words and their relations with each other. And this is precisely where the ethical dilemmas lie when these images are used by the media in order to inform the audience as quickly and completely as possible. "There are also ethical and legal issues: since with the use of machine learning all stereotypes can be reproduced (for example more images of men when the text does not mention a specific gender), there is a risk of fake news (for example images of politicians who do something they didn't do)", (Coeckelbergh, 2023).

The rise of artificial intelligence (AI) has revolutionized the creation of images through technologies such as generative adversarial networks (GANs) and text-to-image models like DALL·E, Midjourney, and Stable Diffusion. These systems can produce highly realistic images based on textual prompts, blurring the line between real and synthetic visuals. While these advancements offer significant benefits in fields like entertainment, education, and design, they also raise numerous ethical concerns. These include misinformation, consent and privacy violations, intellectual property infringement, and potential social harms such as deepfakes and the reinforcement of bias.

One of the most pressing ethical concerns related to artificial images is misinformation. AI-generated images can be nearly indistinguishable from real photographs, making them powerful tools for spreading false information.

Deepfakes—realistic but fabricated media, often involving public figures—have been used to manipulate public opinion, influence elections, and damage reputations (Chesney & Citron, 2019). As synthetic images become more accessible and convincing, the risk of their misuse in propaganda and fake news escalates. This undermines public trust in media and complicates efforts to verify authentic content.

Another critical ethical issue is consent and privacy. AI models often train on large datasets scraped from the internet, which may include personal photos or copyrighted images without the original creators' or subjects' consent (Carlini et al., 2023). When these models generate images based on real individuals or use their likenesses, they can infringe on privacy rights. For example, using AI to create fake pornographic images of real people, especially without their knowledge or permission, constitutes a severe violation of personal autonomy and dignity.

Intellectual property (IP) concerns also emerge as AI-generated images draw upon existing works. Many artists and photographers have expressed frustration over their work being used to train AI models without attribution or compensation (Andersen, 2023). Since AI does not "create" in the human sense but synthesizes from existing inputs, questions arise about who owns the resulting images and whether their use constitutes plagiarism or fair use. The legal framework surrounding this issue remains unclear, as intellectual property laws struggle to keep pace with rapidly evolving AI capabilities.

AI-generated images can also reinforce social biases. Training data often reflect historical inequalities and stereotypes, and without careful curation, AI models may replicate or amplify them. For instance, image generators might produce gender or racial stereotypes based on biased datasets, reinforcing harmful representations (Bender et al., 2021). These biases can perpetuate discrimination, especially when AI is used in domains like advertising, hiring, or law enforcement.

Moreover, there is a risk of dehumanization and over-reliance on artificial imagery. As synthetic images become more integrated into society, there is a concern that they may replace authentic human expression, reducing the value of real experiences and contributions. In creative fields, this can lead to a commodification of art, where originality is supplanted by algorithmic imitation.

In response to these challenges, several strategies have been proposed. These include developing AI watermarking and detection tools, enforcing transparency in data collection, and implementing stronger legal frameworks to protect individual rights and intellectual property. Ethical AI development also requires inclusive and diverse training datasets, as well as collaboration between technologists, ethicists, and policymakers.

In conclusion, while artificial images created by AI present exciting opportunities, they also raise profound ethical questions. The challenges of misinformation, privacy, intellectual property, bias, and dehumanization must be addressed proactively. Society must balance innovation with responsibility, ensuring that AI serves the public good without compromising individual rights and social trust.

Artificial intelligence

The European Commission's Communication on Artificial Intelligence (European Commission, 2018a) defines artificial intelligence as follows: “Artificial Intelligence (AI) refers to systems that exhibit intelligent behavior by analyzing their environment and taking action – with some degree of autonomy – to achieve specific goals”. Artificial Intelligence (AI) refers to the simulation of human intelligence in machines designed to think, learn, and act like humans. It encompasses a broad range of technologies, including machine learning, natural language processing, robotics, and computer vision. AI is transforming various aspects of society, from healthcare and education to business and entertainment. As it continues to evolve, AI presents both vast opportunities and significant ethical, social, and economic challenges that must be addressed thoughtfully. AI also plays a crucial role in automation, allowing machines to perform tasks that previously required human labor. This includes everything from self-driving cars to automated customer service chatbots. While automation can increase efficiency and reduce costs, it also raises concerns about job displacement. According to Frey and Osborne (2017), a significant percentage of current jobs could be automated within the next few decades, particularly in manufacturing, transportation, and administrative roles.

The rapid advancement of AI also brings ethical challenges. Issues of bias in AI systems are particularly concerning. Since AI learns from data, if the data used to train an AI model is biased, the resulting system can perpetuate or even amplify existing social inequalities (Binns, 2018). For instance, biased facial recognition systems have shown higher error rates for people of color, raising concerns about their use in law enforcement. Another ethical concern is privacy. AI systems often rely on large datasets that include personal information. If not properly managed, this can lead to unauthorized surveillance or data breaches. Moreover, the use of AI in military applications, such as autonomous drones, raises questions about accountability and the moral implications of delegating life-and-death decisions to machines.

To address these challenges, researchers and policymakers are increasingly advocating for responsible AI development. This includes ensuring transparency in how AI systems make decisions, promoting fairness in data collection and algorithm design, and establishing regulations to protect

individuals' rights. The goal is to create AI that benefits humanity without compromising ethical standards or societal values.

In conclusion, artificial intelligence is a powerful technology that holds great promise for improving lives and solving complex problems. However, its potential risks and ethical implications must not be overlooked. Balancing innovation with responsibility is key to ensuring that AI is developed and used in ways that are fair, transparent, and beneficial for all.

One of the most profound impacts of AI is its ability to enhance productivity and decision-making. In healthcare, AI algorithms assist doctors in diagnosing diseases more accurately and quickly, sometimes detecting conditions that may be missed by human eyes (Topol, 2019). In business, AI is used to analyze large volumes of data to predict consumer behavior, optimize logistics, and personalize user experiences. For example, recommendation systems on platforms like Netflix and Amazon are powered by AI, improving customer satisfaction and boosting sales.

The technical basis for AI systems is machine learning to implement what the user asks (Veale & Brass, 2019). AI-based systems can be purely software-based, operating in the virtual world (eg voice assistants, image analysis software, search engines, speech and facial recognition systems) or AI can be embedded in hardware devices (eg advanced robots, autonomous cars, drones or Internet of Things applications). Within this report, we consider both software-based AI and intelligent robots (i.e. robots with an embedded AI) when exploring ethical issues, as intelligent robots are a subset of AI (whether they use machine learning or not).

The challenges of using generative imagery in journalism

Visual journalism has been defined as "the narrative elements of the story that can be seen or seen" such as photographs, visualizations and graphics always in the function of information (Gynnild, 2019). The use of generative images in journalism is quite challenging, not only for the media but also for the audience because the ethical rules of using the image must be respected and other images might be generated from this image. These changes also change the ontological characteristics of the images, which now show a certain variety: The digital image is a code and it is also visible, but for this there must be transparency from the operator (Vasconcelos & Barbosa, 2024). It is photographic and also digital, this without delving into the details of the multiple versions of images encompassed by the categories of code, information or algorithm (Mintz, p.90, 2019). Since these types of images are not only photographs but also journalism and must be grounded, realistic and not created by the mind of the individual (Baetens and Sánchez-Mesa 2024), they are subject not only to the changes that occur in the photographic act , but

also the changes that occur within journalism itself due to its presence in digital media and the effect of being as attractive as possible to the reader.

Visual communication and illustration has long been a key component of journalistic meaning-making, despite being generally ranked secondary to text in the study and professional practice of journalism (Thomson, 2019). Technological developments, including generative AI, reiterate the tensions between, on the one hand, discourses of journalistic objectivity supported by evidence-based photorealism and “mechanical objectivity”, (Carlson 2019), and, on the other, the subjectivity of the use of images in journalism for illustration (Thomson et al, 2024).

The discourse on AI ethics is active as challenges surrounding privacy, bias, and accountability in machine output continue to seek solutions, and new considerations have emerged alongside advances in autonomous technologies such as language models. Floridi (2018) argues that contemporary digital technologies pose several ethical risks: (1) machines that enable large-scale fraud and disinformation; (2) AI systems capable of producing vast amounts of low-quality yet seemingly credible content; and (3) technologies that diminish direct engagement among key stakeholders. All of this is facilitated by online communication, which accelerates the dissemination of content that often bypasses traditional media’s ethical filters. For media organizations, the appeal of such tools lies in their efficiency—they can obtain or generate images at little to no cost, though often at the expense of quality and professional standards. Consequently, fewer skilled individuals are required to perform tasks that would traditionally demand professional oversight, thereby weakening the media’s role in delivering factual, contextual, and ethically grounded representations of events.

Most of these debates have addressed the ethical dimensions of digital journalism in today's online society without much change in the codes of ethics of professional associations and bodies, despite growing pressure to adapt self-regulatory mechanisms to better define the ethical boundaries of online journalism. and the regulation of online media as media already established in social use, which is obliged to respect ethical principles like traditional media (Mateus, 2019). The use and application of technological and innovative developments are a normal part of journalistic practice. However, these innovations can also introduce ethical challenges. As new technologies enter the newsroom and journalists adopt them, ethical standards must evolve accordingly. This creates the need for continual review and revision of professional guidelines to address the concerns that emerge alongside technological developments (García-Avilés, 2021).

The rise of generative artificial intelligence (AI) has introduced a new era of content creation, where images can be generated from text prompts with impressive realism. Tools like DALL·E, Midjourney, and Stable Diffusion allow for the rapid production of visual content that can support storytelling

across media platforms. In journalism, where imagery plays a crucial role in informing and influencing public opinion, the use of AI-generated images presents both opportunities and serious challenges. These include issues of authenticity, trust, ethical responsibility, copyright, and potential misinformation.

One of the most critical challenges is the threat to journalistic integrity and public trust. Journalism is fundamentally grounded in the principles of truth and accuracy. When news organizations use AI-generated images, especially without clear labeling or disclaimers, they risk misleading audiences. A viewer may interpret a synthetic image as a photograph of a real event, leading to confusion or false beliefs. According to the Reuters Institute Digital News Report (Newman et al., 2023), public trust in news media is already fragile in many countries, and the introduction of potentially deceptive imagery can exacerbate skepticism about media reliability.

Closely tied to this issue is the difficulty of maintaining transparency and clarity. Journalists must make it explicitly clear when an image is AI-generated, not captured from real-life events. However, as generative tools become more sophisticated, the line between real and artificial becomes increasingly difficult to detect, even for trained professionals. This raises ethical questions about the responsibility of journalists to verify and disclose the origins of their visual content. Without clear guidelines, newsrooms may inadvertently blur fact and fiction, damaging their credibility.

Another major concern is the risk of misinformation and manipulation. Generative imagery can be exploited to create realistic but entirely fictional scenes, which can then be used in disinformation campaigns. In politically sensitive contexts, such as conflicts or elections, synthetic images can mislead the public, provoke outrage, or falsely attribute actions to individuals or groups. Chesney and Citron (2019) warn that such technologies can be weaponized to sow discord and distort democratic discourse. Journalists must therefore be cautious not to amplify or validate manipulated content.

The use of generative imagery also poses legal and copyright challenges. Many generative AI tools are trained on vast datasets of publicly available images, often without the consent of original creators. When journalists use these AI-generated visuals, they may unknowingly infringe on intellectual property rights or violate licensing agreements. This raises concerns about the ethical sourcing of content and the rights of artists and photographers whose work has been absorbed into training data without compensation (Andersen, 2023).

Moreover, there is the issue of editorial standards and professional accountability. Traditional photojournalism adheres to strict codes of conduct—images must not be digitally altered to change their meaning, and photojournalists are expected to document reality. Generative imagery, by its nature, is synthetic. Its use challenges these long-held norms and necessitates

the creation of new standards for visual verification and ethical storytelling in the digital age.

To address these concerns, leading media organizations and journalism schools are beginning to establish ethical frameworks for AI use in newsrooms. These include requiring labels for AI-generated content, promoting media literacy among audiences, and developing internal policies on when and how synthetic visuals can be used. Some advocate for the use of AI watermarking and detection technologies to ensure transparency and authenticity.

While generative imagery offers journalists new tools for visual storytelling, it also introduces significant ethical, legal, and practical challenges. In a media landscape already strained by misinformation and declining trust, journalists must approach the use of synthetic visuals with caution, transparency, and a strong commitment to truth. Navigating these challenges is essential to preserving the credibility and public service role of journalism in the age of AI.

Online media journalistic standards and professional ethics are two concerns that have accompanied digital media since their initial emergence thirty years ago. As a consolidated professional and academic reality in digital journalism (Salaverría, 2019), these appear in debates promoted by professional organizations, as well as being the focus of many research projects. AI has an urgent need for ethics, with new approaches from a technological perspective (Tzachor et al., 2020) and with renewed proposals and perspectives from a journalistic approach, with the aim of increasing the degree of transparency in the eyes of the audience.

The ability of AI-generated images to elicit emotional responses in humans depends on several factors, such as the quality of the generated image, the context in which the image is being presented, as well as individual differences that influence the emotional interpretation of the image by the audience (Paik et al., 2023). While AI-enabled image generators are said to be used at present just for fun (Wilson, 2023), it is important to consider their potential trajectory, especially as there is an imminent prospect of AI images mediating public perceptions of events of the real world, including political developments, conflicts and wars. Where the scale of manipulation and misinformation is very large and to the detriment of the audience and with consequences for them. The emergence of generative visual media challenges our understanding of representation – the first key moment in the cultural circuit (Hall, 2013) – by reconfiguring the ways in which we understand the world outside our immediate reality. Because the images presented to us by the media are increasingly constructed and manipulated, what we receive is often a form of fabrication rather than an accurate, interference-free reflection of reality.

To understand how AI-generated images position viewers in relation to the subjects (or represented participants), the dataset should first be annotated for three key elements of visual composition—gaze, frame size, and angle (both

horizontal and vertical)—using a notation scheme adapted from Kress and van Leeuwen (2021). Then you can create a generative image, which may have no relation to the actual reality.

Copyright and AI generated images

Artificial Intelligence (AI), and more specifically Generative Artificial Intelligence (GAI), was initially celebrated as the most innovative technology since the advent of smartphones (Barqaw & Abdallah, 2024). GAI platforms provide a variety of Application Programming Interfaces (APIs) tailored for content production, offering services such as content analysis, sentiment analysis, event extraction, summary generation, personalized recommendations, content editing, and visualization (Yi & Sun, 2024). The intersection of copyright law and AI-generated content presents unique challenges and raises important questions regarding the ownership, protection, and legal status of content generated by AI systems (Werzansky-Orland, 2024). Copying is prohibited (as it means that the work is not original), while inspiration is not only allowed but also encouraged (Abdus Salam, 2022). Even if the copied part is incorporated into a larger work or presented in a slightly altered form, it can still be considered infringement if the essential elements that define the original work are reproduced (Scheffer et al., 2022). Open AI has claimed that it is impossible to have an AI tool as advanced as ChatGPT without infringing on copyright materials and that the training material embedded in its GPT-4 model is protected material (Milmo, 2024). An important risk is that the fundamental principles of journalistic ethics, including truth, accuracy, objectivity and accountability, may face unprecedented challenges in this evolving paradigm (Ouchchy & Dubljević 2020).

The rise of artificial intelligence (AI) tools capable of generating images from text prompts, such as DALL·E, Midjourney, and Stable Diffusion, has sparked a revolution in digital creativity. These technologies enable users to produce realistic or stylized images within seconds, without the need for traditional artistic skills. However, the widespread use of AI-generated images presents complex challenges to existing copyright frameworks. The core legal questions center around authorship, intellectual property ownership, and the rights of original content creators whose work may have been used in training data.

One of the most fundamental legal challenges concerns questions of authorship and ownership. In a broader sense, a crisis refers to a situation in which an organization is unable to function normally, hindering the achievement of its objectives and threatening its very survival (Abrashi & Reçi, 2023). Traditional copyright law, particularly in the United States, is based on the notion of human creativity. According to the U.S. Copyright Office (2023), works created solely by non-human entities, such as AI systems, are not eligible for copyright protection. This means that images produced by an AI, without significant

human input, may fall into the public domain or exist in a legal gray area. As AI-generated content becomes more prevalent in creative industries, the lack of clear ownership may lead to disputes over rights and usage.

Another significant concern is the use of copyrighted materials in AI training datasets. Many generative models are trained on massive collections of data scraped from the internet, which frequently include copyrighted images, raising legal and ethical issues regarding authorship and intellectual property. This process occurs without the consent of the original creators, raising ethical and legal questions. Artists and photographers argue that their intellectual property is being used to train systems that could potentially replace them or devalue their work (Andersen, 2023). The New York Times filed a lawsuit against OpenAI, claiming its AI models were trained on copyrighted articles without permission. The case challenges the use of media content in AI, raising legal and ethical questions about copyright, fair use, and intellectual property. The outcome could reshape AI training practices and journalism licensing (The New York Times, 2023).

The lack of transparency in training data further complicates matters. Users generating AI images often have no way of knowing whether the output is derived from protected works. If an AI-generated image closely resembles a copyrighted image or replicates a distinctive artistic style, the legal liability is unclear. This has led to concerns about style appropriation, where AI models mimic the work of living artists without their permission, potentially infringing on their moral rights or diluting their brand.

As a response, some artists and organizations have called for the creation of opt-out mechanisms that allow creators to exclude their work from AI training datasets. Additionally, watermarking and digital fingerprinting are being explored as tools to identify and trace AI-generated content.

Watermarking and digital fingerprinting are techniques used to identify and trace digital content. Watermarking involves embedding visible or invisible markers directly into an image, video, or text to indicate its origin or authenticity. Digital fingerprinting creates a unique, hidden signature from the content's properties, allowing tracking and verification without altering the original file (Chesney & Citron, 2019). Both methods help detect AI-generated or manipulated content and protect intellectual property.

In conclusion, the intersection of copyright law and AI-generated images is a developing legal frontier. Current frameworks are struggling to adapt to the rapid pace of AI innovation, leaving artists, developers, and users uncertain about their rights and responsibilities. As AI continues to reshape creative industries, it is essential to develop clearer legal standards that balance innovation with respect for intellectual property.

Disinformation from AI-generated images

There is a growing concern that the advancement of artificial intelligence (AI) technology may produce fake photos, which may create confusion and decrease trust in photography (Zeyu et al., 2023). In digital media, the impact of AI in reshaping content creation and user interaction is profound (Califano & Spence, 2024). “The migration of the public unto online platforms, the full mediatization of everyday life, the transformation of individuals into media entities via social media, the emergence of new forms of bottom-up censorship, and the involvement of non-human actors (such as AI) as media communicators and producers, have profoundly reshaped contemporary society” (Saliu, 2024). The availability of information and its quality have a proportional relationship with decision-making (Raman et al., 2024). The generation of fake news, in text, image and video formats, seems to be increasing every day, reaching such levels that citizens may, at times, face difficulties in being accurately informed about what is happening in the world (Vericad & Váñez, 2022). Disinformation is a longstanding problem, but given that AI techniques present in the digital ecosystem create new opportunities to manipulate individuals effectively and at scale, numerous ethical concerns arise or worsen (Bontridder & Poulet, 2021). Deepfake video generators continue to be refined, seamlessly inserting any face into movies with nuanced expressions and lip movements. Deepfakes are synthetic media that have been manipulated to deceptively change an individual's appearance, voice, and mood (Helmus & Chandra, 2024). Deepfake technology has advanced and can now create convincing images (Hejase & Hussein, 2022). Those so inclined may use them for political, financial or ideological purposes to spread lies and undermine opponents (Baker, 2024). However, as of 2022, Diffusion Models (Rombach et al., 2022) and more common publicly accessible models such as Stable Diffusion and Midjourney have become the most popular choice for generating a variety of realistic images using text stimuli (Rombach et al., 2022). One condition is that many people today have social media as their main source of information. These platforms tend to dilute awareness of information sources, blur the distinctions between more or less reliable sources, and often have a business model that promotes not only negative but also improbable or "clickbait" stories at the expense of more honest ones and balanced news (Hausken, 2024). Malicious actors pose another threat by generating fake images and videos to represent fictional phenomena as fact (Park et al., 2024).

Conclusions

Addressing this issue shows that the impact of AI-enabled image and photography fraud and de-authentication undermines audience trust and poses a serious challenge in the field of media ethics. The ability of AI to create highly realistic images has raised the level of significant concerns about image authenticity and integrity. Difficult to detect methods, low cost of their use,

availability and ease of use of image generation models become major sources of threats to authenticity and copyright. The ongoing confrontation between emerging technologies and anti-plagiarism or content-detection measures is likely to become a persistent and complex challenge, making it increasingly difficult for audiences to discern authentic content from manipulated or AI-generated material. Particular focus should be given to future developments that include: ethical and transparency considerations: developing frameworks that prioritize ethics, considerations in image placement and classification technologies, including transparency in decision-making processes and respect for privacy and principles of justice, and copyright. Addressing these ethical concerns and finding professional solutions would contribute and ensure a coexistence between technological innovation and its use for social and material benefit and would demonstrate high performance in distinguishing the subtle differences between real and fake images created by AI. Then we would have the transparent announcement from the media about the generative image published and a good information for the audience about the interventions made in the generative image by AI.

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THE PHENOMENON OF GHOSTING IN DIGITAL COMMUNICATION

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Abstract

In recent years, the concept of ghosting has gained attention in both every day and academic communication. Scholars define it as the interruption of communication initiated by one person (temporary or permanent), with the intention of limiting or completely severing contact with individuals who negatively impact the relationship, often accomplished using one or more technological channels (LeFebvre et al., 2019). This paper analyzes scientific articles on the phenomenon of ghosting, published in full on Google Scholar between 2017 and 2024. The corpus was narrowed to 50 freely available full-text articles from humanities fields, including psychology, communication, and language studies, and categorized into four thematic groups: *articles focusing on personality traits, articles centered on individual characteristics, studies examining motivation, and research addressing the consequences of ghosting*. Research indicates that ghosting is driven by personal characteristics, coping styles, and the ease of ending contact in digital environments, while at the same time producing a range of negative emotional reactions, especially in long-term relationships and friendships. The research findings indicate that ghosting is a multidimensional phenomenon that can be explained only when all relevant factors are considered, including individual traits, motivation, consequences, and contextual influences. Furthermore,

the study highlights the need for a more precise definition of the phenomenon itself, as it manifests differently depending on the goals of individuals who employ this abrupt communication-termination style and on the victim's perception.

Keywords: *ghosting, digital communication, interpersonal relationships, online behavior, communication interruption*

1. Introduction

In the digital age, personal, social, and professional life is nearly inconceivable without the use of the internet and social media. This is reflected in statistical data highlighting the growth in the number of internet and social media users. According to Statista, 5.44 billion people globally use the internet, while social media users are estimated to number 5.07 billion, or 62.6% of the total global population.¹ Internet usage is more frequent among young people aged 16 to 29, with approximately 97% of them accessing the internet daily²³. These statistical findings highlight shifts in the dynamics of friendships, romantic relationships, and professional connections. The key feature of digital communication is primarily associated with the speed and ease of message exchange. However, digital communication also carries certain negative dimensions that are increasingly recognized in both academic research and everyday experience. "Contrary to the expectations that the internet will enable greater freedom and the autonomy of users, that they will be connected with others, eliminate spatial distance and facilitate learning, obtaining information and providing entertainment, the reality framed by digital experience reveals its negative side" (Stamenković, Aleksić & Đukić Živadinović, 2023, p. 201). The increasing emphasis on mediated communication creates opportunities for

¹Please review the details on the website: <https://www.statista.com/statistics/617136/digital-population-worldwide/> (Accessed: November 10, 2024).

² Please review the details on the website: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Young_people_-_digital_world (Accessed: September 29, 2024).

³In Serbia, data shows that in 2023, 75.4% of the population accessed the internet, while 82.3% of internet users had social media accounts. All respondents (100%) aged between 16 and 24 reported using the internet in the past three months of 2023. The most common online activities were sending messages via WhatsApp, Viber, Skype, and Messenger (93.2%), as well as making internet calls (94.0%). Social media platforms (Facebook, Twitter) were also frequently used by 82.3% of users. Please review the details on the website: <https://publikacije.stat.gov.rs/G2023/Pdf/G202316018.pdf> (Accessed: August 10, 2024).

abuse and manipulation in online relationships, with psychological and emotional impacts becoming more evident among users (Forrai et al., 2023; Pancani et al., 2022; Timmermans et al., 2021; LeFebvre et al., 2020).

One phenomenon that has been gaining attention in both every day and academic discussions, related to communication issues online, is called ghosting, so named due to the ghost-like disappearance in communication. It refers to the sudden end of communication between two people without any explanation, particularly in electronic interactions such as texting, emailing, and messaging (Merriam-Webster; June 18, 2024). Based on available information, the term "ghosting" was first included in the dictionary in February 2017⁴. The phenomenon of ghosting is defined by LeFebvre and colleagues as "Unilaterally ceasing communication (either temporarily or permanently) in order to block access to individuals leading to the dissolution of a relationship (either suddenly or gradually), typically carried out through one or more technological mediums" (LeFebvre et al, 2019, p. 134). In recent years, interest in the study of the ghosting phenomenon has grown, with the increasing prevalence of online interactions in various types of relationships fueling this research. According to a 2020 study by the Pew Research Center, individuals from all age groups reported encountering ghosting. It is most common among young people aged 18 to 29 (42%), with the percentage decreasing as age increases. Among those aged 30 to 49, 37% reported experiencing ghosting, while only 14% of those over 65 had this experience⁵. Other research indicates that abruptly ending online interactions is becoming more frequent, particularly among younger individuals, although this occurrence is also found in the general population at a notable rate (20-40%) (Freedman et al., 2019; LeFebvre et al., 2019).

Ghosting can happen in romantic, friendly, or professional relationships, whether between employees and employers, students and professors, or any other type of relationship (Brazeau et al., 2024; Fanti et al., 2023; LeFebvre et al, 2019; LeFebvre et al, 2020, LeFebvre & Fan, 2020; Freedman et al., 2022a; Freedman et al., 2019; Pancani et al., 2022; Powell et al., 2021; Forrai et al., 2023). When examining the factors contributing to the breakdown of professional communication, Brezo and colleagues identify three key elements: *the speed of information flow, the volume of work and information, and the perceived or actual immediacy in terms of professional priorities* (Brazeau et al., 2024, p. 2). Beyond external factors, internal factors, such as personality traits and personal assessments of the person ending the

⁴ Retrieved from the website: <https://www.merriam-webster.com/wordplay/ghosting-words-were-watching> (Accessed: June 18, 2024).

⁵ Please review the details on the website: <https://www.pewresearch.org/social-trends/2020/08/20/personal-experiences-and-attitudes-of-daters/> (Accessed: June 11, 2024).

communication, can also play an important role in the ghosting phenomenon. Factors such as a loss of interest, lack of attraction, inappropriate behavior by the other person, avoidance of confrontation or conflict, and concerns over safety in personal encounters (LeFebvre et al., 2019; Koessler et al., 2019) are all part of the spectrum of motivations for abruptly ending an online interaction. Additionally, some authors have explored the relationship between personality traits and the occurrence of ghosting in online spaces and have discovered that the so-called dark triad of traits is linked to the tendency to view ghosting as an acceptable way to end a relationship (Daraj et al., 2024). This is particularly evident in individuals with high scores in personality traits such as Machiavellianism (cynicism, manipulativeness), narcissism, and psychopathy (Jonason et al., 2021), who end short relationships by “disappearing” from the communication process.

The growing prevalence of ghosting as a method for ending interactions in various types of relationships, along with its significant emotional and psychological effects, has led to an increase in research on this phenomenon. As a result, questionnaires measuring the tendency to abandon a partner have been developed, and the corpus of analyzed studies includes assessments of the statistical parameters of these questionnaires and scales (Lopez et al., 2024; Husain et al., 2024; Herrera et al., 2024; Jahrami et al., 2023). While this phenomenon was previously identified as a strategy for ending romantic relationships (Nar & Luong, 2023; LeFebvre et al., 2019; Bagnas et al., 2022; Fanti et al., 2023; Freedman et al., 2022a), today, ghosting can also occur in non-romantic relationships, such as friendships and professional connections (Campaioli et al., 2022), as well as in both informal and formal interactions with others (Brazeau et al., 2024; Yap et al., 2021), and even between married couples (Nashrullah & Nuruddien, 2023) (See Table 1).

Table 1: The phenomenon of ghosting in different social relationships

Relationship type	Authors
Romantic relationship	LeFebvre et al., 2019 Khattar et al., 2023 Jain Nidhi, 2024 LeFebvre et al., 2020 Pancani et al., 2021 Šiša, 2022 Freedman et al., 2022a Helin Mereta, 2023 Pancani et al., 2022 Freedman et al., 2019 Powell et al., 2021 Bagnas et al., 2022 Manning et al., 2019

The phenomenon of ghosting in digital communication

	De Wiele & Campbell, 2019 Fanti et al., 2023 Prasertwit, 2019 LeFebvre & Fan, 2020 Freedman et al., 2022b Willis et al., 2023 Biocati et al., 2022 Koessler et al., 2019
Friendship	Campaioli et al., 2022 LeFebvre et al., 2019 Sukmana et al., 2022 Forrai et al., 2023
Professional relationship	Brazeau et al., 2024
Family relationship	Nashrullah & Nuruddien, 2023

As modern romantic relationships become increasingly reliant on online communication and the use of apps and networks, Pancani and colleagues have pointed out phenomena closely associated with ghosting. One of these is known as orbiting, where a person who ends a romantic relationship continues to monitor their ex-partner's activities on social media, occasionally liking the content they post (Pancani et al., 2022). Another phenomenon linked to ghosting is breadcrumbing, which focuses not on progressing a romantic relationship but rather on fulfilling a need for attention. In this online interaction, the manipulative person shows no interest in truly getting to know the person they send romantic messages to, frequently cancels plans, avoids initiating meetings, fails to engage in meaningful communication or relationship development, and is insecure or lonely, or they maintain a parallel relationship with two individuals (Navarro et al., 2020a; Khattar et al., 2023; Helin, 2023; Wilis et al., 2023). Another term discussed in studies of online romantic relationships is catfishing, which involves creating a false identity to initiate a romantic relationship. The aim is to deceive, targeting someone for an online romantic relationship that never comes to fruition (Rull García & Bove, 2022).

Some researchers have explored the impact of various forms of deception, abandonment, and psychological abuse in online dating among young people. One study, which focused on three psychological constructs—life satisfaction, loneliness, and helplessness—revealed that participants who experienced breadcrumbing or a combination of breadcrumbing and ghosting reported lower life satisfaction and heightened feelings of loneliness and helplessness. However, none of the psychological constructs studied showed strong correlations with the experience of ghosting (Navarro et al., 2020a). In contrast, other studies suggest that both ghosting and breadcrumbing have

negative effects on victims, increasing feelings of loneliness and helplessness while reducing life satisfaction and self-esteem (Gupta, 2022). A study that viewed orbiting and ghosting as forms of ostracism focused on the psychological effects of these behaviors, particularly social exclusion. The effects included the emergence of negative emotions, threats to basic needs fulfillment, event interpretation, and aggression. The authors also considered rejection as a strategy for ending a relationship, where the partner clearly communicates the reasons for ending the romantic relationship. The findings showed that participants experienced ghosting more intensely than rejection because the sudden end of interaction resulted in a stronger sense of social exclusion, due to the lack of feedback on the reasons for the breakup. No significant statistical differences were observed among the three categories of experience in relation to orbiting. The degree of social exclusion experienced by orbiting victims was somewhere between those who experienced ghosting and those who experienced rejection (Pancani et al., 2022). A study examining the correlation between personality traits and ghosting and breadcrumbing found no clear link between victims' personalities and breadcrumbing, but identified a negative correlation between extroversion and ghosting. This suggests that extroverted individuals are more resilient to ghosting, experiencing milder emotional consequences compared to introverted personalities (Helin, 2023).

This paper explores the academic literature addressing the phenomenon of ghosting. The objective is to analyze and summarize the findings of research papers that have investigated the topic of ghosting. Given that the term ghosting was first introduced into the dictionary in 2017, this year has been selected as the starting point for the analysis, which includes studies published until 2024 on Google Scholar. An additional reason for this analysis is the growing prevalence of unexpected relationship termination in online spaces, particularly among individuals of all age groups who use dating apps and social media platforms.

2. Methods

Through qualitative content analysis, academic articles published on Google Scholar from 2017 to 2024 were examined. The search was conducted using the keyword "ghosting," which helped identify articles where this term appeared in the title, abstract, or keywords. The inclusion criteria were:

1. A study had to explicitly address the phenomenon of ghosting (e.g., in the context of interpersonal relationships, communication, or psychological outcomes, and fell within various fields of the humanities, including psychology, communication studies, and language studies).
2. The study had to be either original research or a review article.

3. The full text had to be available.

Studies that only mention ghosting superficially, without an analytical focus were excluded.

The initial corpus of 67 studies was reduced to 50 based on the previously mentioned criteria. A qualitative approach was used for the content analysis, with coding guided by a combination of deductive and inductive strategies. All studies were read in detail to gain a general understanding and to identify preliminary themes. Subsequently, all relevant meaning units were identified across the studies, without any predefined categories. The codes were then grouped into thematic clusters based on similarities, relationships, and recurring patterns observed in the analyzed corpus. As a final outcome, four main categories were formed, integrating the key themes present in the literature. The resulting central categories (personality traits, individual characteristics, motivation, and the consequences of ghosting) emerged through repeated reading, connecting, and interpreting the content. These categories indicate the dominant directions of ghosting research in the analyzed literature. Coding was conducted by two coders, which ensured consistency through comparison of their codes and the reconciliation of discrepancies.

3. Results with discussion

By using the focus of the article as an indicator, four categories were identified, into which the analyzed articles were classified. These categories include:

- a. Articles that consider *personality traits* as an important factor in the context of ghosting;
- b. Articles that highlight *individual characteristics* as significant when analyzing the phenomenon of ghosting;
- c. Articles where the *motivation* of the person initiating ghosting was the primary focus of the research;
- d. Articles that explore the *consequences of ghosting*.

3a. *Personality traits*

Personality traits significantly influence individuals' behavior in social interactions (Furnham & Heaven, 1999 as cited in Jonason et al., 2009), particularly within romantic relationships (Botwin et al., 1997 as cited in Jonason et al., 2009). Research utilizing the Big Five personality traits has found a positive correlation between relationship stability, partner selection, and approaches to ending relationships (Botwin et al., 1997 as cited in Jonason et al., 2009). Conversely, studies have also examined the connection between emotional relationship behaviors and negative traits, especially those

categorized under the dark triad of personality traits. This triad, comprising narcissism, psychopathy, and Machiavellianism, has been linked to a predisposition for casual sexual encounters, a high number of sexual partners, and promiscuous attitudes, desires, and behaviors (Jonason et al., 2009). Narcissism is commonly associated with entitlement and superiority, Machiavellianism with cynicism and manipulateness, and psychopathy with callousness, cruelty, and interpersonal antagonism (Jonason et al., 2021). In examining relationship termination patterns related to dark triad traits, findings indicate that individuals scoring highly on dark triad traits view ghosting as an acceptable behavior, though only within the context of short-term relationships (Jonason et al., 2021). These results are consistent with earlier studies (Freedman et al., 2019; Koessler et al., 2019). The study further demonstrated that individuals with pronounced Machiavellian and psychopathic traits were more likely to engage in abrupt disappearances, while no significant connection was identified between narcissism and this method of ending romantic relationships (Jonason et al., 2021). Another study, which considered dark triad traits, secondary love styles, and gender as predictors of ghosting, found that women with high scores on the pragma love style, who have a pragmatic approach to selecting a partner based on their suitability for family life, were more inclined to abruptly leave their partners, while men did not exhibit this tendency. Additionally, high scores on the mania love style, characterized by intense emotional involvement and dependency, were associated with a lower likelihood of using ghosting as a breakup method among men, though no such trend was observed in women. Lastly, the agape love style, defined by selflessness and profound commitment to a partner, showed a negative correlation with ghosting among both men and women (Sulymka, 2022: 38–39).

In opposition to the dark triad of traits, there is a concept known as the light triad, which includes Kantianism, the inclination to treat others as ends in themselves rather than as means to an end; humanism, the belief in the inherent goodness of people; and faith in humanity. Individuals who score higher on the light triad traits are less likely to leave others without explanation. Conversely, narcissism, a component of the dark triad, increases the likelihood of employing ghosting as a method for ending relationships. Additionally, extroverts, compared to introverts, are more prone to abruptly end relationships through communication platforms. Considering attachment styles, be it secure, anxious, or dependent, the dependent style is negatively correlated with ghosting. Moreover, individuals exhibiting borderline personality traits are more inclined to leave others without providing an explanation. As for those who are ghosted, they tend to display the following characteristics: they possess traits from the dark triad, are extroverted, and exhibit borderline personality tendencies. Similar to the previous findings, the dependent attachment style shows a

negative correlation with experiencing ghosting. On the other hand, a secure attachment style acts as a protective shield against the negative impact of ghosting, while other attachment styles intensify the severity of negative experiences and perceptions (Di Santo et al., 2022).

The experience of ghosting elicits heightened emotional responses in participants, including anger, anxiety, and paranoia. This suggests that individuals scoring high on tests assessing pathological personality traits, such as narcissistic and borderline traits, tend to exhibit more intense emotional reactions when faced with an unexpected relationship termination. In relation to narcissistic traits, Fanti and colleagues discovered that individuals displaying traits of vulnerable narcissism, characterized by hypersensitivity to rejection and criticism, experience stronger negative psychological reactions and exhibit paranoid states. In contrast, grandiose narcissism does not exert a similar influence on behavior or emotional responses in participants (Fanti et al., 2023).

3b. Individual characteristics

Given that numerous individual, interpersonal, and relational factors play a role in shaping romantic relationships, certain studies on the phenomenon of ghosting have centered on examining specific attitudes and beliefs, such as self-esteem, sense of power, moral disengagement, assertiveness, empathic concern, and conflict resolution styles (Navarro et al., 2020b). This research found no evidence of a significant relationship between these socio-cognitive factors and either the intention or the act of abruptly ending a relationship without explanation. Of all the personal beliefs analyzed, only moral disengagement showed a positive but weak correlation with ghosting behavior and intentions, while self-esteem was positively associated only with the intention to ghost, not the behavior itself. Furthermore, hostile engagement as a conflict resolution style revealed a positive yet weak correlation with ghosting behavior and intentions. Conversely, assertiveness, empathy, and a sense of power did not exhibit any meaningful connection to the practice or intention of ending romantic relationships in the digital age (Navarro et al., 2020b).

Life in a digitalized world often leads to an overwhelming influx of information, inspiring a study to examine experiences on social media platforms, such as fear of missing out (FoMo), perceived victimization in abrupt relationship endings (ghosting), and ambiguous relationships (vaguebooking). The study also investigated the mediating role of these experiences in the relationship between personal traits, such as need for belonging, social comparison orientation, social identity, and histrionic personality, individual characteristics (gender, age), and mental health. The research confirmed a connection between increased social media use and a

heightened likelihood of experiencing fear of missing out, becoming a victim of sudden relationship endings, or being part of an undefined romantic relationship. These experiences can contribute to mental health issues among social media users. For example, victims of ghosting may experience negative emotions such as sadness, hurt, anger, disappointment, and related feelings. The results also showed that women are less likely than men to fall victim to sudden relationship terminations and are less preoccupied with missing out on social media. Older participants were found to dedicate less time to social media, enjoy better mental health, and demonstrate higher levels of self-esteem.

The authors suggest that there is also a positive relationship between the need for belonging and the fear of losing connections, with a more pronounced need for belonging linked to a reduced likelihood of experiencing unclear or suddenly ended relationships online, as these individuals tend to have a well-developed set of social skills. On one hand, a positive correlation was found between the need for comparison and the fear of missing out on connections, as well as the possibility of being abandoned in the online space. On the other hand, a well-established social identity supports mental health but is associated with both the fear of missing out on social connections and the potential for negative romantic experiences. Histrionic personality, with a strong need to build self-esteem through social approval and judgment, increases the likelihood of experiencing fear of missing out on social connections and being victimized in the context of both types of unhealthy online relationships (Astleitner et al., 2022).

3c. Motivation

A range of motivational factors contributes to the occurrence of ghosting as a method of ending a relationship. These include factors linked to the personality and behavior of the person doing the ghosting, as well as characteristics of the individual excluded from further interaction. External factors that may contribute to the termination of communication and a romantic relationship are also identified. The first group consists of loss of interest, the introduction of a new partner, negative traits, issues with commitment and attachment, lack of readiness for a relationship, inadequate communication skills, and a tendency to avoid confrontation (Pancani et al., 2022; LeFebvre et al., 2019; LeFebvre et al., 2020; Timmermans et al., 2021; Yap et al., 2021; Keffer, 2024). On the other hand, those who end relationships through ghosting often report that the reasons lie in the partner's personality and the perception that they are unable to accept a breakup, as well as protective reasons (Manning et al., 2019; Timmermans et al., 2021; LeFebvre et al., 2019). Those left behind are criticized for being boring, falling in love too easily, and exhibiting a fear of commitment and attachment (Timmermans et al., 2021). Racist and

misogynistic views are often cited as reasons for cutting off communication, as such beliefs conflicting with the views held by those who end the interaction (Dean Marshall et al., 2024; Timmermans et al., 2021). Concerns about negative reactions from the person being ghosted are especially prominent when that person displays negative behaviors such as a controlling attitude, rudeness, manipulation, increased intrusiveness, or sending unwanted sexual content (Timmermans et al., 2021; Koessler et al., 2019). This can lead to fears that an in-person encounter could result in verbal abuse or aggressive outbursts, making online breakups a form of self-defense (Timmermans et al., 2021). Additionally, behaviors such as intrusiveness, excessive attachment, incompatibility, and unpleasant interactions are given as reasons for justifying the sudden end of a relationship (Timmermans et al., 2021; Koessler et al., 2019). However, participants may experience guilt and remorse after choosing to indirectly end a relationship by disappearing from their network (Dean Marshall et al., 2024; Koessler et al., 2019), although this often comes with a sense of relief (Freedman et al., 2022a). Some participants associate the ability to end communication through social networks and dating apps with a sense of control over the situation, as they fear the other party might try to change their mind or manipulate them (Timmermans et al., 2021).

In exploring the reasons behind rejection and indirect termination of romantic relationships, Freedman and colleagues found that safety concerns are a key factor in choosing this method to end a relationship. While it is more likely that safety concerns contribute to the sudden breakup (ghosting), it remains unclear whether the gender of the person excluded from the relationship influences this decision (Freedman et al., 2022b). Regarding the motivation to abruptly stop communication with a partner, Freedman identifies three main factors. These include the ease of rejection, as the relationship is online, and there is no chance for direct confrontation with the partner, followed by concerns about reputation and safety. By ending the relationship through disappearing from all networks, the feelings of guilt and discomfort typically associated with face-to-face encounters are reduced. Social reputation, based on the importance of social perception and approval, plays a significant role, so those who highly value this aspect are more likely to use ghosting to abruptly end a romantic relationship or friendship. The third factor is safety concerns, which impact the decision to end online interactions due to a potentially aggressive partner or verbal or psychological abuse (Freedman et al., 2022b).

This phenomenon can also be observed in toxic friendships, where it is shaped by personality traits of the friend who is left behind (Yap et al., 2021). In addition to the traits that can explain the occurrence of sudden interaction termination, relationship incompatibility, differing values, and diverging opinions can also result in the cessation of communication (Dean Marshall et al., 2024; LeFebvre et al., 2020). Alongside these factors, the technological

aspects of mediated communication can encourage and facilitate ghosting, as many users view mediated forms of rejection and ending romantic relationships as an easier and more convenient way to leave a partner (Dean Marshall et al., 2024; Timmermans et al., 2021). Moreover, given the technologically altered environment and the rise of various channels for finding romantic partners, many dating app users admit they turn to these platforms out of boredom. However, using specialized dating apps does not relieve their boredom, which is why they sometimes feel that uncreative texting with others leads to the conclusion that disappearing from the network is the only viable solution (Narr & Luong, 2023).

When examining the demographic characteristics of individuals who use ghosting to end a romantic relationship, research has indicated that younger people are more likely to engage in this behavior (Timmermans et al., 2021). As for gender, the findings are mixed. Some studies suggest that gender is not a significant factor (Biolcati et al., 2021; Timmermans et al., 2021), while others show that women are more likely than men to use ghosting due to safety concerns (Freedman et al., 2022b). Freedman and colleagues found that different beliefs about relationships can impact the intention and actions of suddenly abandoning a partner online. They compared participants who held beliefs in fate with those who believed in growth within romantic relationships. The core of fate-related beliefs revolves around the idea of soulmates, while growth beliefs emphasize mutual effort to develop a relationship, without the notion of fate as something fixed and predestined. Those who believed in fate, as opposed to growth beliefs, were more likely to view ghosting positively, had prior experiences with it, and intended to engage in it again (Freedman et al., 2019). These findings were corroborated in a subsequent study, which added that avoidant attachment styles were common among those who ghosted, while anxious attachment styles were more prevalent among those who were unexpectedly left in the online space (Powell et al., 2021). Moreover, studies suggest that those who have previously been victims of ghosting later adopt the practice of disappearing from networks as an acceptable behavior in romantic relationships (Sukmana et al., 2022; Powell et al., 2022; Freedman et al., 2019; Timmermans et al., 2021; Navarro et al., 2020b; LeFebvre et al., 2019).

In a study using the semi-structured interview method, eight themes were identified that explain the reasons for the sudden end of communication in relationships (Wu & Bamishigbin, 2023). These include: a clear cause, avoidance of confrontation, short-term orientation, ghostees as socially inferior, ignoring then blocking, attempts by ghostee to reach out, mixed and evolving feelings, and recognition of harm. Apart from romantic partners, the cessation of communication in online spaces also happens in friendships and family relationships. The common reasons for abandoning romantic partners and

friends are the perceived incompatibility of values and traits between the individuals involved (Wu & Bamishigbin, 2023).

Avoiding direct confrontation with a partner when ending a romantic relationship is becoming an increasingly common experience among users of digital media and social networks. This form of relationship termination is preferred by many for several reasons. One of them is the desire to avoid the pressure of a face-to-face encounter, which would involve explaining the reasons for the breakup and dealing with both one's own and the other person's emotions. Research also indicates that abandonment and disappearance from romantic relationships are more common in shorter relationships, where the level of commitment between partners is lower compared to those that end through direct communication. Distress and negative emotions are higher for those who are left this way than for those who do the leaving, while those who choose a distant breakup experience less stress than those who end things directly. Additionally, breakups that involve completely disappearing are characterized by greater use of avoidance/withdrawal, distant/mediated tactics, and a lack of open confrontation and positive tone/self-blame. The authors clarify that in relationships where partners have developed a close and intimate connection, direct conversation is the preferred strategy for ending the relationship, whereas avoidance as a breakup method is more frequent when the desired level of closeness is lacking between the partners (Koessler et al., 2019). When there is difficulty articulating the reasons for the breakup due to poor communication skills, or a fear of direct confrontation with the emotional responses of both partners, the one making the decision to end the relationship is more likely to choose complete exclusion from communication platforms (Wu & Bamishigbin, 2023).

3d. Consequences of Ghosting

Given that ghosting is increasingly prevalent in the modern online dating world (Freedman et al., 2019), research efforts are directed toward understanding this behavior as a strategy for ending relationships in online spaces, as well as its resulting consequences. Humans are inherently social beings and seek to form and maintain relationships while avoiding social isolation. Social networks and specialized dating sites are integral parts of life in the new mediatized communication environment. Access to these communication platforms has raised various questions about how romantic relationships begin and end, as well as the psychological effects of such forms of interaction. Although communication on these platforms often occurs between complete strangers, its conclusion carries psychological and emotional consequences for the person who is left without any explanation.

The practice of abruptly ending a relationship can negatively affect the mental health of the person experiencing ghosting, leading to consequences such as stress, depression, anxiety (Lad, 2023), and negative emotional experiences like sadness, loneliness, helplessness, and a decrease in life satisfaction (Gupta, 2022). Other effects include a reduced sense of belonging, low self-esteem, feelings of loss of control, and a diminished sense of life meaning (Freedman et al., 2022a). Moreover, victims of ghosting often experience changes in their self-perception and an increase in feelings of self-criticism, self-doubt, hopelessness, and mistrust of future romantic relationships (Thomas & Dubar, 2021). Timmermans and colleagues point out that after the sudden cessation of interaction, without any explanation for the decision, some individuals feel sadness and hurt, while others express feelings of anger, frustration, and disappointment (Timmermans et al., 2021). Additionally, long-term effects on mental health, particularly in terms of self-esteem, well-being, trust in others, and depression, have also been identified (Šiša, 2022; Timmermans et al., 2021). However, a more recent study found that ghosting does not have a lasting impact on self-esteem, which the authors attribute to the fact that such experiences are now expected and considered part of the new normal in online relationships (Forrai et al., 2023; Šiša, 2022). The same group of authors notes a difference in the effects on mental health based on whether the relationship being ended was romantic or platonic, with the termination of friendships being linked to an increased likelihood of depressive symptoms, while no such effect is observed in romantic relationships (Forrai et al., 2023). This is consistent with findings from a study examining the relationship between psychological factors such as life satisfaction, helplessness, and loneliness, and experiences of manipulative relationships or breadcrumbing, and sudden abandonment in online environments, ghosting. The study found that individuals who experienced sudden abandonment did not suffer from mental health issues. Specifically, no significant connection was found between the experience of an abrupt breakup and the psychological factors measured. This supports the idea that individuals who were left may have developed effective coping strategies, and that factors such as individual characteristics, e.g., less rumination, lower social anxiety, and psychological flexibility, as well as the shorter duration of the relationship, contributed to this. The lack of a significant effect on life satisfaction, loneliness, and helplessness from a sudden breakup is also explained by the growing prevalence of unexpected relationship terminations online (Navarro et al., 2020b). While ghosting does affect mental health, one study also found that attachment styles may play a mediating role in how ghosting impacts mental health, although this effect was not statistically significant (Lad, 2023).

In one qualitative study focused on the experiences of individuals who have been excluded from relationships, data was collected regarding how they

interpret this type of experience. The metaphors used by the participants, such as wall, knife in the back, door slammed in their face, reflect the emotional state of the recipients of the messages, as well as the psychological and emotional consequences of ghosting. Many describe this action as creating a wall and initiating a silence without any clear explanation. The result is confusion and questioning about the meaning of this action and what they may have done wrong, alongside the feeling of an unresolved story with no closure or sense. Some participants link this behavior in the online space with a sense of power, where the power rests with the person who ends the contact and interaction, leaving the abandoned individual completely dependent on the other person's next move (metaphor of tied hands). However, the intensity and depth of the consequences depend on the level of significance, intimacy, and closeness of the relationship, with the experience being more painful and the suffering greater when a friendship ends in this way, compared to a relationship with a stranger (Campaioli et al., 2022). One study showed a correlation between the degree of closeness and negative emotional experiences (directed at oneself and others) associated with an abrupt ending of the relationship, meaning that as feelings of intimacy increase, so does the intensity of emotions such as sadness, fear, confusion, regret, remorse, shock, guilt, anger, and even a desire for revenge (Prasertwit, 2019).

LeFebvre and colleagues also point out that while the experience of an unexpected breakup may not lead to trauma, it can still be accompanied by pain and discomfort related to uncertainty, ambiguity, hurt, distress, and the need to create a narrative that provides a satisfying explanation for the reasons behind the relationship's end. Among the main reasons given by participants to explain why they were left, several are mentioned: the presence of an alternative partner (as the dominant reason), confusion, unwillingness for a relationship, loss or lack of interest, insufficient personal traits, incompatibility, and misalignment of sexual desires, (LeFebvre et al., 2020). Lerida and colleagues conducted a thematic analysis of the experiences of those who were left without an explanation. They identified three key themes in the narratives of victims of an unexpected breakup. These are euphoric-toxic issues with the partner who initiated the breakup and disappeared without explanation (Masala effect), bittersweet problems with the breakup initiator (Matcha effect), and "smoke in the eye" issues with the partner who ends the romantic relationship (Lapsang effect). The first theme, labeled the Masala effect, is marked by a shift from the euphoric phase of the romantic relationship to toxic behavior by the partner, while the second theme involves mixed feelings of disappointment and confusion that, although bitter, might motivate the person to accept the end of the romantic relationship and move forward. The third theme is connected to feelings of sadness, with "smoke in the eyes" being a metaphor for unclear reasons for the breakup, where sadness, confusion, and anger cloud the person's

perspective (Lerida et al., 2023). A qualitative study focusing on interviews with young people highlighted several significant themes in the experiences of ghosting victims. These include justification, confusion over taking responsibility, avoidance of future vulnerability, and the role of technology (Holmes, 2022).

By comparing three methods of ending a romantic relationship, direct rejection, sudden cessation of communication (ghosting), and orbiting in romantic relationships (orbiting), Pancani and colleagues gained insights into the specific psychological responses triggered by indirect forms of relationship termination. In the initial phase, feelings of unexpectedness and surprise emerge, with ghosting and orbiting producing more intense reactions than direct breakups, alongside confusion and disorientation due to the lack of clarity in the behavior of the person who abandons their partner. The second phase involves guilt tied to a sense of responsibility, anger, and sadness, which the authors attribute to an unfulfilled need for belonging, as ghosting and orbiting are considered forms of social exclusion. Furthermore, the intensity of these emotional responses following a breakup depends on the significance of the relationship, with greater emotional investment leading to stronger emotional reactions. The third phase begins with acceptance of the new reality, detaching from the past relationship, and moving on to potential new partners (Pancani et al., 2022).

In several studies, the phenomenon of sudden abandonment in the online space is often viewed as a strategy influenced by new communication technologies, while strategies used by those who are left after a breakup are also examined (LeFebvre & Fan, 2020; Pancani et al., 2021). Dating apps create an environment conducive to the occurrence of sudden disappearance, with some authors arguing that this form of abrupt relationship termination is often incidental (Timmermans et al., 2021). In the context of gaming theory, Šiša highlights that these online spaces provide users with entertainment and excitement, while simultaneously offering them a shield from the risks associated with direct encounters, thanks to the option of withdrawing from relationships without offering any explanation. Šiša notes that the role of technology is vital for understanding the emergence of ghosting. Although this breakup mechanism is related to dating site users, the relationship they form with technology significantly contributes to the interpretation of new communication methods and their endings (Šiša, 2022). Another significant conclusion from this qualitative study is that ghosting, as a strategy for discontinuing communication, has become completely normalized in a hyper-connected yet uncertain environment, with many users having been both initiators and victims of this experience (Šiša, 2022).

Ghosting can be viewed as a strategy for ending a romantic relationship, with some authors recognizing four potential forms of indirect

breakups, which arise from the intersection of the duration categories (short-term and long-term) and the breakup interval (sudden and gradual) (see Chart 1).

		Sudden			
Short-term ⁶		Quickly disappears without notice and leaves opportunity to reinstate communication.	Quickly disappears without notice and plans not to reinstate communication.		Long-term
		Slowly disappears over time and leaves opportunity to reinstate communication.	Slowly disappears over time and plans not to reinstate communication.		
		Gradual			

Chart 1: Indirect ghosting disengagement strategies, according to LeFebvre et al., 2019, p. 140.

Unlike mutual involvement in initiating a breakup, the phenomenon of ghosting is marked by a one-sided cessation of communication and interaction, creating both physical and, above all, psychological distance. In the first scenario, uncertainty is minimal, which allows for greater control over what happens after the relationship ends, whereas with ghosting, uncertainty is heightened for various reasons. The consequence of this uncertainty can be the abandoned person's inability to confront the breakup, accept the separation, or close the story, leading them to feel stuck in the mourning process (LeFebvre et al., 2019). The person who ends communication with their partner takes the primary role, leaving the abandoned person to navigate the process of abandonment and deal with its personal and relational effects. A significant percentage of respondents reported that they did not use any strategies, as the experience did not negatively impact their mental health or well-being. Effective coping strategies for handling online abandonment include focusing on the future, accepting the new reality, and moving forward, as well as engaging in alternative communication with others who are still in contact with the ex-partner, redirecting focus to other things, and initiating new interpersonal

⁶ In this chart, the x-axis represents the duration (short-term and long-term), with short-term linked to the breakup initiator's desires (focused on themselves), while in the case of long-term, the initiator has decided to permanently end the relationship without any indication that it could be rekindled. The y-axis shows the interval chosen by the initiator for the breakup, which may be either gradual or sudden (LeFebvre et al., 2019).

relationships and intimacy. Another helpful strategy is maintaining a positive focus on oneself, which contributes to the development of a healthy and prosocial life for the person who has been abandoned.

Ineffective uncertainty-reduction strategies include both active and passive information seeking, which refers to the person who has been abandoned attempting to directly or indirectly contact their ex-partner, as well as monitoring their activities through social media. This leads to an intensification of suffering and pain, as concluded by the authors (LeFebvre & Fan, 2020). The uncertainty that arises after ghosting has been examined in the context of the need for closure, taking into account the attributions assigned to the person who ends the relationship and the time needed to recognize that abandonment has taken place, the study shows that individuals with a stronger need for closure tend to be more confident in their judgments when faced with uncertain situations, such as the experience of unexpected abandonment in an online context. Additionally, emerging adults (aged 18 to 29) have less definite attribution assessments but require less time to conclude that they have been ghosted or abandoned in the online space. Arvidson and Flygfors link this finding to the ability of younger individuals to identify the signals of newer forms of relationship termination, as well as to their experiences, given that the topic is frequently discussed and such experiences are more common among them than among those over 30 (Arvidsson & Flygfors, 2023). These results highlight the widespread occurrence of increasingly unstable and less clearly defined relationships among young people. While this may shield them from excessive emotional investment in relationships with strangers online, it also impedes their attempts to form meaningful romantic and friendships based on trust and commitment.

4. Conclusion

In recent years, the term ghosting has gained increasing popularity in both every day and academic discussions. This can be attributed to the influence of technology on communication practices, the emergence of new spaces for meeting people and forming romantic and friendship connections, and the shift in relationships with existing social networks. Apart from technological factors, which have made it easier to form different types of relationships in the online space, researchers have explored the motivations of those who suddenly cut off all communication with others, as well as the personality traits associated with the intention and practice of ending a relationship in this way. Additionally, the emotional consequences experienced by both those who do not initiate the breakup and those who do have become significant points of investigation. The authors found that the main emotional responses include confusion,

disorientation, feelings of guilt, sadness, hurt, anger, frustration, and disappointment. Over the long term, the effects on mental health can compound, as individuals left without explanation may experience lower self-esteem and difficulty trusting others in the future. The results regarding depression, however, remain unclear. Sudden abandonment and permanent cessation of communication in short-term online relationships are considered acceptable forms of behavior, while in relationships with a longer duration and a certain degree of commitment and closeness, ghosting is deemed an inappropriate model for ending a romantic relationship, as the authors concluded. More intense emotional reactions are found in friendships that end through complete disappearance and exclusion.

Recent studies, however, show that this practice is becoming more common among users of social media and dating platforms, and as a result of these new experiences, people are becoming less emotionally reactive to these forms of ending romantic relationships. On one hand, this supports the idea that individuals have developed coping skills when dealing with communication issues, but on the other hand, it suggests that such behavior has been normalized and is increasingly seen as an acceptable mode of functioning in contemporary romantic and friendship networks. Additionally, this should be viewed in the context of the overwhelming flow of information that floods online users, leading them to a state of apathy and indifference, as well as the creation of new behavioral norms that are unhealthy and could seriously disrupt personal functioning and self-image, as well as perceptions of others. Moreover, the lack of response increases anxiety in any situation, and the use of technology to form romantic and friendly relationships seems to contribute to the emergence of counterproductive effects, with alienation, distrust, and lack of intimacy being the most prominent outcomes. These emotional effects for participants in the ghosting process point to the need to reassess responsibility for one's actions in the digital realm of romantic and friendship relationships, as the responsibility lies with the network users and specialized apps, rather than the technology itself.

The research findings indicate that ghosting is a multidimensional phenomenon that can be explained only when all relevant factors are considered, including individual traits, motivation, consequences, and contextual influences. Furthermore, the study highlights the need for a more precise definition of the phenomenon itself, as it manifests differently depending on the goals of individuals who employ this abrupt communication-termination style and on the victim's perception. In this regard, understanding the motivation of those who engage in ghosting may contribute to the development of targeted programs or workshops promoting healthier models of ending communication in digital spaces, as well as strategies for protecting users of social networks and specific applications.

With respect to socio-psychological consequences, it would be beneficial to conduct longitudinal research that could show how the effects of ghosting develop over time. Additionally, more empirical studies with clear operationalizations are needed to examine the relationships between personality traits, motivation, and the consequences of ghosting. This could lead to the refinement of existing theoretical perspectives and the establishment of a more robust and comprehensive theoretical model of ghosting.

While the phenomenon of ghosting is being studied more extensively, it is evident that this is just the beginning, as many questions remain unanswered and require further investigation. Some of the questions that remained outside the scope of previous research relate to the influence of social and cultural context on the occurrence of ghosting, as well as the role of algorithmic systems, platform design, and user anonymity in facilitating this type of behavior in digital environments.

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