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Symposium

Preface: Crises and Development – The Impact of Multiple Crises on the Evolution of EU Law

The Faculty of Law and Political Sciences of ELTE Eötvös Loránd University, in cooperation with the Embassy of the Kingdom of Belgium, organised an international conference on the occasion of the 20th anniversary of Hungary's accession to the European Union and the Hungarian presidency of the Council of the European Union on 11–12 April 2024 in Budapest.

With the conference 'Crises and Development – The Impact of Multiple Crises on the Evolution of EU Law', the Faculty wanted to express its continued commitment to European integration. On 1 May 2004, Hungary rejoined the family of European nations, led by the conviction that the long-term freedom, safety and prosperity of our country can only be safeguarded within the European Union. This conviction has only become stronger over the past two decades.

The purpose of the conference was to analytically reflect on the evolution of EU law under the influence of multiple crises. The underlying assumption of the conference was that the EU has been confronted with crises that have affected very different aspects of its operation, but had at least two common features. First, the magnitude of the crises had the potential to rattle the very foundations of European integration. Second, at the beginning of each crisis, the EU did not seem to have clear-cut competences suitable for meeting the challenges. Yet, despite the challenges posed by the numerous crises, the EU always found ways to identify appropriate competences or develop creative legal solutions within its constitutional restraints. In other words, even if certain measures could not be foreseen fifteen or twenty years ago, the inherent capacity to implement these measures was provided for by the founding treaties. As a result, the operation of the EU may have changed in several areas quite significantly. What is more, the change in the perception of certain fields may have been even more significant. But the constitutional fabric on which this operation is based stayed as it was. This allows us to be optimistic about the resilience of the European Union and its ability to respond to future crises.

The conference commenced with a two-day plenary session, which was opened with welcome speeches by Prof. Dr. László Borhy, Rector of the University, Dr. János Bóka,

* Prof. Dr. Pál Sonnevend, Dean of the Faculty of Law and Political Sciences, ELTE Eötvös Loránd University.

Minister for European Affairs and H.E. Jeroen Vergeylen, Ambassador of the Kingdom of Belgium to Hungary. Prof. Dr. Koen Lenaerts, President of the Court of Justice of the European Union, gave the keynote speech, in which he highlighted the role of the Court of Justice in addressing crises. The panels of the plenary session addressed four crises of the many the EU has been confronted with: the consequences of the financial crisis of 2008–2009, the rule of law and democracy backsliding, the resilience of the internal market, as well as the challenges posed by the war in Ukraine. The lectures of the plenary session were concluded by Daniel Calleja Crespo, Head of the Legal Service of the European Commission. The plenary session was followed by lectures and discussions in workshop panels which explored the delicate interplay between EU law and national law in various fields of public and private law, including internal market law, criminal law, family law and tort law.

The event brought together prominent scholars of European law and gave Hungary, as well as ELTE Eötvös Loránd University, the opportunity to discuss the far-reaching consequences of the crises of the past decades on the development of EU law. The significance of the conferences was demonstrated not only by the excellence of speakers but also by the high number of participants. The event constitutes a contribution to European scholarship. It emphasises the inestimable value and importance of academic exchange, signals the will and ability to develop common ideas that support the future of Europe and, above all, promotes a positive image of the European Union as a community of law. The conference showed that the exchange of ideas and experience between scholarship and practice is essential for meeting the challenges of our age.

This issue of the ELTE Law Journal offers a selection of the written versions of lectures delivered at the conference for those interested in EU law and integration.

The Impact of Multiple Crises on the Evolution of EU Law

Abstract

Against the backdrop of the multiple crises that the EU has faced over the last two decades, this keynote speech, delivered by President Lenaerts to celebrate the 20th anniversary of Hungary's accession to the EU, examines three areas of EU law in the light of the common values enshrined in Article 2 of the Treaty on European Union. First, it assesses the impact of the financial crisis, not only on the legal framework of Economic and Monetary Union but also on primary EU law more broadly. Second, it analyses how the case law relating to the COVID-19 pandemic has helped clarify the limits that may be imposed on free movement in the context of an exceptional public health crisis. Finally, it explores the rule of law crisis, considering its broader implications for understanding the scope and significance of the values enshrined in Article 2 TEU. This threefold examination supports the contention that, while these crises have raised new and complex legal questions – requiring the Court of Justice of the EU to resolve them expeditiously – the Court, in interpreting EU law, must remain respectful of the limits imposed on its jurisdiction by the Treaties and of the foundational values on which the EU is founded.

Keywords: Court of Justice of the EU, evolution of EU law, financial crisis in the EU, EMU, rule of law crisis, right to free movement during the COVID-19 pandemic, Article 2 TEU, EU values

I Introduction

It is a pleasure to be here at ELTE Law School in Budapest and I am honoured to celebrate the 20th anniversary of Hungary's accession to the European Union (EU) with you today. I would like to congratulate the organisers of this conference for having brought together

* Koen Lenaerts is President of the Court of Justice of the European Union and Professor of European Union Law, Leuven University. All opinions expressed herein are personal to the author.

a broad array of distinguished experts and I look forward to the further fruitful discussions on the always-relevant subject of the impact of multiple crises on the evolution of EU law.

The theme of this conference is of key importance when looking back on the EU since the 2004 enlargement. One of the EU's founding fathers, Jean Monnet, noted in his memoirs that: 'Europe would be built through crises, and [...] would be the sum of their solutions.'¹ This statement was very prescient and indeed, over the course of the last few decades, the EU has reckoned with numerous challenges, three of which being: the financial crisis, the COVID-19 crisis and the rule of law crisis. These crises all had different sources and impacts on the lives of Europeans. Every crisis has also had a profound effect on the evolution of EU law. Its substantive and procedural provisions had to be interpreted and applied in an unprecedented context. However, as the saying goes: 'In the midst of every crisis, lies great opportunity'. An opportunity to return to the basics and to remind ourselves of our common foundations and values, as listed in Article 2 of the Treaty on the European Union (TEU), namely human dignity, freedom, democracy, equality, the rule of law and respect for human rights. In my address, I would like to examine, in particular, three areas of EU law.

First, I shall explore the financial crisis, and the effect that it had on the understanding of Economic and Monetary Union law, but also on EU primary law more broadly.

Second, I shall examine how the case-law arising from the COVID-19 pandemic has helped clarify the acceptable limits to free movement of persons in such exceptional circumstances, notably by interpreting the public health derogation set out in the Citizenship Directive.²

Third and finally, I shall take a look at the rule of law crisis. Here, I shall not only focus on how the respect for the rule of law may be pursued through the procedures before the Court of Justice of the European Union (Court or Court of Justice), but also on how that crisis contributed to a better understanding of the scope and effect of the Article 2 TEU values, of which the rule of law forms part.

This examination will show that while these crises raised new and challenging questions of law in respect to both EU primary and secondary law provisions, as well as compelled the Court to resolve them rather expediently, the Court remained, in interpreting those provisions, mindful of the limits to its jurisdiction as enshrined in the Treaties and of the foundational values which underpin the EU legal order.

¹ Jean Monnet, *Memoirs* (tr. by Richard Mayne, Third Millenium 1978, London) 417.

² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77 and corrigendum [2004] OJ L229/35.

II The Financial Crisis

The 2008–2009 financial crisis struck the EU heavily, requiring a Treaty revision in order to allow for the establishment of a financial and economic safeguard in the form of the European Stability Mechanism (ESM). The simplified Treaty revision procedure introduced by the Lisbon Treaty allows the European Council, deciding unanimously, to amend in whole or in part ‘Part Three of the FEU Treaty’, which concerns ‘Union policies and internal actions’. To date, it has only been applied once, to pave the way for the establishment of the ESM by the Member States whose currency is the euro in 2012. The European Council inserted a new third paragraph in Article 136 TFEU, enabling the Member States whose currency is the euro to – and I quote – ‘establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole’. This same provision provides that such financial assistance must be subject to strict conditionality.

1 The EMU Provisions of the Treaties

The *Pringle* judgment arose from a challenge to this Treaty revision. Thomas Pringle, a Member of the Irish Parliament, alleged that this was an unlawful amendment of the Treaties. The Irish Supreme Court notably had doubts as to whether that new Treaty provision resulted from a correct application of the simplified revision procedure, and thus referred to the Court questions on this matter.

The Court explained that it had to ascertain in particular whether the Treaty amendment at issue concerned solely ‘Part Three of the FEU Treaty’. The mere fact that the amendment at issue formally concerned Part III of the TFEU was not sufficient. The Court also verified that it did not entail any alteration of Part I of that Treaty by encroaching on the EU’s competences in the areas of monetary policy³ or the coordination of the economic policies of the Member States,⁴ and that it did not increase the Union’s competences.

The Court found that the amendment at issue fulfilled all those conditions. A stability mechanism such as the ESM would not encroach upon the EU’s exclusive competence on monetary policy. Its objective consists of ensuring the stability of the euro area as a whole, and thus not merely ensuring price stability.⁵ Of course, the stability of that area as a whole may have a positive impact on the stability of the euro as a currency.⁶ That impact is indirect, however, and an economic measure cannot be qualified as ‘monetary’ on the sole ground that it influences the stability of the euro or prices in the euro area indirectly. The envisaged stability mechanism should in fact be regarded as a measure of economic policy as

³ Article 3(1)(c) TFEU.

⁴ See in particular Article 5(1) TFEU.

⁵ See Article 127(1) and 282(2) TFEU.

⁶ Judgment of the Court (Full Court), 27 November 2012, Case C-370/12 *Thomas Pringle v Government of Ireland and Others*, EU:C:2012:756, para 56.

it aims to complete the EU regulatory framework for the strengthened economic governance of the EU. However, it was not found to undermine the EU's competence to coordinate the economic policies of the Member States as it differs in nature and scope from a mere 'coordination'.⁷ Moreover, the Court ruled out Article 122(2) TFEU as a potential legal basis for establishing the ESM. That provision concerns *ad hoc* financial assistance to a Member State and is therefore not adapted to the establishment of a permanent mechanism aiming to safeguard the stability of the euro area as a whole.⁸ Lastly, the Court explained that the amendment did not confer any new competences on the EU, as it created no new legal basis for the EU to undertake action that was not possible prior to its entry into force.⁹ The Court emphasised that the Member States could only make use of the possibility offered by the new provision if they complied with the rules and principles governing the EU's economic and monetary policy. Thus, the 'strict conditionality' for granting financial assistance under the new mechanism aimed to ensure that it operates 'in a way that will comply with [EU] law,' including measures coordinating the Member States' economic policies.¹⁰

Having established that the European Council Decision amending the TFEU was validly adopted pursuant to the simplified amendment procedure, the Court then proceeded to carry out a more specific analysis, examining whether the Member States' adherence to the ESM Treaty would comply with the rules and principles governing the EU's economic and monetary policy.

The Court found, for analogous reasons to those explained in its reply to the first question, that the activities of the ESM as envisaged in that treaty do not encroach upon the EU's exclusive monetary policy¹¹ and that they do not run counter to the provisions governing the EU's coordination of economic policies of the Member States either.¹²

The judgment was particularly awaited for the interpretation of Article 123(1) TFEU and the famous 'no bail-out' clause in Article 125(1) TFEU. The obstacle of the first provision was easily overcome, as the prohibitions it contains, in particular to grant credit to public bodies of the Member States or of the EU, are addressed exclusively to the ECB and the Member States' central banks. The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition.¹³

As to the 'no bail-out clause', it provides that neither the EU nor the Member States can be 'liable for [...] the commitments' of another Member State or 'assume [those commitments]'. That does not mean that the Union or a Member State may not generally grant any form of

⁷ Ibid, para 64.

⁸ Ibid, para 65. The Court also referred to Article 143(2) TFEU. Although that provision enables the Union, subject to certain conditions, to grant mutual assistance to a Member State, it covers only Member States whose currency is *not* the euro (referred to as Member States 'with a derogation' in that provision) (Ibid, para 66).

⁹ Ibid, paras 74–76.

¹⁰ Ibid, para 69.

¹¹ Judgment in *Pringle*, paras 96 and 97.

¹² Ibid, paras 110 and 111.

¹³ Judgment in *Pringle*, para 125.

financial assistance to a Member State. Article 125(1) TFEU must be interpreted in the light of its objective to ensure that the Member States follow a sound budgetary policy. Economic and monetary policy rests on the principle that the logic of the market applies to the Member States when they enter into debt. Indeed, maintaining or reinforcing budgetary discipline allows them to borrow at lower rates. To avoid undermining that incentive, financial support must be limited to situations where it is indispensable to safeguard the financial stability of the euro area as a whole and must be subject to strict conditionality.¹⁴

Those conditions were found to be fulfilled in the case of the ESM. Notably, ESM's financial support is reserved to situations where an ESM member's difficulties in obtaining financing on the market threaten the stability of the euro area as a whole and is subject to strict conditionality tailored to the financial instrument chosen.¹⁵ Those features preserve the incentive for the Member States to conduct sound budgetary policies.

Finally, it is worth mentioning that the *Pringle* ruling also brought about important clarifications on the possibility for the EU institutions to participate in mechanisms established outside the framework of the Union, such as the ESM. Indeed, the ESM Treaty allocates various tasks to the Commission and the ECB. These institutions, in liaison with one another, notably assess requests for stability support and their urgency, negotiate a Memorandum of Understanding detailing the conditionality attached to the financial assistance granted and monitor compliance with the said conditionality. The Court found that their tasks fall within a non-exclusive area of competence, namely economic policy, and that they do not entail any power to make decisions on their own. Any activities pursued by those institutions within the ESM Treaty commit solely the ESM as such.¹⁶

The Court also noted that these tasks do not alter the essential character of the powers conferred on those institutions by the Treaties. The Commission, in line with its role as specified in Article 17(1) TEU, by exercising these tasks, promotes the general interest of the Union, namely the financial stability of the euro area as a whole and the ECB, by virtue of its duties within the ESM Treaty and in line with its mandate as envisaged in Article 282(2) TFEU, supports the general economic policies in the Union. Their participation in the operation of the ESM Treaty was thus found to be compliant with EU primary law.¹⁷

The judgment in *Pringle* has a long legacy in many other cases brought in the wake of the financial crisis. For example, the dividing line clarified in that judgment between the EU's monetary and economic policies was central to the reasoning in the famous *Gauweiler* case, in which doubts arose as to whether the ECB had disregarded its mandate when developing its outright monetary transactions (OMT) programme.¹⁸ In particular,

¹⁴ Ibid, para 136.

¹⁵ Ibid, para 142.

¹⁶ Ibid, paras 160 and 161.

¹⁷ Ibid, paras 162 to 165.

¹⁸ Judgment of the Court (Grand Chamber) of 16 June 2015, Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, EU:C:2015:400.

the Court reasoned by analogy when it held that the mere fact that that programme could contribute indirectly to the stability of the euro area did not mean that it relates to economic policy rather than monetary policy.¹⁹ Both the objectives of a measure and the instruments that it uses are relevant to decide whether it belongs to monetary or economic policy. Since the purchases in secondary sovereign bond markets envisaged in the context of the OMT programme could be implemented only in so far as necessary for the maintenance of price stability, they could be regarded as a measure of monetary policy. That was not called into question by the fact that comparable purchases relate to economic policy when carried out by the ESM, because the latter's objective is to stabilise the euro area as a whole.²⁰ The Court also confirmed that the OMT programme was compatible with the prohibition of monetary financing of Member States in the euro area. To reach that conclusion, the Court applied, by analogy, its reasoning on Article 125 TFEU in *Pringle* to Article 123 TFEU. Article 123 TFEU prohibits all financial assistance from the ESCB to a Member State, but does not preclude, generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State.²¹ The Court confirmed that approach in *Weiss*, in which the ECB's public sector asset purchase programme (PSPP) was at issue.²²

2 Clarifications to Other EU Primary Law Provisions

Cases arising from the financial crisis, apart from delineating the boundaries of the EMU provisions set out in the relevant Treaty articles, also clarified other 'constitutional' matters relating to the Court's jurisdiction and the EU institutions' obligations under EU primary law.

Firstly, in *Pringle*, the Court confirmed that it had jurisdiction to rule on the case. Various Member State Governments, as well as the Council and the Commission, argued that the jurisdiction of the Court was limited, if not excluded, by the fact that the questions related to the validity of a European Council decision, which amended EU primary law. Under Article 267 TFEU, the Court has no power to assess the validity of the Treaties.

However, the Court pointed out that the European Council is now an EU institution listed in Article 13(1) TEU. Its decisions can therefore in principle be subject to judicial review, on condition of course that the challenged measure really is to be attributed to the European Council and not to the representatives of the Member States.²³ Moreover, in a Union based on the rule of law, compliance with all procedural and substantive conditions for a simplified revision procedure should be subject to judicial review by

¹⁹ Ibid, paras 51–52.

²⁰ Ibid, paras 63–64.

²¹ Ibid, paras 94–95.

²² Judgment of the Court (Grand Chamber) of 11 December 2018, Case C-493/17 *Heinrich Weiss and Others*, EU:C:2018:1000, especially paras 50, 51, 61, 63 and 103.

²³ Judgment in *Pringle*, para 44. See also Order of the Court (First Chamber) of 16 June 2021, Case C-685/20 P *Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member States*, EU:C:2021:485, para 51.

the Court. The Court therefore asserted its jurisdiction and recalled in that respect that according to the first subparagraph of Article 19(1) TEU, it is its constitutional role to ensure that the law is observed in the interpretation and application of the Treaties.

Secondly, an important clarification was brought by the cases following *Pringle*, namely cases involving actions for annulment of ‘ESM measures’ such as Memoranda of Understanding and actions seeking to obtain damages from the Union based on the involvement of the ECB or the Commission in the adoption of such measures. In *Ledra Advertising v Commission and ECB*,²⁴ *Mallis and Others v Commission and ECB*,²⁵ and in *Council v K. Chrysostomides & Co. and Others*,²⁶ the Court recalled its position from the *Pringle* ruling and confirmed that ‘the activities pursued by those institutions within the ESM Treaty commit the ESM alone’, which ‘fall[s] outside the EU legal order’. It follows that such acts, and also more generally Eurogroup measures, cannot form the subject matter of an action for annulment before the EU Courts.²⁷ However, the involvement of the Commission and the ECB in the activities of the ESM does not exonerate these institutions from their duty to act in conformity with EU law. That applies in particular to the Commission, which acts as the ‘Guardian of the Treaties’. This means for example that the EU might incur non-contractual liability if the Commission fails to identify a violation of EU law in the conditionality reflected in a Memorandum of Understanding that it has negotiated with the beneficiary Member State.²⁸

Thirdly, the *Ledra Advertising* judgment confirms that even when the EU institutions act outside of the framework of the Treaties, such as when the Commission concludes Memoranda of Understanding with Member States in the ESM context, they are bound to respect the Charter of Fundamental Rights of the EU (Charter) and to ensure that those memoranda are consistent with the fundamental rights guaranteed by the Charter.²⁹ Unlike for Member States, Article 51(1) of the Charter does not contain any limit as to its applicability to the actions of the institutions.³⁰ The financial crisis thus also helped clarify the constitutional boundaries of the Charter, and that institutions remain bound to respect it even when not directly implementing EU law.

²⁴ Judgment of the Court (Grand Chamber) of 20 September 2016, Joined Cases C-8/15 P to C10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, EU:C:2016:701, para 45.

²⁵ Judgment of the Court (Grand Chamber) of 20 September 2016, Joined Cases C-105/15 P to C109/15 P *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)*, EU:C:2016:702, paras 53 and 54.

²⁶ Judgment of the Court (Grand Chamber) of 16 December 2020, Case C-597/18 P *Council v K. Chrysostomides & Co. and Others*, EU:C:2020:1028, para 131.

²⁷ See, to that effect, judgment of 20 September 2016, *Mallis and Others v Commission and ECB* (n 25) para 61.

²⁸ See, to that effect, judgment of 16 December 2020, *Council v K. Chrysostomides & Co. and Others* (n 26) para 96.

²⁹ See, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others v Commission and ECB* (n 24) para 67.

³⁰ See, to that effect, Opinion of Advocate General Wahl in Joined Cases *Ledra Advertising and Others v Commission and ECB* (n 24) point 85.

III The COVID-19 Crisis

The COVID-19 public health crisis is a recent memory to us all, and its effects are still felt strongly everywhere today. The uncertainty and exceptional nature of this crisis led many Member States to take similarly exceptional measures to counter the spread of the coronavirus. Challenges to these measures have recently come before the Court questioning, in particular, the compatibility of these measures with fundamental aspects of EU law, such as free movement of people and the Citizenship Directive.³¹

*Nordic Info*³² was a case arising out of the rules imposed in Belgium during the health crisis linked to the COVID-19 pandemic. In the spring of 2020, the Belgian Government prohibited non-essential travel having as its point of departure or arrival Belgium, on the one hand, and the countries of the EU, the Schengen Area and the UK, on the other, provided that those countries were designated as ‘red zones’ in the light of their epidemiological situation. That prohibition was based on a three-tiered country classification system, comprising green, orange and red countries. Green meant low risk and no travel restrictions, orange meant moderate risk and a travel warning, and red meant high risk and a travel ban for non-essential travel. Moreover, any traveller coming from a country classified as a red zone was required, in Belgium, to undergo screening tests and observe quarantine. Sweden was first briefly classified as red in the summer of 2020, then as orange.

Nordic Info, the applicant in this case, is a travel agency who cancelled all of its scheduled trips between Belgium and Sweden for the summer 2020 period as a reaction to those classifications. It subsequently filed a civil action before the Brussels Court of First Instance and sought damages. Nordic Info argued, *inter alia*, that the Belgian measures restricted the right to free movement guaranteed by the Citizenship Directive and that there was no legal basis for such a derogation. The Brussels Court of First Instance essentially asked the Court whether the ban on leaving Belgium, the compulsory screening tests and quarantine measures complied with the freedom of movement.

In this case, the Court was called upon to interpret Articles 27 and 29(1) of the Citizenship Directive, which allow for the adoption of measures restricting free movement on public health grounds. It was the first time that the Court had to interpret those provisions in the context of a global health emergency such as the spread of the COVID-19 disease. The Court followed a six-step analysis in interpreting those provisions of the Citizenship Directive, which I shall summarise as follows.

First, the Court found that the emergency measures had been enacted with non-economic aims and sought to stop the spread of the COVID-19 disease, which had been classified as a pandemic by the WHO.³³

³¹ Directive 2004/38/EC (n 2).

³² Judgment of the Court (Grand Chamber) of 5 December 2023, Case C-128/22 *Nordic Info BV v Belgische Staat*, EU:C:2023:951.

³³ Judgment of 5 December 2023, *Nordic Info* (n 32) paras 50 to 54.

Second, the Court explained that measures restricting the freedom of movement on public health grounds may cover both components of that freedom, namely the right of entry and the right of exit. It observed that limiting both components may be necessary in order to curb the spread of the disease. Moreover, measures restricting freedom of movement which a Member State may adopt on public health grounds under the Citizenship Directive not only cover measures that impose a partial or total ban on entering or leaving the national territory but all measures that adversely affect free movement by rendering it less attractive, such as an obligation for travellers entering that territory to undergo screening tests and to observe quarantine.³⁴

Third, whilst the Citizenship Directive applies to measures limiting the right of exit to all Union citizens, including nationals, the same does not hold true in respect of the right of entry. When nationals exercise their right of entry into their own Member State, the Directive does not apply.³⁵

Fourth, the Court observed that, unlike measures limiting free movement on public policy or public security grounds, which must be adopted in the form of an act of individual application, measures grounded in public health concerns may be of general application.³⁶

Fifth, the Court went on to examine whether the Citizenship Directive contains conditions and safeguards that are to be attached to measures restricting free movement on public health grounds. The relevant provisions of the Directive Articles 30 to 32, contain terms and expressions calling to mind measures of individual application. Logically, the question that arose was whether those conditions and safeguards also applied to measures of general application. The Court replied in the affirmative, since those provisions give effect to the principle of legal certainty, the principle of good administration and the principle of effective judicial protection, all of which are general principles of EU law that apply to all measures restricting free movement, regardless of the form in which they are adopted. In concrete terms, this meant that the measures of general application that restrict free movement on public health grounds must be brought to the attention of the public by means of an official publication and by means of sufficient official media coverage. In addition, those measures must be open to challenge in judicial and, where appropriate, administrative redress procedures, either directly or incidentally.³⁷

Sixth and last, the Court observed that measures restricting free movement on public health grounds must comply with the principle of proportionality. That compliance implies that national authorities must carry out an analysis of the appropriateness, necessity and proportionality (*stricto sensu*) of the measures at issue.³⁸

³⁴ Ibid, paras 57 to 59.

³⁵ Ibid, para 60.

³⁶ Judgment of the Court (Grand Chamber) of 5 December 2023, *Nordic Info* (n 32) paras 62 to 64.

³⁷ Ibid, paras 65 to 76.

³⁸ Ibid, paras 76 and 77.

Whilst it was for the referring court to examine whether the measures at issue complied with the principle of proportionality, the Court sought, nonetheless, to provide it with useful guidance based on the documents relating to the main proceedings.

In particular, the Court noted that the appropriateness of a given measure must be assessed in relation to the scientific data commonly accepted at the time of the facts in the main proceedings, the trend in cases of infection and mortality and the degree of uncertainty that might prevail in that regard.³⁹ The Court also drew the attention of the referring court to the fact that similar measures were adopted by the other Member States in a joint effort to curb the spread of the disease.

In regards to necessity and assessing whether less restrictive yet equally effective measures exist, the Court noted the large margin of discretion enjoyed by the Member States in the field of public health, given the precautionary principle.⁴⁰ In assessing whether in the case concerned less restrictive responses to the spread of COVID-19 would have been sufficient, account had to be taken of the overall epidemiological situation in Belgium at the time, as well as the extent to which the Belgian health services were overstretched, and ultimately, the need for these measures for the overall protection of the population.⁴¹

Finally, in regards to proportionality *stricto sensu*, the Court emphasised the balancing that must be struck between the public health objective pursued against the free movement rights of Union citizens and their families, the respect of their private and family rights guaranteed under Article 7 of the Charter, as well as the freedom to conduct business of legal persons, in this case *Nordic Info*, under Article 16 of the Charter.⁴² The importance of the objective pursued must be proportionate to the seriousness of the interference with these rights.

In regards to a ban on leaving the Belgian territory, the Court observed that the contested measures did not prevent all exits from that territory but was limited to non-essential travel, such as leisure travel and tourist trips. Moreover, that ban was lifted as soon as the Member State of destination was no longer classified as a red zone. Regarding the compulsory screening measures, the Court noted that, because of the rapidity of the tests and the limited interference with the Charter rights at issue, those measures contributed to fulfilling the aim of containing and curbing the spread of the COVID-19 virus.⁴³ As to measures imposing a compulsory quarantine for travellers coming from a Member State classified as a red zone, the Court observed that those measures appeared, subject to verification, to comply with the principle of proportionality, read in the light of the precautionary principle, for two main reasons. First, there was a significant probability

³⁹ Ibid, para 82.

⁴⁰ Ibid, para 90.

⁴¹ See to that effect, *ibid*, para 91.

⁴² Ibid, paras 92 and 93.

⁴³ Ibid, paras 95 and 96.

that such a traveller would be infected by the virus, thereby passing it on to other persons. Second, screening tests were not entirely reliable at that time.⁴⁴

The *Nordic Info* ruling provides two interesting clarifications to the derogations contained in Articles 27 and 29(1) of the Citizenship Directive, applied to the extraordinary circumstances of the COVID-19 pandemic. First, the scope of those derogations itself was confirmed, covering both measures of entry and exit, as well as restrictive measures of general application. This wide scope reflects the particular nature of the public health derogation. If a Member State has scientific evidence of an epidemic or a pandemic, it is likely that comprehensive restrictive measures will have to be imposed on the general public to protect the health of the population. A more restrictive reading of the scope of Articles 27 and 29(1), and the types of measures justified under the public health derogation, could render attempts to ‘curb the spread or risk of the spread of a disease’ ineffective, thereby jeopardising the objective of that derogation.

Second, and relatedly, Member States have a wider discretion in the public health context, which will affect any analysis of the proportionality of restrictive measures arising from a health crisis as extraordinary as COVID-19. This wider margin is related to the scientific uncertainty that persisted throughout the COVID-19 crisis and justified the imposition of protective measures. It was often precisely because of incomplete information that restrictive measures were enacted, in view of the potential risks.

However, in the final analysis, the restrictive measures taken must still be balanced against the free movement rights at issue, but also against potential interferences with other Charter rights. Indeed, various rights guaranteed under the Charter may be affected by these measures and the courts will therefore have to balance the objective of the measures against numerous potential interferences with fundamental rights.

All of this has a bearing on any future challenges to restrictions on free movement law brought about by the COVID-19 pandemic or any future pandemic or epidemic.

IV The Rule of Law Crisis

As you all know, respect for the rule of law is inherent in the EU legal order. More generally, it serves to create and to safeguard the bonds of solidarity and mutual trust between the Union’s Member States. Respect for this value, along with the other values enshrined in Article 2 TEU, is thus essential in order to ensure that the pillars of the EU legal order stand strong.

The *sui generis* constitutional structure of the EU enables it to uphold the values on which it is founded and to attain the objectives set out in the Treaties. This requires the EU institutions and the Member States to respect the vertical and horizontal allocation of powers as established by the authors of the Treaties. For the Court of Justice, this means that

⁴⁴ Ibid, para 97.

it is bound to uphold that structure via Treaty interpretation without modifying it, as such modification would disturb the checks and balances on which the EU is founded. Thus, the Court of Justice, whilst being fully committed to upholding the rule of law within the EU and tasked by the first subparagraph of Article 19(1) TEU to do so, it must, in carrying out its mission, respect the limits set to its own jurisdiction.

Article 19(1) TEU entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. Indeed, the second subparagraph of that provision states that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. The Court first operationalised this subparagraph of Article 19(1) TEU in the *Portuguese Judges* judgment, which involved a Union’s challenge to measures reducing the salary of Portuguese judges, arguing that they violated the principle of judicial independence. In its judgment, the Court explicitly linked that Article 19(1) TEU to the values of the EU espoused in Article 2 TEU, specifically the rule of law. It found Article 19(1) TEU to be a ‘concrete expression’ of the rule of law.⁴⁵

The rule of law crisis resulted in many cases before the Court, which have confirmed the status of the Article 2 TEU values, most importantly the rule of law, as protected under Article 19(1) TEU and as part of the right to effective judicial protection under Article 47 of the Charter.⁴⁶ I wish to highlight two aspects of these cases. First, the procedural avenues by which the rule of law may be upheld before the Court of Justice. Second, the way in which the rule of law crisis allowed the Court to clarify the status of Article 2 TEU values.

1 Procedural Avenues by which to Protect the Rule of Law

Regarding the procedural avenues for invoking Article 19(1) TEU and Article 47 of the Charter before the Court of Justice, a distinction must be drawn between infringement actions and preliminary references.

In the context of infringement actions, the application of Article 19(1) TEU only requires that the independence of the courts of the defendant Member State, which may be called upon to rule on questions relating to EU law, is adversely affected by the national measure(s) or practice(s) challenged by the Commission or another Member State. If that is the case, the Court of Justice will find that Article 19(1) TEU applies and proceed to examine the merits of the action.⁴⁷ Given that infringement actions seek to determine whether the defendant

⁴⁵ Judgment of the Court (Grand Chamber) of 27 February 2018, Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117, para 32.

⁴⁶ See eg, *ibid*, paras 35 and 41.

⁴⁷ Judgment of the Court (Grand Chamber) of 24 June 2019, Case C-619/18 *European Commission v Republic of Poland (Independence of the Supreme Court)*, EU:C:2019:531, paras 55–59; and judgment of the Court (Grand Chamber) of 5 November 2019, Case C-192/18 *European Commission v Republic of Poland (Independence of ordinary courts)*, EU:C:2019:924, paras 104–107.

Member State infringes EU law in general and in an objective manner, there is no need for a relevant dispute before the national courts.⁴⁸

The situation is different with regard to preliminary references. Indeed, Article 19(1) TEU cannot change the function of the Court of Justice in the context of this procedure, which ‘is [...] to help the referring court to resolve the specific dispute pending before that court’.⁴⁹ Hence, the need to safeguard the EU judicial architecture cannot go as far as transforming the preliminary reference mechanism into a form of infringement action.

As the Court of Justice observed in *Miasto Łowicz*, access to the preliminary reference procedure is made conditional upon the existence of a connecting factor between the interpretation of Article 19(1) TEU (and Article 47 of the Charter) sought by the referring court and the dispute before it.⁵⁰

It is rather straightforward to establish the connecting factor between Article 19(1) TEU and the dispute in the main proceedings in cases where the judges whose independence is being threatened are parties to those proceedings. In order to ensure compliance with the rule of law, those judges must have access to effective remedies before an independent court of law. Since Article 19(1) TEU produces direct effect, applicants may rely on that Treaty provision in order to have a court set aside conflicting national measures.

As the Court of Justice has pointed out, that connecting factor may be of a substantive or a procedural nature. For example, in the *Portuguese Judges* case, it was substantive since the referring court had to decide whether it should annul administrative decisions reducing the salaries of members of the Tribunal de Contas (Court of Auditors) on the ground that the national legislation providing for such reduction was incompatible with Article 19(1) TEU.⁵¹

In certain cases, that connecting factor is procedural. Indeed, the Court has declared admissible preliminary references that relate to procedural questions of national law concerning judicial independence raised *in limine litis*, before the referring court can, as required, rule on the substance of the case, for example the question of whether the panel of judges who delivered the judgment under appeal was formed properly.⁵²

⁴⁸ Judgment of the Court (Grand Chamber) of 26 March 2020, Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa v Płocku v Skarb Państwa – Wojewoda Łódzki and Others*, EU:C:2020:234, para 47.

⁴⁹ Ibid. See also judgment of the Court (Grand Chamber) of 20 April 2021, Case C-896/19 *Republika v Il-Prim Ministru*, EU:C:2021:311, para 48.

⁵⁰ Judgment of 26 March 2020, *Miasto Łowicz v Prokurator Generalny* (n 48) para 48.

⁵¹ Judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (n 45) para 12 and judgment of the Court (Second Chamber) of 7 February 2019, Case C-49/18 *Carlos Escribano Vindel v Ministerio de Justicia*, EU:C:2019:106.

⁵² See, for example, judgment of the Court (Grand Chamber) of 6 October 2021, Case C-487/19 *W.Ż.* (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), EU:C:2021:798, para 94; Judgment of the Court (Grand Chamber) 16 November 2021, Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa v Mińsku Mazowieckim and Others*, EU:C:2021:931, para 49; and judgment of 29 March 2022, Case C-132/20 *BN and Others v Getin Noble Bank S.A.*, EU:C:2022:235, para 67.

By contrast, in *Miasto Łowicz*,⁵³ any connecting factor was missing, since an answer to the questions referred by the national courts was not objectively needed for the resolution of the disputes in the main proceedings. Those questions, which were of a general nature, sought to determine whether the legislative reforms affecting the disciplinary proceedings applicable to judges called into question the principle of judicial independence within the meaning of Article 19(1) TEU. Those questions arose in disputes that related, firstly, to the payment of expenses incurred by a Polish town in the performance of certain tasks entrusted to it in respect of government administration and, secondly, to criminal proceedings brought against certain persons as a result of their involvement in kidnappings, in which an exceptional reduction in the sentence was anticipated. Although the references adequately stated the reasons which prompted the questions on the interpretation of Article 19(1) TEU,⁵⁴ they did not establish a connecting factor between the requested interpretation and its objective need for a resolution of the disputes in question.⁵⁵

In a judgment *G. and others*⁵⁶ rendered at the start of this year, in Joined Cases C-181/21 and C-269/21, the Court held two further Polish references to be inadmissible.

The first reference was from a court sitting in a three-judge panel. During the course of proceedings, one of those judges expressed doubts as to the status of the panel as a ‘court’ in the view of how another judge had been appointed in light of the recent judicial reforms in Poland. The doubting judge, acting alone, thus referred questions relating, *inter alia*, to Article 19(1) TEU and Article 47 of the Charter and whether the panel could be considered an independent and impartial tribunal established by law. The Court held that, although every court is obliged to verify whether it constitutes an independent or impartial tribunal,⁵⁷ the judge who referred the questions was not able to act alone in a way that could take into account the Court’s interpretation of those provisions, for example, where appropriate, to recuse another judge.⁵⁸ The questions referred therefore did not meet an objective need linked to a decision which that judge might take. They were consequentially hypothetical, and thus inadmissible.

The second reference was from a court in single judge formation, questioning whether a definitive order, adopted by a panel of three judges, where one of the judges had been appointed under the procedure introduced as a result of the Polish judicial reforms was in conformity with EU law. The Court also held this reference to be inadmissible, noting that national law did not grant the referring court jurisdiction to apply its interpretation of EU law to the definitive order.⁵⁹ It also noted that the questions referred related to a part of the

⁵³ Judgment of 26 March 2020, *Miasto Łowicz v Prokurator Generalny* (n 48).

⁵⁴ *Ibid*, para 41 and 42.

⁵⁵ *Ibid*, paras 52 and 53.

⁵⁶ Judgment of the Court (Grand Chamber) of 9 January 2024, Joined Cases C-181/21 and C269/21 *G. and Others v M.S. and X.* (Appointment of judges to the ordinary courts in Poland), EU:C:2024:1.

⁵⁷ Judgment of 9 January 2024, *G. and Others* (Appointment of judges to the ordinary courts in Poland) (n 56) para 68.

⁵⁸ *Ibid*, para 69.

⁵⁹ *Ibid*, para 76.

procedure that was definitively closed, as the order was no longer subject to appeal. The questions thus related to a general assessment, disconnected from the requirements of the dispute.⁶⁰

A third procedural avenue, actions for annulment, has allowed the Court to add important clarifications related to the scope and effects of the Article 2 TEU values, to which I now turn.

2 The Status of the Article 2 TEU Values

Cases arising from the rule of law crisis have allowed the Court to rule on fundamental questions as to the status of the said values. First, what is the legal ‘value of values’ in the EU legal order? Stated differently, are they ‘merely a statement of policy guidelines or intentions’ that lack any binding legal effects? Is the enforceability of values a political question? The Court of Justice replied in the negative to those questions in the so-called *Conditionality* judgments, ruling that the values laid down in Article 2 TEU are imbued within the entire body of EU law. These judgments concerned a challenge to the validity of a Regulation which imposed rule of law conditionality for the protection of the EU budget.⁶¹ Hungary and Poland brought actions for annulment, alleging, *inter alia*, that ‘the rule of law’ does not lend itself to a precise definition and the abstract nature of that concept confirmed that the Article 2 TEU values are political, not legal in nature.⁶² In that regard, the Court held – and I quote – that ‘Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States’.⁶³

The Court of Justice has consistently held that respect for the Article 2 TEU values lies at the core of EU membership. On the one hand, a candidate State for EU membership must align its own constitution and national identity with those values as a *conditio sine qua non* for accession. Acquiring the status of ‘Member State’ is, therefore, a ‘constitutional moment’ for the State concerned since at that very moment, the legal order of the new Member State is deemed by the ‘Masters of the Treaties’ to uphold the values on which the EU is founded.

On the other hand, after accession, the Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That ongoing commitment means that there is ‘no turning back the clock’ when it comes to respecting the

⁶⁰ Ibid, paras 77 and 78.

⁶¹ Judgment of the Court (Full Court) of 16 February 2022, Case C-156/21 *Hungary v European Parliament and Council of the European Union*, EU:C:2022:97; and Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union*, EU:C:2022:98.

⁶² Judgments of 16 February 2022, *Hungary v Parliament and Council* (n 61) para 222.

⁶³ Judgments of 16 February 2022, *Hungary v Parliament and Council* (n 61) para 232, and *Poland v Parliament and Council* (n 61) para 264.

values contained in Article 2 TEU. Accession is the starting point in value protection and not the finish line. A Member State can always improve its own level of value protection. However, EU law precludes such a Member State from falling into democratic backsliding. ‘Compliance with those values’, the Court of Justice has held, ‘cannot be reduced to an obligation which a candidate State must meet in order to accede to the [EU] and which it may disregard after its accession’.⁶⁴ The Member States must respect those values ‘at all times’.⁶⁵

This means that claims based on national identity may not call into question the values on which the EU is founded. In the recent *Commission v Poland* case Poland had argued that upholding the Commission’s complaints would be *ultra vires* and ‘amount, for the Court, to exceeding its own powers and those of the European Union’.⁶⁶ By not leaving Poland the last say in the organisation and jurisdiction of its own judiciary, the Court would not be respecting the national and constitutional identity of the Polish State pursuant to Article 4(2) TEU.⁶⁷

The judgment in *Commission v Poland* explicitly states that the values enshrined in Article 2 TEU cannot be derogated from in the name of national identity. The respect for these values, such as the rule of law, is a requirement for EU accession and must be maintained throughout EU membership. There is thus no basis for arguing that the requirements deriving from Article 2 TEU may adversely affect the national identity of a Member State under Article 4(2) TEU. That provision must be read taking into account the provisions of the same rank, namely Article 2 and the second subparagraph of Article 19(1) TEU.⁶⁸

While Article 4(2) TEU gives a certain degree of discretion to Member States in implementing principles of the rule of law, this discretion does not extend to the result to be achieved. The values which Member States sign up to on accession, particularly the rule of law and what that value entails, must be respected at all times and cannot be undermined by reference to a Member State’s particular constitutional model.⁶⁹

V Concluding Remarks

To conclude, this brief and necessarily selective examination of the Court’s case law confirms that the EU legal order has indeed evolved in times of crisis. The understanding of core provisions of EU law, such as the Treaty articles on the EMU and Articles 2 and 19(1) TEU, has been deepened and refined through judgments arising from such exceptional

⁶⁴ Judgments of 16 February 2022, *Hungary v Parliament and Council* (n 61) para 126, and *Poland v Parliament and Council* (n 61) para 144.

⁶⁵ Judgments of 16 February 2022, *Hungary v Parliament and Council* (n 61) para 234, and *Poland v Parliament and Council* (n 61) para 266.

⁶⁶ Judgment of 5 June 2023, Case C-204/21 *European Commission v Republic of Poland (Independence and private life of judges)*, EU:C:2023:442, paras 60 and 61.

⁶⁷ See to that effect, *ibid*, para 61.

⁶⁸ *Ibid*, para 72.

⁶⁹ See, to that effect, *ibid*, para 74.

circumstances. Procedural issues addressed in these cases, such as whether the Court has jurisdiction over certain EMU issues or whether the referred rule of law questions are admissible, have also been clarified.

The Court has also made clear that even in times of crisis, the EU institutions and Member States alike must continue to comply with EU law. Furthermore, the EU institutions must respect the Charter even when they are not implementing EU law and may incur non-contractual liability. Additionally, the preliminary reference procedure cannot be transformed into an infringement action through allegations concerning rule of law violations. Finally and fundamentally, even in the face of crisis, Member States may not regress on underpinning principles, such as the Article 2 TEU values, that they sign up to upon accession to the EU.

Preserving these values is, however, not entirely an end in itself. One should never forget that the principal aim pursued by the EU is, as stated in Article 3(1) TEU, the promotion of peace. The European Union, which was created in the aftermath of Second World War is, and remains fundamentally, a peace project. It has been a guarantee for peace and stability in the region in the last 70 years. The current worrying international context in which all Europeans live and the experience of living through the past crises should reinforce our awareness of the inestimable value of this achievement. These crises have however forged new links in the chain that unites all of us within the EU legal order. I am sure that this chain will hold just as strong through any further crises that may come our way.

Striking a Balance: EU Law, National Security and Procedural Guarantees in Hungarian Immigration Procedures and the Lessons of the GM Case

Abstract

In the GM case, the Court of Justice of the European Union condemned the Hungarian legal practice of restricting the right to know the reasons for a decision when national security is at stake. The case emphasises individual rights in relation to state interests, highlighting the challenges in legal remedies involving classified data.

EU integration requires mutual respect between Member States and the EU, balancing law, public order and national security. While Member States possess procedural autonomy, their rules must align with EU law's principles of equivalence and effectiveness. The balance between national security and procedural safeguards in immigration decisions is a broader issue. The involvement of secret services and restricted access to case files raise fairness concerns in other Member States as well. The decision in the GM case is a landmark judgment that clarifies the obligations of EU Member States when handling asylum cases involving national security concerns. It underscores the necessity of maintaining the balance between national security and the protection of fundamental rights, thereby ensuring that asylum seekers have access to a fair and transparent legal process. The GM case illustrates a general problem with Hungary's immigration procedures. In any case, practices that compromise constitutional principles are considered unconstitutional, regardless of the implications associated with the EU.

Keywords: national security, procedural rights, access to documents, reasoning, migrants

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I Twenty Years On: Persistent Ambiguities in EU Legislative Competencies

Considering the accession of a Member State to the European Union (EU), the concept of change is of paramount importance. The fulfilment of accession prerequisites requires significant adjustments and the obligations associated with membership continually demand modifications in the legal system and legal practice, requiring proactive behaviour. Yet, even 20 years after accession, there remain areas where legislative competencies and the interpretation of certain obligations arising from the Treaties are still subjects of confusion.¹

This study examines procedural autonomy, which Member States enjoy when implementing EU law: the EU legislator dictates the ‘what’ and the framework of ‘how’, but the Member States are responsible for the implementation of EU law. This leads to particularly interesting challenges, as mentioned in the loyalty clause provided for in Article 4 of the Treaty on the European Union (TEU), when national powers collide with the implementation of common policy. Migration policy is a prime example, being a leading topic in preliminary decision-making procedures,² where the Charter of Fundamental Rights of the European Union (EU Charter) is the point of reference.

The focus of this study is Case C159/21 of the Court of Justice of the European Union (CJEU) from 22 September 2022 (the ‘GM case’).³ The preliminary ruling was initiated by the Budapest-Capital Regional Court, and the case exemplifies the clash between common substantive law, national security issues recognised as the exclusive competence of Member States and procedural rules.

The legal framework leading to this decision and the related jurisprudence help to understand how procedural autonomy and national competence can be interpreted in such situations. They also clarify the boundary between the purely national scope and the impact of EU law.

II The GM Case and the Shortcomings of the Relevant Hungarian Legislation

From the study’s perspective, the interesting aspect of the *GM* case concerns the restricted access to documents, including classified data, for reasons of national security, leading to a negative official decision without justification and the assessment of the legality of this situation.

¹ András Bíró-Nagy, Gergely Laki, ‘Europeanization of Public Policy in Hungary: An Empirical Research’ (2022) 29 (2) *Politologický časopis – Czech Journal of Political Science* 101–124, DOI: <https://doi.org/10.5817/PC2022-2-101>

² Court of Justice of the European Union, ‘A Bíróság igazságügyi statisztikái – 2023’ 9, 17, <https://curia.europa.eu/jcms/jcms/Jo2_14640/hu/> accessed 1 April 2025.

³ Case C-159/21 *GM v Országos Idegenrendészeti Főigazgatóság, az Alkotmányvédelmi Hivatal, a Terrorrelhárítási Központ*, ECLI:EU:C:2022:708 (*GM case*).

The plaintiff GM received a decision withdrawing his refugee status and refusing to grant him subsidiary protection status on the grounds of his inherent threat to national security. While leaving and returning to the home country is generally acknowledged as a basic right by the international community, entering and residing in a country as a foreigner is not a fundamental right, especially if the state perceives the individual as a threat.⁴ No one can stay in Hungary if their presence threatens national security or harms national security interests.⁵ The decision was based on an unsubstantiated expert opinion issued by the Constitutional Protection Office and the Counter-Terrorism Centre that concluded that GM's presence threatened national security. He did not receive an explanation as to why and how he was deemed dangerous, preventing him from properly exercising his procedural rights. The authority decision was formulated according to the legal norms in force – ie, the omission of the reasons based on their qualified nature was rightful on the side of the authority. However, from the client's perspective, he had no opportunity to learn of nor refute the underlying facts.⁶

When the legal status of a third-country national is decided by immigration and asylum authorities, the potential danger posed by the individual is determined by designated authorities, such as the Constitutional Protection Office or the Counter-Terrorism Centre.⁷

⁴ József Hargitai, 'Az útlevel és a külföldre utazáshoz való jog nemzetközi jogi alapjai' (1995) 42 (12) Magyar Jog 710; John Torpey, *The Invention of the Passport. Citizenship and the State* (Cambridge University Press 2000, Cambridge) 4–18, DOI: <https://doi.org/10.1017/CBO9780511520990>; Eric Neumayer, 'On the detrimental impact of visa restrictions on bilateral trade and foreign direct investment' (2011) 31 (3) Applied Geography 901, DOI: <https://doi.org/10.1016/j.apgeog.2011.01.009>

⁵ GM case (n 3) para 19. In the case of a refugee, § 8(4) of Act LXXX of 2007 on the Right of Asylum (2007. évi LXXX. törvény a menedéjogról, hereinafter: Met.) stipulates that not posing a threat to national security or being harmful to national security interests is a general precondition for being allowed to remain in Hungary. For other types of international protection, the same requirement is set out in §§ 15(b) and 21(b) of the Met. Regarding the entry and stay of third-country nationals, § 6(3) § 33(2) point b); § 35(7); § 38(9); § 42(6) d); § 43(1) c) and (2) d) of Act II of 2007 on the Entry and Stay of Third-Country Nationals (2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról, hereinafter: Harmtv.), which was in force until 31 December 2023, prescribes the same requirement. The provisions of the new Act XC of 2023 on the General Rules for the Admission and Right of Residence of Third-Country Nationals (2023. évi XC. törvény a harmadik országbeli állampolgárok beutazására és tartózkodására vonatkozó általános szabályokról, hereinafter: Btátv.) are consistent with the approach of the previous legislation; see §§ 12(2)–(3), 17(h), 80(1)(b), 86(1)(f), 98(1)(d)–(e), 106(2)(b), 107(b), 108(1), 111(5)(d), 121(3), 122(1)(c), 123(2), and 245(1)(c). *The (non-official) translations of legal acts related to migration are available in English in the legal database of Wolters Kluwer (subscription required), and serve as the basis for the terminology used in this article. All other legal sources have been translated by the author, and the translations reflect the author's interpretation.* See also, Laufer Balázs, 'A nemzetbiztonság veszélyeztetésének előfordulása a magyar migrációs jogszabályokban' (2020) 8 (4) Nemzetbiztonsági Szemle 3–20, DOI: <https://doi.org/10.32561/nsz.2020.4.1>

⁶ Case C-159/21 *GM v Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ*, Opinion of AG de la Tour, ECLI:EU:C:2022:326, para 21–22; see the case history and the brief legal background of the case in para 13–26.

⁷ Gov. Decree 301/2007 (XI. 9.) on the execution of LXXX of 2007 on the right of asylum [301/2007. (XI. 9.) Korm. rendelet a menedéjogról szóló 2007. évi LXXX. törvény végrehajtásáról, hereinafter: Met. vhr.] § 2/A a);

The process of a decision-making authority premising its decision on the opinion of a far more competent body in a relevant issue related to the case – a so-called specialised authority – has been a longstanding construct in Hungarian state administration.⁸ This decision-making structure is not inherently incompatible with EU law, as expressed by the CJEU in the *GM* case.⁹ However, it becomes problematic if the acting authority cannot know the facts on which its decision is based and cannot evaluate these facts and circumstances independently.¹⁰ The acting authority must rely on the professional authority's position as a mandatory, indisputable basis for its decision, which must be explained in the justification.¹¹ In the Hungarian co-decision system, which applies to all sorts of migration procedures,¹² the acting authority's decision includes the specialised authority's position,¹³ but without any reference to the protected data (classified information). In immigration and asylum cases, this leads to unjustified decisions based on reference to national security threats that lack factual grounds or proof that supports the qualification. However, the decision of the specialised authority can be challenged within the context of a legal remedy against the substantive decision of the acting authority. The acting authority provides information on this possibility in its substantive decision.¹⁴

Gov. Decree 295/2010 (XII. 22.) on the designation of the anti-terrorism body and the detailed rules for the performance of its duties [295/2010. (XII. 22.) Korm. rendelet a terrorizmust elhárító szerv kijelöléséről és feladatai ellátásának részletes szabályairól] (1a); The Counter Terrorism Centre collects secret information for the purpose specified in points *a*) and *e*) and *f*)–*i*) of § 64 of the Act XXXIV of 1994 on the Police (1994. évi XXXIV. törvény a Rendőrségről), as well as on the basis of the Act CXXV of 1995 on National Security Services (1995. évi CXXV. törvény a nemzetbiztonsági szolgálatokról, hereinafter: Nbtv.); Gov. Decree 35/2024 (II. 29.) on the implementation of Act XC of 2023 on the general rules for the entry and residence of third-country nationals [35/2024. (II. 29.) Korm. rendelet a harmadik országbeli állampolgárok beutazására és tartózkodására vonatkozó általános szabályokról szóló 2023. évi XC. törvény végrehajtásáról] § 242(1).

⁸ János Kálmán, 'A szakkérdés vizsgálata a magyar közigazgatási hatósági eljárásjogban' (2018) 78 (2) Jogtudományi Közlöny 108.

⁹ *GM* case (n 3) para 68.

¹⁰ The *GM* case also drew attention to the fact that the acting authority must also have all relevant information and, taking this information into account, must evaluate the facts and circumstances on its own; that is, this authority must have discretion. In this regard, Hungarian legal practice violates EU law. See, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 (Qualification Directive) art 14 (4) *a*), *GM* case para 80–81.

¹¹ Directive 2011/95/EU (n 10) art 14 (4) *a*); *GM* case (n 3) para 80–81; cf. Case C-300/11 *ZZ v Secretary of State for the Home Department*, ECLI:EU:C:2013:363 (*ZZ* case), para 61; Erzsébet Csatlós, 'Az Európai Unió Bíróságának *GM*-ügyben hozott döntése: Nemzetbiztonsági okok és eljárási garanciák összeecsapása a menekültügyi hatóság határozatában' (2023) 14 (4) *Jogesetek Magyarázata* 57–65.

¹² Met. (n 5) § 32/Q (2) *d*)–*g*); Harmtv. (n 5) § 87/M(1).

¹³ Act CL of 2016 on the general code of administrative proceedings (2016. évi CL. törvény az általános közigazgatási rendtartásról, hereinafter: Ákr.) § 81(1).

¹⁴ Met. (n 5) § 32/Q(2) *h*) and § 57(4).

The *GM* case highlights a common practice in Hungary, not only in international protection cases but also in immigration removal proceedings. Due to the existence of data classified for national security reasons, the right to effective legal remedy is formally guaranteed but practically void.¹⁵ Having access to documents containing classified data and the system of legal redress against decisions involves a set of complicated, completely independent and unrelated procedures. This results in the inability to dispute the facts underlying the procedure during the legal redress process.

In the *GM* case, the CJEU made several fundamental observations regarding negative official decisions on international protection. The legal interpretation allowing a State (its authority) to deprive a client (in this case, a citizen of a third country) of basic procedural rights on national security grounds is not in conformity with EU law. Access to the documents associated with the procedure must be ensured, even if encrypted due to classified national security data, as knowing the reasons and the factual basis of the decision(s) is key to the implementation of the right to an effective legal remedy.¹⁶

III Clash of the Titans: EU vs Member State

All disputes regarding the conformity of national legal practices with EU law revolve around competencies and the interpretation of the scope of national law in light of EU law. The debate becomes particularly intense when it concerns issues that remain the exclusive competence of Member States. Hereby, the aim is not to analyse the case but the competencies related to the main legal areas that the case represents: national security and access to documents as procedural guarantees. Therefore, the following subchapters aim to clarify the limitations.

1 The Loyalty Clause and National Security: Balancing EU Integration and Member State Sovereignty

Many principles influence the operation of the EU, but perhaps the root of its cooperation with the Member States lies in the *loyalty clause* included in Article 4 of the TEU. This clause has existed since the beginning of the integration process¹⁷ and is now a general

¹⁵ See details, Erzsébet Csatlós, 'National Security-Related Expulsion Cases during the Pandemic in Hungary: Secret Revealed?' (2023) 43 (2) *Acta Iuris Stetinensis* 27–42, DOI: <https://doi.org/10.18276/ais.2023.43-02>

¹⁶ Tobias Lock 'Article 41 CFR Right to good administration' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (Oxford University Press 2019, Oxford) 2206, DOI: <https://doi.org/10.1093/oso/9780198759393.003.564>

¹⁷ Geert de Baere, Timothy Roes, 'EU Loyalty As Good Faith' (2015) 64 (4) *International and Comparative Law Quarterly* 830–831, DOI: <https://doi.org/10.1017/S0020589315000421>

legal principle.¹⁸ It states that all powers not conferred on the EU by the Treaties remain with the Member States and that the EU and the Member States shall mutually respect and assist each other in carrying out the tasks arising from the Treaties. Member States must do their best to fulfil obligations and refrain from any action that could jeopardise the EU's objectives. The EU also respects the competencies established for it, including the fact that the protection of national security, an important bastion of identity,¹⁹ remains the sole responsibility of the Member States.

National security, as an absolute value to be protected, is an exception in many areas and is often covered by derogation clauses.²⁰ Entering and staying in the territory of a foreign state cannot be considered a universal fundamental right. Freedom of movement and the right to freely choose a place of residence belong only to those who reside legally in the given state. A fundamental condition for legal entry and stay is that the person does not pose a threat to the national security, public safety, or public health of the State.²¹

EU legislation on free movement and migration varies according to personal scope: different rules apply to the free movement of EU citizens and the residence of third-country nationals based on duration and title. What is common, however, is that no Member State is obliged to admit or tolerate persons who threaten national security.²² The extent to which a specific cause related to the past behaviour of the person or an actual or potential threat based on a person's behaviour constitutes a sufficient level of national security risk varies.²³ EU citizens and their family members enjoy wider protection against state discretion, while third-country nationals are less favourably placed if such concerns arise.²⁴

¹⁸ Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014, Oxford) 243–245, DOI: <https://doi.org/10.1093/acprof:oso/9780199683123.001.0001>

¹⁹ Consolidated version of the Treaty on European Union [2012] OJ C326/13. art 4 (3); Stelio Mangiameli, 'The Union's Homogeneity and Its Common Values in the Treaty on European Union' in Hermann-Josef Blanke, Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012, Heidelberg, Dordrecht, London, New York) 21–46, 33; Norbert Tribl, *Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben* (Iurisperitus 2021, Szeged) 81.

²⁰ Vitaliy Slepak, 'National security clause: law and practice of European Union and Eurasia Economic Union' (2019) 1406 (1) *Journal of Physics: Conference Series* 2, DOI: <https://doi.org/10.1088/1742-6596/1406/1/012002>; Eric K. Yamamoto, Rachel Oyama, 'Masquerading behind a Facade of National Security' (2019) 128 *Yale Law Journal Forum* 271–273.

²¹ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (adopted 16 September 1963, entered into force 2 May 1968) ETS No 46, art 2(1), art 3.

²² See Kay Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International 2024, The Hague).

²³ See the comparison of the statuses and relevant legal acts, Pieter Boeles et al., *Public Policy Restrictions in EU: Free Movement and Migration Law General Principles and Guidelines* (Meijers Committee 2021, Amsterdam) 39.

²⁴ See details, Erzsébet Csatlós, 'Aki a nemzetbiztonságot, a közbiztonságot vagy a közrendet sérti vagy veszélyezteteti... – Gondolatok egyes 2020–21 során született kiutasítási ügyek kapcsán' (2022) 4 (1) *Külgügyi Műhely* 9–10, DOI: <https://doi.org/10.36817/km.2022.1.1>; Case C-165/14 *Alfredo Rendón Marín v Administración Del Estado*, EU:C:2016:675, paras 84–86; cf. Case C-544/15 *Sahar Fahimian v Bundesrepublik*

Generally speaking, it is practically impossible to universally define what kind of actions a state may consider threatening to national security, public safety, or public order. As a result, the system of defence against such threats allows a high degree of State discretion.²⁵ However, the common denominator of such challenges is that, regardless of the people involved, it is a democratic criterion of the rule of law and a human rights issue that procedural rights can be limited but not completely revoked. As Jeney stated, the system of rules on international refugee law, the international protection of human rights and EU law limit the State's main power in this area.²⁶

2 Balancing Procedural Autonomy and National Security

EU law is implemented by Member States through their law enforcement bodies, operating within their internal organisational structures and under the framework of procedural autonomy.²⁷ Since the *Rewe* decision in 1976,²⁸ this principle has governed the implementation of EU law. Advocate General Trstenjak emphasised that procedural autonomy does not grant Member States unrestricted discretion in establishing procedural rules. Rather, it allows national authorities and courts to apply EU law based on national substantive and procedural laws when EU rules are absent or incomplete.²⁹ Procedural autonomy extends not only to procedural issues but also to the choice of the most effective means of enforcing EU law with a view to ensuring it achieves its intended purposes. Member State authorities must apply EU law according to national procedural standards, ensuring equivalent legal protection as provided under domestic law (principle of equivalence). They must also refrain from making it excessively difficult to exercise rights under EU law (principle of effectiveness).³⁰ These principles collectively safeguard procedural autonomy in EU law matters.³¹

Deutschland, ECLI:EU:C:2017:255, para 50; Václav Stehlík, 'Discretion of Member States vis-à-vis Public Security: Unveiling the Labyrinth of EU Migration Rules' (2017) 17 (2) *International and Comparative Law Review* 137–138, DOI: <https://doi.org/10.2478/iclr-2018-0019>

²⁵ Csatlós (n 24) 8–9, see the case law cited.

²⁶ Petra Jeney, 'A nemzetközi védelemhez való jog vizsgálata a nemzetközi jog, az uniós jog és a nemzeti (tagállami) jogrendszer szempontjából' in Nóra Chronowski (ed), *Szuverenitás és államiság az Európai Unióban. Kortárs kérdések és kihívások* (ELTE Eötvös Kiadó 2017, Budapest) 173.

²⁷ Katalin Gombos, 'Tagállami eljárási autonómia – az elv korlátokkal és kérdőjelekkel' (2019) 22 (3) *Európai Tükör* 37, DOI: <https://doi.org/10.32559/et.2019.3.3>

²⁸ Case C-33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para 5.

²⁹ Case C-591/10 *Littlewoods Retail Ltd and Others v Her Majesty's Commissioners of Revenue and Customs*, Opinion of AG Trstenjak, ECLI:EU:C:2012:9, paras 23–24; see also Case C-212/04 *Konstantinos Adeneler et al. v Ellinikos Organismos Galaktos (ELOG)* ECLI:EU:C:2006:443, paras 93–94.

³⁰ Case C-33-76 *Rewe-Zentralfinanz eG* (n 28), para 5, Case C-268/06, *Impact v Minister for Agriculture and Food and Others* [2008] ECLI:EU:C:2008:223, para 41 (von Colson principle) and para 43–48.

³¹ Case C-161/15, *Abdelhafid Bensada Benallal v État belge*, EU:C:2016:175, para 25; Case C-3/16, *Lucio Cesare Aquino v État belge*, ECLI:EU:C:2017:209, para 48–49; cf. *Associação Sindical do Juizes Portugueses v Tribunal de Contas*, C-64/16, EU:C:2018:117, para 34; *Commission v Poland* (Independence of Supreme Court), C-619/18,

The challenge lies in balancing State interests served by procedural rules with the procedural guarantees of EU law designed to protect individuals from state arbitrariness, particularly concerning national security issues, notably in immigration and asylum cases in Hungary.³² The procedures for accessing documents containing classified data and the available legal remedies are complex and often disjointed. Decisions such as removal or refusal and the withdrawal of international protection involve challenges where courts cannot disclose or review classified information that directly affects decisions either.³³ The court is entitled to have access to the disclosed files and assess whether the procedure before the authority was lawfully conducted but has no right to reveal any elements of the classified document – neither the facts nor any reference to the reason for being a threat or danger to national security. Therefore, the judgment of the court does not explore or reveal the real reasons either.

Regarding the administrative procedure, the Hungarian Law on Asylum explicitly prescribes the content of the decision, including the obligation of omitting the classified information,³⁴ while the Law on Third-Country Nationals refers back to the rules of general administrative procedure and mandates their application.³⁵ Accordingly, any document or part thereof from which conclusions can be drawn about protected data or personal data the conditions for the disclosure of which are not defined by law cannot be disclosed unless the lack of disclosure would hinder the exercise of rights guaranteed by this law.³⁶ This administrative authority phase is closely connected to the judicial review as the court examines and verifies the authority's decision and establishes its judgment on the legality of the process and the decision it resulted in in terms of formal and substantial matters.

In legal remedy proceedings against substantive decisions – such as expulsion by immigration authorities or the rejection of international protection – the court, due to the classified nature of the documents, is not authorised to disclose classified data to anyone, including the affected foreigner, nor to verify the adequacy of its content or overturn it

EU:C:2019:531, para 52; Daniel Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach' (2021) 23 Cambridge Yearbook of European Legal Studies 157; Case C-654/21, *LM* (Counterclaim for a declaration of invalidity), ECLI:EU:C:2023:462, para 56.

³² See Katalin Juhász, *The Right to Know in the European Union: Comparative Study on Access to Classified Data in National Security Related Immigration Cases* (Hungarian Helsinki Committee 2024, Budapest) 40–44 <<https://helsinki.hu/en/wp-content/uploads/sites/2/2024/04/The-Right-to-Know-in-the-European-Union-2024.pdf>> accessed 1 April 2025.

³³ Act CLV of 2009 on the protection of classified data (2009. évi CLV. törvény a minősített adat védelméről, hereinafter: Mavtv.) § 4–6.

³⁴ Met. (n 5) § 32/Q(3) and (2) *d*.

³⁵ Harmtv. (n 5) § 87/M., § 92/C point 6.

³⁶ Ákr. (n 13) § 34(2).

substantively. Its activity is confined to verifying the factual basis of the risk assessment;³⁷ hence, the court cannot disclose classified data in its decision either.³⁸

Access to the actual reasons and essential grounds for decisions is allowed under a viewing permit issued by the certifier. However, this permit can be denied because the knowledge of classified personal data could hinder the effective performance of the specialist authority's national security, law enforcement and crime prevention activities, including their direction, methodology and procedural integrity, thus indirectly harming Hungary's national security interests.³⁹ In practice, such requests are rarely granted, and circumstances often prevent right holders from exercising this right.⁴⁰ Furthermore, even if granted, this only allows viewing; the information thereby obtained cannot be cited in administrative litigation against the substantive decision nor be used for national security reasons.⁴¹ Moreover, this is a completely independent procedure; it has no connection to the judicial review of the authority decision itself.⁴²

Additionally, a separate and autonomous procedure exists for so-called secrecy supervision proceedings aimed at challenging classification decisions. Complaints regarding the legality of classification can be submitted to the National Authority for Data Protection and Freedom of Information, which, upon receipt of a complaint, may initiate proceedings as necessary and potentially modify the classification.⁴³

The standpoint of the Curia of Hungary is that this regulatory situation, including that of the viewing permits, arises from the nature of the data stemming from national security interests which enjoy primacy in state sovereignty. However, the institution of viewing permits and the administrative litigation against authority decisions collectively guarantee the rights of the client.⁴⁴ Even in the rare case when a third-country national may view the

³⁷ Curia of Hungary KfV.37.468/2021/7/II paras 32–33, see also in 2024: Curia of Hungary III.Kfv.37.798/2023/10-II. paras 73–74.

³⁸ Curia of Hungary KGD2016. 27.

³⁹ Mavtv. (n 33) § 11–12.

⁴⁰ Budapest-Capital Regional Court 49.K.703.152/2021/8 para 7. See similar: Curia of Hungary Kfv.I.37.127/2021/10. and Kfv.I. 37.468/2021/7. According to the information provided at the request of the Hungarian Helsinki Committee, the Office for the Protection of the Constitution and the Counter-Terrorism Center did not grant access in any case in the first half of 2019, 2020 and 2021. *National Security Grounds for Exclusion from International Protection as a Carte Blanche: Hungarian Asylum Provisions Not Compliant with EU Law Information Update* by the Hungarian Helsinki Committee, 20 December 2021, 1, fn 5 <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/01/Info-Note_national-security_exclusion_FINAL.docx.pdf> accessed 1 April 2025.

⁴¹ Curia of Hungary Kfv.II.37.075/2021/9. para 16.

⁴² Mavtv. (n 33) § 11(2); Eg Curia of Hungary Kfv.II.37.983/2020/10. para 16; Curia of Hungary II.Kfv.37.075/2021/9/2. para 26; In case of the Curia of Hungary Kfv.I.37.931/2021/8. although with restrictions, but the Curia obliged the defendant to issue a permission to access the classified document. See also: Curia of Hungary Kfv. 37.664/2022/12. para 29, Curia of Hungary I.Kfv.37.127/2021/10. para 26.

⁴³ Act CXII of 2011 on the right to self-determination of information and freedom of information (2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról) § 62–63.

⁴⁴ Curia of Hungary Kfv. 37.983/2020/10. para 26.

content of an expert opinion containing the reasons for a negative decision, those contents cannot be used in judicial proceedings. Therefore, the facts cannot be contested, and there is no opportunity for counter-evidence to be presented against the information content.

3 Balancing National Security and Procedural Rights: Justification and Transparency in Decision-Making

Based on the Hungarian Fundamental Law, authorities are obliged to justify their decisions under the law.⁴⁵ The obligation to provide reasons is a fundamental procedural guarantee tied to the requirements of the rule of law and the right to a fair procedure. Its purpose is to ensure that the decision-making process can be reviewed later, both to assess the legal functioning of the authority and to inform the client about the reasons for the obligations imposed on them. This knowledge is essential for exercising the right to legal remedy.⁴⁶

Law enforcement bodies serving the state's national security interests, including the specialised authorities issuing expert opinions in immigration and asylum procedures, are often referred to as secret services. The essence of their activities would be compromised if everything they did in support of state interests were public. These specialised authorities serve the state by providing professional opinions on third-country nationals, particularly in assessing whether they pose an actual or potential threat to Hungarian national security. Hungarian jurisprudence prioritises national security, public safety and public order over information and other procedural guarantees.⁴⁷ Given the nature of their activities, relevant documents contain data classified for national security reasons, justifying their non-disclosure.⁴⁸ While the assessment applies to a specific person, the techniques, methods and direction of the investigation are the true objects of protection. Disclosing information about these activities would harm state interests and hinder future operations.⁴⁹

Access to evidence is not an absolute right. Strasbourg case law acknowledges that competing interests in criminal proceedings, such as national security, witness protection and the confidentiality of certain police investigative methods, must be balanced with the rights of procedural actors.⁵⁰ In this broader context, bodies implementing EU law are bound by the right to good administration, which includes the obligation to justify decisions. This

⁴⁵ Fundamental Law of Hungary (25 April 2011) art XXIV(1).

⁴⁶ Erzsébet Csatlós, 'Gondolatok a hatóság indokolási kötelezettségéről Martonyi János, Az államigazgatási aktusok indokolása c. művének nyomán' (2023) 13 (3) Forum: Acta Juridica et Politica 71.

⁴⁷ Csatlós (n 24) 17–18.

⁴⁸ Nbtv. (n 7) § 48(3).

⁴⁹ See Decision 29/2014. (IX. 30.) AB of the Constitutional Court of Hungary, ABH 2014, 852–853; Curia of Hungary I.KFV.37.468/2021/7/II. para 31 and I.KFV.37.086/2021/9 para 25.

⁵⁰ Research Division, Council of Europe, European Court of Human Rights, National Security and European Case-Law: Case Law Analysis (Council of Europe 2013) 32 <<https://rm.coe.int/168067d214>> accessed 1 April 2025.; see esp. *Case of Bobek v Poland*, no. 68761/01, ECHR § 69–70; *Case of Bucur and Toma v Romania*, no. 40238/02, ECHR § 72–73.

ensures everyone's right to inspect documents related to their person while respecting the legitimate interests concerning confidential data management.⁵¹ The right to reasoned decision and legal remedy is also reflected in the procedural guarantees provided by EU secondary legislation on migration.⁵² These guarantees guide or set a framework for national legislation and the implementation of EU law by national authorities. In international protection applications, rejection decisions must include factual and legal justification and explain how they can be challenged.⁵³ Member States are also obliged to ensure that the applicant's assistant or representative has access to the information in the applicant's file that serves as the basis for the decision. Exceptions are allowed if disclosing the information or its source would endanger national security, the security of the organisations or persons providing the information, the applicant, the investigative interests of the competent authorities or international relationships. In such cases, courts assessing the decision's legality must still have access to the information, and national laws must guarantee the right to defence of the person concerned and these are subjunctive conditions.⁵⁴

When examining the scope of Member States' manoeuvres and Hungarian legislation, a balance must be found that ensures the protection of national security interests while respecting individuals' procedural rights and the basic principles defined by EU law. Legal restrictions must be proportionate and should not disproportionately infringe on the rights of those concerned. Judgments from the CJEU and the European Court of Human Rights guide the balancing of national security and individual rights. The question is where this equilibrium lies.

⁵¹ Charter of Fundamental Rights of the European Union [2016] OJ C202/389, art 41(2)(b) and (c); art 51.

⁵² See, eg Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1, art 32(2)–(3), Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44, art 20(1), Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, arts 12–13; Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on conditions of entry and residence of third-country nationals for the purpose of highly skilled employment and repealing Council Directive 2009/50/EC [2021] OJ L382/1, art 11(3); Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375, arts 18(4)–(5); Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1, arts 8(1)–(2); Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange programs or educational projects and au pairing (recast) [2016] OJ L132/21, arts 34(4)–(5).

⁵³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60, art 4(2)(b); art 11(2).

⁵⁴ Directive 2013/32/EU (n 53) art 23(1).

4 The *Ratio Decidendi* of the *GM* Case and the Implicit Reference Points for Interpretation

In the *GM* case, the right of applicants for international protection to learn at least the essence of the information related to their cases and the right to use this information in the legal remedy phase of the procedure, even if it affects national security interests, was confirmed.⁵⁵ National security-related problems involving access to files and reasons for decisions were not a new issue before the court. Previously, the CJEU had addressed how the obligation to provide reasons relates to communication contrary to national security interests and the fundamental right to effective judicial protection. In the 2013 *ZZ* case involving a dual citizen (Algerian-French), the CJEU interpreted the right to the free movement and residence of EU citizens and their family members,⁵⁶ notably, the right to defence in cases involving state security. It concluded that if the parties are unable to examine the facts and documents on which the decisions against them are based and, therefore, cannot effectively represent their position, their right to an effective remedy is violated.⁵⁷

The *Kadi II* case, also from 2013, clarified that the guiding principle for determining the essence of the reasons underlying decisions is whether the decision has a unique effect on the person concerned. This evaluation is not limited to the abstract probability of the reasons but focuses on whether the reasons, or at least one of them that alone constitutes a sufficient basis for the decision, are founded.⁵⁸ Regarding restrictions based on national security considerations, the summary communication of the content of the information or evidence must be sufficiently specific.⁵⁹ To fulfil the obligation to provide reasons, at least one well-supported reason is necessary, but this requires identifiable persons, the manner, place and time of the related actions, as well as any allegations regarding the applicant's behaviour that threaten national security.⁶⁰

The preliminary ruling in the *GM* case related to a non-EU citizen and his procedural guarantees. However, the *GM* case also highlights that, in the case of immigration law decisions, the right to legal remedy is formally guaranteed but lacks effectiveness due to the classified nature of national security data. The European Court of Human Rights had already drawn Hungary's attention to the roots of this problem in the 2016 *Szabó*

⁵⁵ *GM* case (n 3) para 60.

⁵⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

⁵⁷ *ZZ* case (n 11) para 53.

⁵⁸ Case C-584/10 P, C-593/10 P, and C-595/10 P. *European Commission v Yassin Abdullah Kadi Joined Cases*, ECLI:EU:C:2013:518 (*Kadi II* case), para 119.

⁵⁹ According to the decision of the European Court of Human Rights – in a similar case from the perspective of a legal problem – a material listing legal provisions does not meet this purpose, even at a minimal level, and neither does a press release. Case *Muhammad and Muhammad v Romania*, no. 80982/12, ECtHR para 168, 174.

⁶⁰ *Kadi II* case (n 58) para 129; 141–149; Csatlós (n 11) 62–63.

and *Vissy* judgment.⁶¹ Since then, nothing has changed: Hungarian jurisprudence does not reflect the principle of actual enforcement concerning the directive-based procedural guarantees arising from fundamental rights and international protection. Accessing documents containing classified data and navigating the legal redress system involves a set of complicated, independent and unrelated procedures, resulting in the inability to dispute the facts underlying the procedure during the legal redress process.⁶²

IV The Impact and (Lack of) Implementation of the *GM* Case in Hungarian Jurisprudence

In the *GM* case in September 2022, the CJEU specifically held that the primary and secondary legislation in question must be interpreted as precluding national legislation such as that of Hungary. Hungarian jurisprudence was incompatible with EU law, necessitating changes. Despite this, the rules regarding asylum procedures have not changed: the decision of the asylum authority must include, among other things, the justification of the authority's decision, the facts, the evidence, the circumstances considered, and the position of the specialist authority. If the specialist authority's opinion contains classified data, this cannot be displayed in the decision. The decision may only contain protected data that can be seen by the person to whom the decision is communicated according to the applicable national provisions of document inspection. It must be formulated to reference the content of the considered protected data without describing it.⁶³

However, a new law regarding the entry and residence of third-country nationals was enacted at the end of 2023. The former Law on Third-country Nationals was replaced by Act XC of 2023, effective from March, following a two-month suspension of proceedings during which no applications within its scope could be submitted.⁶⁴ The new norm essentially retained the previous version of the text for decisions, along with the rule referring to the general code of administrative proceedings.⁶⁵

In judicial practice, the *GM* case has not remained untraceable and forms a basis for reference in several contexts. In 2023, the Curia of Hungary reaffirmed that courts shall

⁶¹ Case of *Szabó and Vissy v Hungary*, no. 37138/14, ECHR para 79.; István Solti, 'Fából vaskarika? A Szabó–Vissy-ügy hatása a nemzetbiztonsági célú titkos információgyűjtésre' (2019) 67 (1) *Belügyi Szemle* 162–165, DOI: <http://doi.org/10.38146/BSZ.2019.1.13>

⁶² In June 2024, Hungary's attention was drawn to the failure to comply with the provisions of the judgment. Committee of Ministers, Supervision of the Execution of Judgments of the ECHR – Cases Examined at 1501st Meeting (HR) – 11–13 June 2024, 2 <<https://rm.coe.int/table-1501-eng/1680b06019>> accessed 1 April 2025.; H46-17 *Szabó and Vissy group v Hungary* (Application No 37138/14), 1501st meeting, 11–13 June 2024 (DH); CM/Del/Dec/1501/H46-17.

⁶³ Met. (n 5) § 32/Q.

⁶⁴ Btátv. (n 5) § 286(1).

⁶⁵ Btátv. (n 5) §190(1); § 221 point 7.

fulfil their objective and subjective duty of legal protection in administrative proceedings, thereby ensuring ‘equality of arms’ by inspecting and checking documents containing classified data. The purpose of such an investigation is to determine whether the facts and data underpinning the specialist authority’s decision are sufficient to justify the measure contained in the immigration police decision, ie, whether the former prove the existence of a national security risk. The court may not overrule a reasonable and logical official conclusion based on data suitable for justifying the national security risk.⁶⁶

The Curia emphasised that the procedure for issuing a permit to access nationally classified personal data and the related immigration police or other basic procedures are separate. The related legal remedy procedure and substantive legal regulations are also distinct. The legality of the administrative decision regarding the refusal to issue the access permit must be examined based on the provisions of the Act on classified data. The procedural guarantees governing immigration enforcement procedures, as developed in the case law of the European Court of Human Rights and the CJEU, including in the *GM* case, are not guidelines for this.⁶⁷ The Curia also stressed that access to the documents is granted on an individual basis. However, access to nationally classified personal data can only be ensured if it does not compromise national security or other public interests protected by the classification. If the classified data has such a scope, then the issuance of permission to access it cannot be legally refused. This does not concern learning the essence of the classified data or extracting it but is about ensuring that if knowing certain data does not harm the protected public interest, then the reason for limiting the plaintiff’s rights does not exist for that part of the data.⁶⁸ Regarding the ‘right to know the substance’, the Curia stated that extracting nationally classified personal data is incompatible with the nature of the legal institution. If the public interest to be protected does not allow the knowledge of specific information, extracting it would not lead to knowing the specific information but would instead result in a certain level of generalisation. Generalisation in this field would cause the information to lose its character as personal data. Therefore, there is no such thing as ‘substantial reasons’ for producing a document or the ‘extraction’ of a document. It is not possible to sort or compress the content of a classified document to satisfy both parties (the classifier and the plaintiff). The information can either be known without risk or it cannot; there is no grey zone in Hungarian jurisprudence in this regard.⁶⁹

⁶⁶ Curia of Hungary VII.Kfv.37.517/2023/12-I para 3. Referring to its practice: Curia of Hungary Kfv.II.37.533/2020/9. paras 31–32; Curia of Hungary Kfv.II.37.671/2020/17. paras 44–45; Curia of Hungary Kfv.II.37.863/2020/15. paras 38–39; Curia of Hungary Kfv.II.37.761/2021/9. paras 45.

⁶⁷ Curia of Hungary I.Kfv.37.664/2022/12/II. paras 40, 39 and 36. In 2022, see the same: Curia of Hungary I.Kfv.37.055/2022/9/II. para 35, in 2024: Curia of Hungary III.Kfv.37.798/2023/10-II. para 69–75.

⁶⁸ Curia of Hungary I.Kfv.37.664/2022/12/II para 27.

⁶⁹ Curia of Hungary I.Kfv.37.455/2022/11/II para 45, referring to Curia of Hungary Kfv.I.37.259/2022/8. paras 51–52 as a principle.

V Evaluation of the (Desirable) Impact of EU Law

At the moment, no change in the relevant legislation has been made yet. However, it is worth noting that the justification of an official decision should be interpreted in a broader context. This not only applies to the specific addressee in the given case but also has a deeper meaning.

This does not imply a violation of procedural autonomy, nor does it mean the Europeanisation of procedural guarantees. The Fundamental Law of Hungary recognises that the rule of law encompasses respect for legal certainty and the prohibition of arbitrariness. This includes access to justice, judicial review of administrative acts and respect for human rights.⁷⁰ The formal and substantive elements governing decisions ensure that public administration, particularly decision-making activities, adhere to the principles of the rule of law and fair procedure.⁷¹ Among these elements, the justification stands out. Like Ariadne's Thread, it guides the reader through the entire process: from the circumstances behind the decision, through the formation of the legal relationship in the given situation, to the actual and possible consequences. It explains why the authority took action, the reasons underlying the decision, and how the law regulates the subject matter of the case. Additionally, the justification provides insight into the circumstances under which the authority decided on the merits of the case, applying legal principles.

The principles of the rule of law fundamentally require the protection of individuals against state arbitrariness.⁷² In public administration, this is reflected in the strict rules binding the authority's decision-making activities in individual cases.⁷³ Procedural guarantees ensure that the procedure is carried out fairly, allowing all parties involved – both the individual and the administrative bodies – to understand, reflect on, and dispute the decision based on the information provided in the justification.⁷⁴ This is why the obligation to provide reasons is constitutional; the Fundamental Law of Hungary expressly

⁷⁰ Fundamental Law of Hungary, (n 45) art B) para (1), see also Zoltán Magyary, *Magyar közigazgatás. A közigazgatás szerepe a XX. sz. államában. A magyar közigazgatás szervezete működése és jogi rendje* (Királyi Magyar Egyetemi Nyomda 1942, Budapest) 40.

⁷¹ Rule of Law checklist, adopted by the Venice Commission at its 106th Plenary Session, Venice, 11–12 March 2016, CDL-AD(2016)007, 11.

⁷² Louis B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982) 32 (1) *American University Law Review* 22, 28–31; Steven Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 (3) *Oxford Journal of Legal Studies* 490, DOI: <https://doi.org/10.1093/ojls/23.3.405>; Andreas Follesdal, 'International human rights courts and the (international) rule of law: Part of the solution, part of the problem, or both?' (2021) 10 (1) *Global Constitutionalism* 119, DOI: <https://doi.org/10.1017/S2045381719000364>

⁷³ Decision 56/1991. (XI. 8.) AB of the of the Constitutional Court of the Republic of Hungary, ABH 1991. 456.; Decision 38/2012. (XI.14.) AB of the Constitutional Court of Hungary, ABH 2012. 209.; cf. Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies, art IV.

⁷⁴ Curia of Hungary Kfv. 37.111/2023/11. para 15.

states this.⁷⁵ If the client cannot learn the real reasons for a decision, they cannot defend themselves against it, and the court cannot verify the legality of the decision. Consequently, the operation of the public administration cannot be properly controlled as the court cannot assume an executive role and must remain within its judicial function.

In Hungarian jurisprudence, the court can fulfil its objective and subjective legal protection duties in public administrative proceedings by reviewing documents, including those containing classified data, to ensure ‘equality of arms’, as referred to by the Curia. However, this is only one side of the story.⁷⁶ The other party remains disenfranchised, as highlighted by the *GM* case, which underscores the individual’s rights in relation to the state’s national security interests. The Curia acknowledges that the client must obtain a complete picture of the authority’s decision, including the facts uncovered, those considered or ignored, and the legal provisions applied. This transparency guarantees that the decision can be reviewed later and its correctness and legality judged on its merits.⁷⁷

Thus, there are always at least two recipients of the justification: the client, whose legal situation is evaluated by the authority and whose fundamental interest is to know all aspects of the decision-making to challenge it, and the body overseeing the legal operation of the public administration, tasked with evaluating it within their remit.⁷⁸ Based on this, the obligation to justify authorities’ decisions is expressly declared in paragraph (1) of Article XXIV of the Fundamental Law of Hungary. The specifics of the justification are recorded in legal acts, but due to the simple nature of the hierarchy of norms, no law can be interpreted to allow the authority to completely deprive the justification of its intended effects.⁷⁹ This holds even if legislation permits the protection of certain information for state security reasons. In cases of conflicting fundamental rights, a necessary proportionality test must be applied, recognising the right to effective remedy.

Despite the international recognition that states can exercise their sovereignty to protect national security, this authority remains within the sovereign territory of Member States according to the loyalty clause. However, this sovereignty cannot override fundamental rights. Any legal interpretation or practice that effectively nullifies these rights is unconstitutional, as are laws that allow for unrestricted considerations of national security without regard for EU law.⁸⁰ The influence of EU law – and related Strasbourg law –

⁷⁵ Fundamental Law of Hungary, (n 45) art XXIV(1); Nóra Chronowski, ‘Mikor megfelelő az ügyintézés? Unió és magyar alapjogvédelmi megfontolások’ (2014) 61 (3) Magyar Jog 144.

⁷⁶ Curia of Hungary VII.Kfv.37.517/2023/12-I paras 37–38; Nóra Chronowski, József Petréttei, ‘Alkotmányi eljárásjog, alkotmányjogi eljárások, eljárási alkotmányosság’ (2016) 12 (3) Iustum Aequum Salutare 69.

⁷⁷ Curia of Hungary Kf.39177/2022/14. para 50.

⁷⁸ Monica Delsignore, Margherita Ramajoli, ‘The ‘Weakening’ of the Duty to Give Reasons in Italy: An Isolated Case or a European Trend?’ (2021) 27 (1) European Public Law 28, DOI: <https://doi.org/10.54648/euro2021002>

⁷⁹ Decision 5/2019. (III. 11.) AB of the Constitutional Court of Hungary, ABH 2019, 156–157.

⁸⁰ Cf. Fundamental Law of Hungary, (n 45) art I(3) and International Covenant on Civil and Political Rights. General Comment on Article 4 (adopted at the 1950th meeting, on 24 July 2001). CCPR/C/21/Rev.1/Add.11. item 16.

on this matter is significant but subject to varying interpretations. These interpretations must align with strict democratic standards and the rule of law, ensuring that all norms, whether explicitly stated or implied by constitutional principles, are upheld. Meanwhile, the importance of EU law – and the often-intertwined Strasbourg law – is debatable in effect, as a range of interpretations consistent with strict democratic standards of the rule of law exists for interpreting all norms originating from and implied by constitutional norms.

The EU is based on, *inter alia*, the rule of law and respect for human rights that function as a cohesive force based on common constitutional standards and guarantees cannot be made dependent on the actual exercise of legislative power. 'In a European Union founded on fundamental rights and the rule of law, protection should not depend on the legislative initiative of the institutions and the political process. Such contingent protection of rights is the antithesis of the way in which contemporary democracies legitimise the authority of the State.'⁸¹

This is where the real impact of EU law on the jurisprudence of Member States lies: as a vigilant overseer, ensuring operations align with fundamental values.

VI Concluding Remarks

Significant anniversaries require reflection. The European Union has undoubtedly led to changes to the legal systems and jurisprudence of all Member States. However, the impact extends beyond legal modifications, reflecting the impulse and consequences of European unity. This impulse, based on the principles of a democratic rule of law, serves as a guiding framework that shapes, reminds and sometimes condemns.

This study focuses on the findings of the *GM* case. According to the CJEU, it is contrary to EU law to deprive a client (in this case, a citizen of a third country) of basic procedural rights for national security reasons. Access to procedural documents must be ensured even if they are classified for national security reasons; otherwise, the right to an effective legal remedy cannot be exercised.

Member States enjoy procedural autonomy when implementing EU law. The EU legislator determines what must be implemented and what its framework is, but the Member States are ultimately responsible for implementation. This leads to particularly interesting and pertinent challenges when national powers, as mentioned in the loyalty clause, collide with the implementation of common policy. An example of this is migration policy, a leading topic in preliminary decision-making procedures, where the key point of reference is compliance with the EU Charter. Hungarian jurisprudence is frequently criticised in this context.

⁸¹ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi*. Opinion of AG Sharpston, ECLI:EU:C:2010:560, para 165; see also: Nóra Chronowski, 'Az Európai Unió Alapjogi Chartája hatályának kiterjesztéséről – alkotmánypolitikai megfontolások' in *Ünnepi kötet Dr. Bodnár László egyetemi tanár 70. születésnapjára* (Acta Universitatis Szegediensis, Acta Juridica et Politica 2014, Szeged) 9.

Examining the legal framework that gave rise to the decision and the jurisprudence creates a closer understanding of how procedural autonomy and national competence can be interpreted in such situations. It also clarifies where the boundary lies between purely national scope and EU legal influence. The principles of the rule of law fundamentally require the protection of individuals against state arbitrariness. In public administration, this is manifested in strict rules governing the authority's decision-making in individual cases. Procedural guarantees ensure the fair course of proceedings, allowing recipients to learn about, reflect on, and dispute the reasons underlying decisions. This is ensured by the obligation of justification, which in all cases binds the authority at a constitutional level and cannot be undermined, even when data classified for national security reasons are involved. The CJEU recently reminded Hungary of such an interpretation, strengthening the individual's right against the state's national security interests.

Welfare Services and the EU: Harmonising Systems without Legal Harmonisation?

Abstract

The literature has emphasised that the EU has different competences in different policies, and that the competences of the EU in the field of welfare (social and health care) services are relatively limited. First, the article will examine the role and impact of the Open Method of Coordination, namely, how the coordination of these services impacts the standardisation of welfare services.

Similarly, the role of EU funds in influencing the welfare policies of EU Member States will be analysed. The rules on the funds of the European Cohesion Policy and 'soft' regulations relating to them greatly influence the regional development policies of these countries. The conditions defined by the EU regulations on development funds greatly influence even those Member States' policies that are primarily defined as national policies. As a result of my research, it should be emphasised that there is no direct legal harmonisation in the field of welfare services. Yet, certain tools still result in the indirect legal harmonisation of laws in these fields, such as the Open Method of Coordination, the cohesion policy of the EU, and especially conditionality within cohesion policy.

Keywords: regional development, welfare services, open method of coordination, Regulation (EU) 1060/2021, multilayer governance, soft power

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I Introduction and Methods

The Member States of the European Union can be considered welfare states,¹ therefore, the role of social policy can be interpreted as very significant in these countries. Around 40 per cent of government expenditure is associated with the funding of the social protection systems in the EU, and these expenditures account for around 20 per cent of the GDP of the EU (see *Figure 1*).

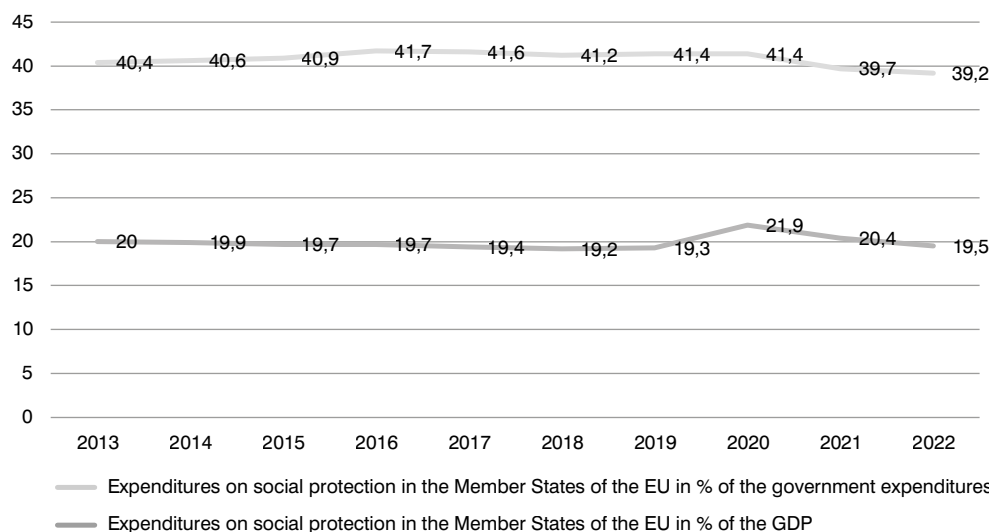


Figure 1. Expenditure on social protection in the EU27 (2013–2022)²

Thus, welfare services play an important role in the EU economy.³ These services are mainly interpreted as services of general interest, and thus, traditionally, the role of integration is limited in this field. The main aim of my paper is to review the legally ‘soft’ tools of the EU that significantly influence national policies. Thus, I would like to analyse how the EU could impact these services using legally non-binding tools and other EU policies (mainly cohesion

¹ Gøsta-Esping Andersen, ‘Towards the Good Society, Once Again?’ in Gøsta-Esping Andersen, Duncan Gallie, Anton Hemerijck, John Myles (eds), *Why We Need a New Welfare State* (Oxford University Press 2002, Oxford) 1–26) 2–4, DOI: <https://doi.org/10.1093/0199256438.003.0001>

² Source: EUROSTAT, COFOG <<https://ec.europa.eu/eurostat/en/web/main/search/-/search/dataset?text=COFOG>> accessed 1 April 2025.

³ Pierre Bauby, ‘From Rome to Lisbon: SGIs in Primary Law’ in Erika Szczyszak, Jim Davies, Mads Andanaes, Tarjei Bekkedal (eds), *Development in Services of General Interest* (T.M.C. Asser Press 2011, The Hague) 19–36, 21–24.

policy). I examine how a converging welfare environment may be implemented without or with limited legal harmonisation.

The method of my analysis is based mainly on the jurisprudential approach. Therefore, my examination will focus on legal regulations and judicial practice. My paper will review the socio-economic background and the major models of social policy as part of the analysis of the regulatory ecosystem. In addition, a comparative approach will be applied because the systems of the different Member States will be partially compared.⁴

II Legal Harmonisation and Welfare Services

1 General Framework

The literature emphasises that the values of the European Union are based on legislation and rules because they may be enforced by the EU bodies (especially by the Commission and the European Court of Justice).⁵ Similarly, authors have underlined that subsidiarity became a principle, but the role of directly applicable EC (later EU) regulations has increased in the last decades.⁶ Thus, examinations based on the jurisprudential approach have focused on the role of EU legislation, especially on directly applicable regulations and EU directives.⁷

Welfare services are interpreted by European law as services of general interest. Therefore, their provision belongs primarily to the competences of the Member States.⁸ Therefore, as seen later, the EU does not have general legislative power in this field.⁹ The main fields of

⁴ A similar approach was applied by Rosalind Dixon. See Rosalind Dixon 'Comparing Constitutionally: Modes of Comparison' in Joshua Aston, Aditya Tomer, Jane Eyre Mathew (eds), *Comparative Approach in Law and Policy* (Springer 2023, Cham) 1–6.

⁵ Kim Lane Scheppele, Dmitry Vladimirovich Kochenov, Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 *Yearbook of European Law* 3–121, 7–10, DOI: <https://doi.org/10.1093/yel/yeaa012>

⁶ Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 (1) *Journal of Common Market Studies* 72–87, 74–76, DOI: <https://doi.org/10.1111/j.1468-5965.2011.02228.x>

⁷ Paul Craig, Gráinne de Burca, *EU Law. Text, Cases and Materials* (3rd edn, Oxford University Press 2003, Oxford) 112–114.

⁸ The European Court of Justice has produced several landmark cases on the interpretation of welfare services as services of general interest. In the *Sint Servatius* case – Case C-567/07 *Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius*, EU:C:2009:593 – it was mentioned by the European Court of Justice that social housing can be interpreted as a service of general interest, which is primarily regulated by national rules. Similarly, the Greek natural risk benefits which are provided as part of the national social policy benefits for farmers are considered similarly as services of general interest, and the primacy of national law was emphasised in this case by the European Court of Justice (Case C-355/00 *Freskot AE v Elliniko Dimosio*, EU:C:2003:298).

⁹ Johan W. van de Gronden, 'Social Services of General Interest and EU Law' in Erika Szczyszak, Jim Davies, Mads Andanæs, Tarjei Bekkedal (eds), *Development in Services of General Interest* (T.M.C. Asser Press 2011, The Hague, 123–153) 124–127, DOI: <https://doi.org/10.1007/978-90-6704-734-06>

harmonisation can be considered indirect tools. The EU's labour law and employment directives also indirectly impact welfare services. Still, their role in influencing the cost of labour, such as the working time directive, significantly impacts the management of human resources by the institutions providing services and, to some extent, wage costs.¹⁰

2 'Land of Confusion' – Different Models and Approaches to the Social Policies of the Member States of the European Union

In an analysis of the role of the EU in the field of welfare services, it should be mentioned that the social policy approaches are quite diversified in the different Member States of the European Union. These models can be distinguished in various ways, but the most widely accepted classification in the literature is based on the research of Gøsta Esping-Andersen.¹¹

As it is clear, at least three – and if we apply the modified Esping-Andersen and the later developed other models, even four or five – models have evolved in the Member States of the European Union.¹² Therefore, even the coordination of these models can be considered a regulatory challenge for European integration.¹³

3 'Navigare necesse est' – The Coordination of Welfare Regulation in the EU and Legislative Competences of the EU

The idea of European integration has been based on the 'four freedoms': the free movement of persons and the free movement of people, goods, services and capital. However, there was debate over whether to include social policies in the integration process during the 1950s, which led to the inclusion of certain social policy measures under the framework established by the Treaty of Rome.¹⁴

¹⁰ For the impact on the EU rules of working time on costs of services see Ralf Rogowski, 'Sustainability and uncertainty in governing European employment law – the community method as instrument of governance: The case of EU Working Time Directive' in Jean-Claude Barbier, Ralf Rogowski, Fabrice Colomb, *The Sustainability of the European Social Model. EU Governance, Social Protection and Employment Policies in Europe* (Edward Elgar 2015, Cheltenham, UK, Northampton, MA, USA, 153–179) 158–162, DOI: <https://doi.org/10.4337/9781781951767.00015>

¹¹ Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990, Cambridge, UK) DOI: <https://doi.org/10.1177/095892879100100108>

¹² For more details on the different models and methodologies, see Wil Arts, John Gelissen, 'Models of Welfare States', in Francis G. Castles, Stephan Leibfried, Jane Lewis, Herbert Obinger, Christopher Pierson (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press 2010, Oxford, 569–586) 572–580, DOI: <https://doi.org/10.1093/oxfordhb/9780199579396.003.0039>

¹³ Gudrun Biffl, 'Diversity of Welfare Systems in the EU: A Challenge of Policy Coordination' (2004) 6 (1) European Journal of Social Security 33–59, 52–54, DOI: <https://doi.org/10.1177/138826270400600103>

¹⁴ Catherine Barnard, *The Substantive Law of the EU. The Four Freedoms* (6th edn, Oxford University Press 2019, Oxford) 31, DOI: <https://doi.org/10.1093/he/9780198830894.001.0001>

The enforcement of the 'four freedoms' has even impacted national welfare services. These services have an important role in the quality of life of workers, and their status significantly influences the free movement of persons. It is especially social security benefits and services that directly impact the latter: before these systems were coordinated, the possible loss of social security benefits may have influenced the migration of workers.¹⁵ Therefore, the coordination of social security systems is one of the most important issues for European integration in the field of welfare services. It should be emphasised that the coordination of the systems is quite different from the harmonisation of welfare services; it focuses on the interoperability between them.¹⁶ Even in the first period of European integration in the late 1950s and later during the late 1960s and 1970s, these issues were regulated by community legislation¹⁷ and now, the current Regulation (EC) No 883/2004 defines the major rules of this coordination.¹⁸ The principles of the previous coordination regulations and the scope of the benefits concerned have not fundamentally changed. First of all, it should be noted that coordination typically covers insurance-based and universal benefits and does not apply to means-tested benefits, which have become increasingly important in the EU since the economic crisis.¹⁹

Legal harmonisation was strengthened by the amendments to the Treaty of Rome. The Single European Act, the Treaty of Maastricht and the Treaty of Amsterdam introduced new community legislative competences, especially in the field of public health and individual and collective labour law.²⁰

It should be emphasised that the judicial practice of the European Court of Justice (ECJ) has had a significant influence on national welfare policies. Because of the relation between the four freedoms and the welfare policies, there are several landmark decisions, especially related to the free movement of services, which have even impacted national legislation. First, it should be noted that rules on the free movement of services should also be applied to health services that fall under the scope of welfare services, as stated in the *Luisi & Carbone* case.²¹ In this case, it was generally indicated that cases when a person travels to another country to receive health and medical services are also covered by the free movement of services provisions of the EEC Treaty. This right cannot, in the view of the Court of Justice of the European Communities, be unlawfully restricted. Within the above framework, the

¹⁵ Sándor Illés, Éva Gellérné Lukács, 'Dual Nature of International Circular Migration' (2022) 19 (2) Migration Letters 149–158, 152–154, DOI: <https://doi.org/10.33182/ml.v19i2.1554>

¹⁶ Axel Kokemoor, *Sozialrecht* (9. Auflage, Vahlen 2020, München) 24–25, DOI: <https://doi.org/10.15358/9783800663903>

¹⁷ Marc Morsa 'The European Regulation on Social Security Coordination from the Perspective of the Belgian Authority' (2019) 1 Belgisch Tijdschrift voor Sociale Zekerheid 139–141, 139–157.

¹⁸ Maximilian Fuchs (ed), *Europäisches Sozialrecht* (Nomos 2010, Baden–Baden) 43.

¹⁹ Raimund Waltermann, *Sozialrecht* (9. Auflage, C. F. Müller 2011, Heidelberg) 47–48.

²⁰ Ralf Rogowski, 'The European Social Model and the Law and Policy of Transitional Labour Markets in the European Union' in Ralf Rogowski (ed), *The European Social Model and Transitional Labour Markets* (Routledge 2016, London, New York, 9–28) 9–11, DOI: <https://doi.org/10.4324/9781315616384-2>

²¹ Case *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro*, EU:C:1984:35.

European Court of Justice first stated in the *Grogan*²² case that health care and, in this case, abortion-related treatments could be interpreted as services based on the direct economic relationship between the provider and the recipient and that the rules on the free movement of services, therefore, should apply. In these cases, the ECJ clearly recognised the service character of privately funded welfare (including health) benefits.²³ It was questionable whether social security benefits could be included in this scope. In the *Kohll* case, the ECJ recognised that social security benefits could also be covered by the free movement of services regime.²⁴

The principle of free movement of goods and services has led to increased competition and a more unified market in the European area, particularly in the pharmaceuticals market.²⁵ Accordingly, in the *Decker* case, the Court of Justice ruled that the failure of the Luxembourg social security body to reimburse the price of glasses purchased in Belgium was contrary to the principle of free movement of goods.²⁶ However, the European Court of Justice has been consistent in not classifying social security bodies as undertakings. The Court first stated that in the *Poucet and Pistre* judgment.²⁷ In the *AOK Bundesverband* case, the ECJ also ruled²⁸ that associations of these insurers cannot be considered undertakings either. In the *INAIL* case,²⁹ the Court stated that the existence of only one insurance body for accidents in a country did not infringe competition rules.

It seems that there was a paradigm shift in EU legislation in 2016 and 2017, when first the president of the European Commission, Jean-Claude Juncker, announced the European Pillar of Social Rights. Based on the announcement, the European Social Pillar was proclaimed as a (joint) communication by the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the

²² Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, EU:C:1991:378.

²³ Tamara K. Herve, 'If Only It Were So Simple: Public Law Services and EU Law' in Marise Cremona (ed), *Market Integration and Public Services in the European Union* (Oxford University Press 2011, Oxford, 179–250) 221, DOI: <https://doi.org/10.1093/acprof:oso/9780199607730.001.0001>

²⁴ Case C-158/96 *Raymond Kohll v Union des caisses de maladie*, EU:C:1998:71.

²⁵ Mark Dawson, *New Governance and the Transformation of European Law* (Cambridge University Press 2011, Cambridge) 171–172, DOI: <https://doi.org/10.1017/CBO9781139017442>

²⁶ Case C-120/95 *Nicolas Decker v Caisse de maladie des employés privés*, EU:C:1998:167

²⁷ Case C-159/91 and C-160/91 *Christian Poucet v Assurances générales de France és Caisse mutuelle régionale du Languedoc-Roussillon*, EU:C:1993:63

²⁸ Case C-264/01 *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft Cordes*; Case C-264/01 *Hermani & Co*; Case C-306/01 *Mundipharma GmbH*; Case C-354/01 *Gödecke GmbH* and Case C-355/01 *Intersan, Institut für pharmazeutische und klinische Forschung GmbH*, EU:C:2004:150.

²⁹ Case C-218/00 *Cisal di Battistello Venziano & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)*, EU:C:2002:36.

Regions.³⁰ The European Social Pillar defines 20 principles in three chapters. It should be mentioned that the Pillar may not be interpreted as a legally binding regulation; it is a soft law document. The literature emphasises that the pillar is based on the European Charter of Fundamental Rights and the current European legislation. It may not be interpreted as a document by which legislative competences are created. It can be considered a summary of the results of Social Europe, and the 'principles' could be the basis for starting new European policies and the coordination of the system. It can even be interpreted as a principle of the EU's cohesion policy in the field of social cohesion. Thus, the literature mainly considers it the 're-packaging' of European social policies and activities.³¹

III Harmonising without Legal Harmonisation: Soft Tools of the European Union

As seen above, the influence of 'traditional' legal harmonisation can be considered limited in the field of welfare services. Therefore, the role of 'soft' harmonisation tools may be appreciated in this field because the EU Treaties, the policy documents, involve quite extensive soft policy making. Similarly, other EU policies – as may be seen later, especially cohesion policy – give the opportunity to build a more harmonised welfare system in Europe.

1 Open Method of Coordination as a Soft Form of Harmonising Different Systems

One of the most significant innovations of the Amsterdam Treaty and one of the most important European integration steps was the establishment of policy on the inclusion of the fight against social exclusion in EU social policy and the introduction of the Open Method of Coordination (OMC) of the social policies of the Member States. Originally, the first OMC was introduced in the field of employment-related policies.³² In the first step, the Council sets strategic objectives. Then, based on a Commission proposal, the Council sets guidelines and indicators, based on which each Member State prepares a national action plan. The Commission evaluates these and their implementation, summarises 'good

³⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights COM/2017/0250 final.

³¹ Ulrich Becker, 'Introduction' in Ulrich Becker, Anastasia Poulou (eds), *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press 2011, Oxford, 1–23) 11, DOI: <https://doi.org/10.1093/oso/9780198851776.001.0001>

³² Martin Heidenreich, 'The Open Method of Coordination: a pathway to the gradual transformation of national employment and welfare regimes?' in Martin Heidenreich, Jonathan Zeitlin (eds), *Changing European Employment and Welfare Regimes. The influence of open method of coordination on national reforms* (Routledge 2009, London, New York, 10–36) 10–12, DOI: <https://doi.org/10.4324/9780203878873>

practices', and finally, as a kind of feedback, proposes the next strategic orientations on the basis of the evaluation.³³

The OMC has been hailed by many as a revolutionary breakthrough and a non-legal instrument for building a social Europe. It can be argued that it is closely aligned with the development of EU law, which is built in many ways on the interactive, consensual elements of good governance.³⁴ Cooperation at the union level has been achieved without transferring the national competences to supranational bodies.³⁵ The OMC became an important tool for harmonising European welfare service systems.³⁶ Although the approaches have been different, this soft, legally non-binding tool has offered the opportunity to adapt successful answers to the same socio-economic challenges. Thus, several important elements of the welfare services have been harmonised by applying this method.³⁷

The main advantage of open coordination is also its main disadvantage. Due to the lack of direct union (legislative) competences, the system operates successfully if all Member States participate voluntarily and in cooperation with each other. In practice, there have been differences in the approach of the Member States to cooperation.³⁸

While there have been difficulties and differences, the application of OMC has facilitated the exchange of national experiences, particularly in the fields of social inclusion, pensions, health care and care for the elderly, thus promoting the development of more harmonised European legislation by adopting good practice and encouraging a process of convergence between European welfare systems.³⁹

2 Cohesion Policy as a 'Soft Tool' for Influencing National Policies

Cohesion policy – which was incorporated into the Treaties by the Single European Act – may impact the policies of the Member States of the European Union. Paragraph 1 of Article 174 of TFEU states that the 'Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion'. Thus, Article 174 of TFEU provides an opportunity for the EU to influence the performance of the competences of the

³³ Mary Daly, 'The dynamics of European Union social policy' in Patricia Kennett, Noemi Lendvai Baiton (eds), *Handbook of European Social Policy* (Edward Elgar 2017, Cheltenham, UK, Northampton, MA, USA, 93–107) 101–102, DOI: <https://doi.org/10.4337/9781783476466.00014>

³⁴ Dawson (n 25) 43–45 and Fabian Terpan 'The definition of soft law' in Mariolina Eliantonio, Emilia Korkea-aho, Ulrika Mörtz (eds), *Research Handbook on Soft Law* (Edward Elgar 2023, Cheltenham, UK, Northampton, MA, USA, 43–56) 50, DOI: <http://dx.doi.org/10.4337/9781839101939>

³⁵ Fuchs (n 18) 44–45.

³⁶ Caroline de la Porte, 'Social OMCs: Ideas, policies and effects' in Bent Greve (ed), *The Routledge Handbook of the Welfare State* (Routledge 2013, London, New York, 410–418) 412–413.

³⁷ Daly (n 33) 102.

³⁸ Konstantinos Alexandris Polomarkakis, 'Social Europe: A Midsummer Night's Dream' in Paul James Cardwell, Marie-Pierre Granger (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar 2020, Cheltenham, UK, Northampton, MA, USA, 224–246) 234, DOI: <http://dx.doi.org/10.4337/9781788971287>

³⁹ Fuchs (n 18) 45.

Member States, and the welfare policies belonging to these policies because they are related to ‘social [...] cohesion’.⁴⁰ Based on this regulation, the EU has developed a cohesion policy that covers not only the traditional EU competences. The abstract rule of Article 174 of the TFEU fits with the transformation of the EU, which is an economic integration and an area of common political and social values.⁴¹ Because of these common values, not only can the financial type of conditionality be applied by the EU, but based on this approach, the rules on cohesion policy have been transformed in the last few years.⁴² The conditionality mechanism has been introduced by the current regulations on cohesion policy – especially Regulation (EU) No 2021/1060 (hereinafter: Framework Regulation). The background regulation of Article 15 is Regulation (EU, EURATOM) No 2020/2092 on a general regime of conditionality for the protection of the Union budget. These regulations offer the possibility of suspending the EU’s funding based on the need to protect its basic values. These rules were contested by Hungary, but the action was dismissed by the European Court of Justice. However, the action of Hungary was based on the EU’s lack of competence in such a regulation; the ECJ stated that Articles 2 and 7 of the TFEU could be interpreted as legitimate bases for the rule of law conditionality mechanism. The ECJ highlighted that the values of the rule of law ‘define the very identity of the European Union as a common legal order’.⁴³ Therefore, they could be enforced by the tools of EU cohesion policy.

The cohesion policy of the EU can be interpreted as a complex policy. The original concept, which was based on the ‘economic integration’ nature of the EU, has been transformed, and now this policy can influence the public service provision of the Member States of the European Union.⁴⁴ The cohesion policy of the EU is primarily based on reducing regional disparities. During the budgetary period 2021–2027, 61.3% of the resources for the investment into jobs and growth have been allocated to less developed regions (whose GDP at purchasing power parity is less than 75% of the EU27 average) [Article 110 of the Regulation (EU) No. 2021/1060]. Therefore, the main recipients of these funds are the new Member States of the European Union because their regions mainly belong to this category.⁴⁵ The role of cohesion policy is very important in the budgetary policies of these

⁴⁰ Steven Ballantine, Lorenzo Mascioli, ‘Spaces of subsidiarity: A comparative inquiry into the social agenda of Cohesion Policy’ (2024) 58 (4) *Social Policy and Administration* 605–620, 607–610, DOI: <https://doi.org/10.1111/spol.13006>

⁴¹ Stephen Weatherill, *Law and Values in the European Union* (Oxford University Press 2016, Oxford) 393–395, DOI: <https://doi.org/10.1093/acprof:oso/9780199557264.003.0008>

⁴² Laurent Pech, Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3–47, 7–10, DOI: <https://doi.org/10.1017/cel.2017.9>

⁴³ Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97.

⁴⁴ Julia Bachtrögl, Ugo Fratesi & Giovanni Perucca, ‘The influence of the local context on the implementation and impact of EU Cohesion Policy’ (2020) 54 (1) *Regional Studies* 21–34, 23, DOI: <https://doi.org/10.1080/00343404.2018.1551615>

⁴⁵ Arjan H. Schakel, ‘Multi-level governance in a ‘Europe with the regions’ (2020) 22 (4) *The British Journal of Politics and International Relations* 767–775, 769–771, DOI: <https://doi.org/10.1177/1369148120937982>

countries.⁴⁶ If we look at the Visegrád countries (the Czech Republic, Hungary, Poland and Slovakia, which countries joined the European Union in 2004), the actual payments (including the n+2 payments) from the European Structural and Investment Funds may be interpreted as significant.

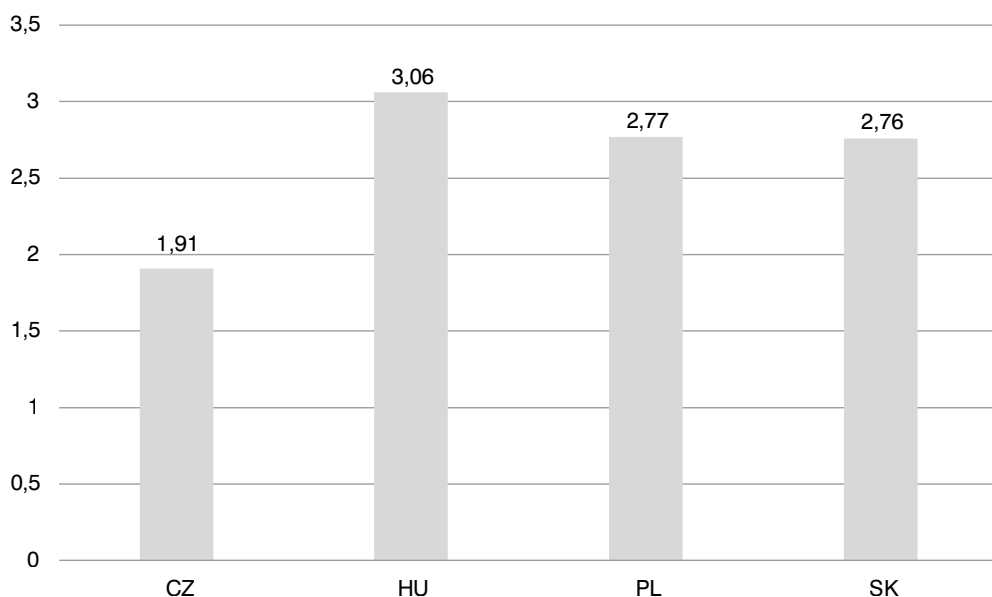


Figure 2. Yearly European Structural and Investment Funds (ESIF) from EU (2014–2020) as share of average of 2014–2020 GDP (current market prices) (%)⁴⁷

The above-mentioned abstract and general regulation of the TFEU offers a wide range of EU interventions. Similarly, the European Social Fund, which was established by the Treaty of Rome, subsidises not only employment issues but even welfare services.⁴⁸ Therefore, the EU funds could influence these national policies, which are defined mainly as the competences

⁴⁶ John Bachtler, Martin Ferry, 'Cohesion policy in Central and Eastern Europe: is it fit for purpose?' in Gregorz Gorzelak (ed), *Social and Economic Development in Central and Eastern Europe* (Routledge 2020, London, New York, 313–344) 334–337, DOI: <https://doi.org/10.4324/9780429450969-14>

⁴⁷ Source: edited by the Author based on data from Eurostat national accounts 2014–2020 and <<https://cohesiondata.ec.europa.eu/countries>> accessed 1 April 2025.

⁴⁸ Karen Hermans, Johanna Greis, Heleen Delanghe, Bea Cantillon, 'Delivering on the European Pillar of Social Rights: Towards a needs-based distribution of the European social funds?' (2023) 57 (4) *Social Policy and Administration* 464–468, 467, DOI: <https://doi.org/10.1111/spol.12879>

of the Member States.⁴⁹ Similarly, because the less developed regions are the main target areas for cohesion policy, the policies of those countries are impacted significantly by countries with lower GDP. Therefore, the welfare, educational and cultural policies of the new Member States of the EU – which accessed the EU after 2004 – are significantly more influenced by the cohesion policy.⁵⁰ This influence can be proved by the role of these European funds in national public service development policies. According to the national partnership agreements, the share committed to funding welfare, education, and cultural services is relatively significant within the resources of the cohesion policy. In Hungary, the share of these funds is around 20% (see *Figure 3*).

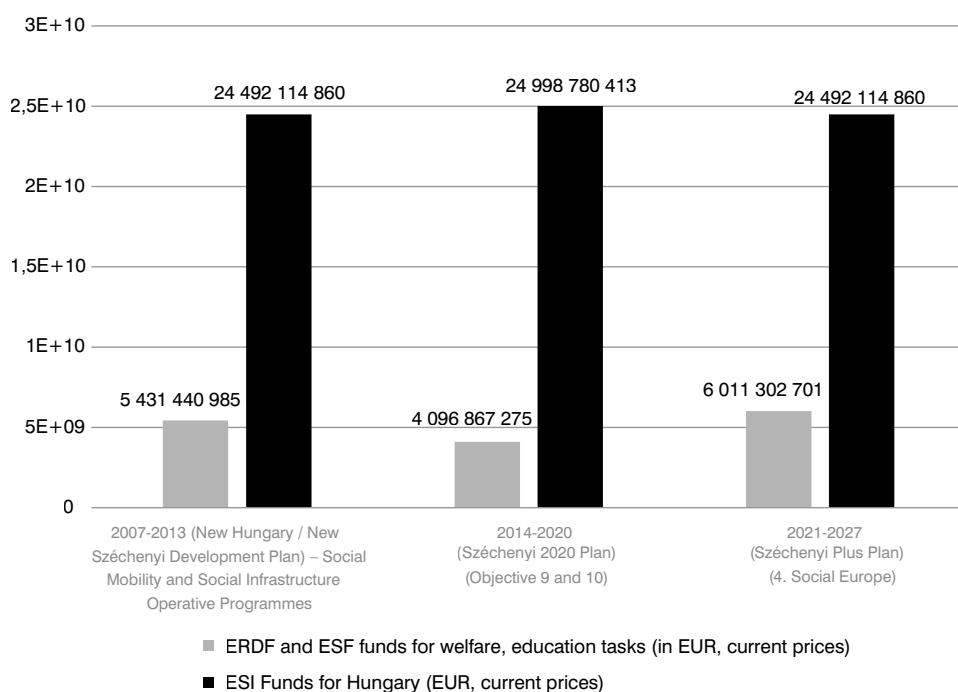


Figure 3. ESI Funds and ESI Funds for welfare and educational objectives in Hungary 2007–2027 (based on the partnership agreements / national strategic reference framework)⁵¹

⁴⁹ Juhász Gábor, Tallér Ágnes, 'A társadalmi kirekesztődés elleni küzdelem az EU új tagállamaiban' (2005) 16 (6) *Esély* 23–63, 35–36.

⁵⁰ Beáta Farkas, 'Quality of governance and varieties of capitalism in the European Union: core and periphery division?' (2019) 31 (5) *Post-Communist Economies* 563–578, 567–570, DOI: <https://doi.org/10.1080/14631377.2018.1537740>

⁵¹ Source: edited by the author, based on Hungarian partnership agreements and the 2007–2013 national strategic reference framework <http://pik.elte.hu/file/_j_Magyarorsz_g_Fejeszt_si_Terv__MFT_.pdf>; <<https://www.palyazat.gov.hu/download.php?objectId=52032>>; <<https://www.palyazat.gov.hu/partnersegi-megallapodas>> accessed 1 April 2025.

3 The Role of Conditionality as a Factor of Influence in the Field of Welfare Services

Conditionality has been part of EU law since the 1990s and has been embedded in various EU policies, including cohesion policy. These mechanisms are not new to EU legislation, as they have been applied to the Cohesion Fund; however, the 1994 Cohesion Fund conditionality was based on macroeconomic issues. During the 1990s, another form of conditionality was developed: the Copenhagen Criteria defined conditions and values for countries that would like to access European integration.⁵² Based on the regulation, a two-tier conditionality system has evolved in the European Union.

The first general tier of the conditionality mechanisms is the rule of law conditionality. As I have analysed earlier, the rule of law conditionality mechanism was introduced by Regulation (EU, EURATOM) No 2020/2092 using a general regime of conditionality to protect the Union budget.⁵³ Thus, there were antecedents of the regulation. The role of budgetary tools in the field of the protection of the basic values of the EU has been mentioned earlier in the literature as well. It is highlighted by several papers that the countries that are the most problematic in the field of basic values and rule of law backsliding (especially Poland and Hungary) are major recipients of EU funds. The authors emphasise that Member States should follow the basic values of the EU as defined in Article 2 of TFEU. Therefore, countries with issues concerning the rule of law should be sanctioned. It has been clear that the procedure based on Article 7 of the TFEU is not sufficient, and it was highlighted that the issues associated with the rule of law could result in a threat to the EU budget because of the elevated risk of corruption and insufficient spending.⁵⁴

This approach was developed, and in 2021, a second, sectoral tier conditionality mechanism was introduced by Article 15 of the framework regulation of the ESIF (2021–2027) by Regulation (EU) No 2021/1060. So-called horizontal and thematic enabling conditions have been introduced by the Framework Regulation. These rules could be interpreted as a supplementary element of the system of conditionality intended to protect the basic values of the EU. The enhanced conditionality mechanism of cohesion policy defines four horizontal enabling conditions: 1. effective monitoring mechanisms for the public procurement market, 2. tools and capacity for the effective application of State aid rules, 3. effective application and implementation of the Charter of Fundamental Rights and 4. implementation and application of the United Nations Convention on the rights of persons with disabilities (CRPD). Thus, it is not enough to fulfil the requirements of Regulation (EU, EURATOM) No 2020/2092; fulfilling

⁵² Christophe Hillion, 'The Copenhagen Criteria and their Progeny' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004, Oxford, UK, Portland, OR, USA, 1–22) 7–11.

⁵³ Pech, Scheppele (n 42) 7–9.

⁵⁴ Pech, Scheppele (n 41) 24–28 and Antonia Baraggia, Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23 (2) *German Law Journal* 131–156, 140–142, DOI: <https://doi.org/10.1017/glj.2022.17>

the horizontal enabling conditions is required to receive funds associated with cohesion policy. It is clear that these additional conditions are linked to basic values and especially to the principle of the rule of law. As a second element, the conditionality mechanism is even part of the protection of fundamental rights, which are considered a basic value of the EU, and because of EU membership in the CRPD, its application is required. The third and fourth horizontal enabling conditions are especially important in the field of welfare services. First of all, the values and principles of the European Charter of Fundamental Rights should be applied in the field of these welfare services. Thus, it became a binding requirement for those national administrations which would like to receive funds from the ESIF. Second, the welfare policies related to persons with disabilities are significantly influenced, and the application of the CRPD is a similar requirement because these principles should be applied directly. Therefore, national policies on care services for persons with disabilities have been transformed – community living should be strengthened, and the role of large care institutions should be decreased because Article 19, point c) of the CRPD favours community care services as a means of promoting the independent living of persons with disabilities.⁵⁵

IV Closing Remarks

There are different tools for harmonising systems in the European Union. The jurisprudential approach focuses primarily on the ‘hard’ judicial tools, legal harmonisation and the legislative powers of the bodies of the European Union. In the field of welfare services, there have been strong limitations on Union legislation because of the nature of these services: they are services of general interest. Therefore, in this field, national competences are dominant. It may be emphasised that there are different, partially legally regulated, but mainly policy-based toolkits for building a joint European framework. First of all, the OMC resulted in a partial harmonisation of welfare systems. Second, especially in the new Member States, which are the main recipients of the funds associated with Cohesion Policy, the ESIF (and partially, between 2021 and 2026, the RRF) may even be an effective tool for developing more harmonised welfare service systems. If we look at such influence, it may be mentioned that these ‘soft’ tools can be quite effective, sometimes even more effective than ‘traditional’ legal harmonisation.⁵⁶ My research indicates that it should

⁵⁵ Andrea Broderick, Silvia Favalli, ‘The Transition from Institutional Care to Community Living in the EU: Lessons Learned in the Shadows of COVID-19 Pandemic’ in Philip Czech, Lisa Heschl, Karin Lukas, Manfred Nowak, Gerd Oberleitner (eds), *European Yearbook on Human Rights 2021* (Intersentia 2022, Cambridge) 231–258, DOI: <https://doi.org/10.1017/9781839702266.013>, 242–246 and Áine Sperrin, ‘A Disability Rights Approach to a Constitutional Right to Housing’ (2023) 3 (1) *International Journal of Disability and Social Justice* 80–95, 85–86, DOI: <https://doi.org/10.13169/intljofdissojus.3.1.0080>

⁵⁶ A similar result is shown by Nikolaos Voulvoulis, Karl Dominic Arpon, Theodoros Giakoumis, ‘The EU Water Framework Directive: From great expectations to problems with implementation’ (2017) 575 *Science of the Total Environment* 358–366, 363, DOI: <http://dx.doi.org/10.1016/j.scitotenv.2016.09.228>

be emphasised that there is no direct legal harmonisation in the field of welfare services. Yet, certain tools still result in the indirect legal harmonisation of laws in these fields, such as the Open Method of Coordination and the cohesion policy of the EU, especially the conditionality associated with it.

The Confluence of the Janus-Faced EU and Hungarian Domestic State Aid Law through Crises

Abstract

The permacrisis, including the COVID-19 pandemic, Russia's war on Ukraine and the urge for the green transition, has put the European Union in a situation whereby it has had to act without delay in many fields, of which one was and still is, the EU's State Aid Law. The European Commission adopted a set of soft law instruments, thereby effectuating the greatest shift in state aid the internal market has ever seen. This shift, however, has had impacts on the competences of the Commission, the power of the Commission, and the undistorted nature of the internal market itself. We are now marking Hungary's 20th year as a Member of the EU, and this anniversary hallmarks great changes in the division of competences within and between the Commission, other institutions, and the Member States. In this paper, I intend to elaborate on this shift in the field of State Aid Law in the light of the permacrisis.

Keywords: EU State Aid Law, Temporary Framework, crisis, internal market, competition law, soft law, competence

I Background

EU state aid law has been loosened since 19 March 2020 by three consecutive regimes. Immediately upon the COVID-19 pandemic-related crisis, the European Commission (Commission) adopted its Temporary Framework¹ as the guardian of EU competition law,² whereby they announced a series of legal bases functioning as derogations from the then-known state aid framework, granting massive 'easing' for Member States regarding how and

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¹ Commission, 'Temporary Framework' (2020) C/2020/1863 and its amendments.

² Katalin Gombos, *Az Európai Unió joga* (2nd edn, Patrocinium 2021, Budapest) 363.

under what conditions they are entitled to grant state aid to the entities of their national economies. Since the effect of most legal bases of the Temporary Framework (TF) lasted until 30 June 2022, it even seemed like, for a short period, that the main state aid regime would be put back in place as if it had never been altered, not even remotely. However, when the Russo-Ukrainian war broke out, the Commission decided to adopt a new, revised framework tailor-made for the ongoing crisis, the Temporary Crisis Framework (TCF),³ on 23 March 2022, still heavily based on the specifications of the then-outgoing TF regime. The enumeration of this has not ended yet, as the Commission, on 9 March 2023, adopted the Temporary Crisis and Transition Framework (TCTF),⁴ further introducing targeted legal bases for granting state aid in a simplified way under uniform conditions *en masse*.

In peace and boom times, Articles 107–109 of the Treaty on the Functioning of the European Union (TFEU) constitute the base of the state aid law of the European Union, where Article 107(1) stipulates a general ban on granting state aid, immediately prior to laying down exceptions from this general prohibition in Paragraphs 2 and 3 of the said Article. These rules are crucial, as they play a key role in establishing the internal market of the European Union (EU) entrusted by Article 2 of the Treaty on the European Union (TEU) alongside the four freedoms and antitrust provisions. Article 107(2) declares certain categories *ab ovo* compatible with the internal market, and within the framework of this Article, the Commission cannot exercise any discretion, as regarding Paragraphs 1 and 2, to declare what measure falls within the category of state aid. Further, which of these measures are deemed automatically compatible with the internal market is a matter of pure EU law, based solely on an objective basis. On the other hand, Article 107(3) grants the Commission the right to declare particular measures to be compatible with the internal market.⁵ Under Article 107(3), even though the Commission is entitled to individually decide about the compatibility of each measure, and may avail itself of discretion,⁶ it cannot be foreseen from the wording of the TFEU that the Commission could broaden the scope, which consists the following: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; and (d) aid to promote culture and heritage conservation where such aid does not

³ Commission, 'Temporary Crisis Framework' (2022) 2022/C 426/01 and its amendments.

⁴ Commission, 'Temporary Crisis and Transition Framework' (2023) 2023/C 101/03 and its amendments.

⁵ Conor Quigley, *European State Aid Law and Policy* (3rd edn, Hart Publishing 2015, Oxford-Portland) 3, DOI: <https://doi.org/10.5040/9781782259329>

⁶ Paul Craig, Gráinne de Búrca, *EU Law, Text, Cases and Materials* (7th edn, Oxford University Press 2020, Oxford) 1171, DOI: <https://doi.org/10.1093/he/9780198856641.001.0001>

affect trading conditions and competition in the EU to an extent that is contrary to the common interest. I find it important to pay attention to the fact that the text of Article 107(3) makes certain differentiations regarding the balance test needed when deciding whether an aid measure may be deemed compatible, as the said Article only prescribes taking into account the ‘common interest’ of the EU in the cases of Points (c) and (d) of the aforementioned Article, from which I infer, regarding Items (a) and (b), that the Commission may not articulate further requirements to be complied with, and it may not even analyse the potential of the harm to the internal market when it comes to, for instance, remedying a serious disturbance in the economy of a Member State. This statement of mine is further elaborated in this paper in light of the *actio radius* of the Commission in the field of state aid control, which is, in practical terms, nothing less but a limitation on the competences of the Member States, upon which the Member States have only agreed to the extent imposed by the Treaties – that is to say, concerning how the wordings of the Treaties are formulated and not beyond this, by any arbitral broadening.

Previously, I mentioned ‘peace and boom times’, although the factual legal situation is that peacetimes and turbulent times do not differ regarding the legal bases of granting state aid. Normatively, the Treaty framework is used to authorise crisis measures, as well. On the other hand, the Commission, by limiting its wide discretion to apply Article 107(3), has adopted soft law instruments. The function of soft law, primarily, is to fine-tune and fill the Treaty provisions with actual and precise substance and a set of clarifications. The Commission adopted the abovementioned frameworks (TF, TCT, TCTF); nonetheless, they do not play the primary legal role in labelling a state aid measure compatible, even though they may seem like they do.

In the following chapters, I intend to briefly introduce some of the Hungarian legislative measures taken during the times of the still ongoing state aid ‘great loosening’ while examining whether the Commission has or has not stretched beyond its rightful *actio radius* at all when seemingly dealing with TFEU-based matters within the frameworks of soft law, supposedly defining criteria additional to the TFEU. When elaborating on these issues, I seek to introduce the domestic implementation of approving Commission decisions, mostly in the form of Government Decrees, which sometimes form a triangle-shaped problem, ie, involving the tensions between the tertiary and primary laws of the EU and between EU and domestic law. In order to draw conclusions, I mainly apply desk research while also relying on my work experience.

II The Legal Nature of the TF, TCF and TCTF

We may declare that state aid rules are monitored by the Commission in the first place. Therefore, the Commission is active when it comes to forming them. This is also why we are faced with several soft law instruments published by the Commission that suggest its

own way of thinking about competition. All in all, I find these kinds of ‘*pseudo* legislation’ instruments legitimate, as they do not create extraordinary or new burdens; they are always formulated to either make existing obligations and rights clear by delineating their boundaries or to fill existing obligations with actual and practical content. This means the Commission does not override the TFEU, any secondary laws of the EU, nor the judgments or interpretations of the Court of Justice of the European Union (Court); it only supplements, construes, highlights or paves the way for them, and these soft law instruments perfectly blend into the ‘immune system’ of the net of – inter alia – the Treaties, regulations, directives, Court judgments and the binding decisions of the Commission. Many soft law measures, during the years of the State Aid Law expansion, have become hard law,⁷ however, and have been turned into regulations (eg the De minimis Regulation⁸ in 2001), which shows that a soft law, in itself, possesses a variable range of power.

TE, TCF, and TCTF belong to the category of soft law instruments, nonetheless, as they are published in the form of communications. That being said, it is visible that they shall not modify or expand any obligations assumed by the Treaties, namely the TFEU in our case. Soft laws play an important role in the modernisation of State Aid Law,⁹ and they give guidance to the legal subjects – unilaterally or in a cooperative way¹⁰ – concerning what the Commission requires from them. The rules of state aid set out by communication and accepted by the Member States practically have binding effects and constitute a measure of general application.¹¹ The Court, in the *Kotnik* case,¹² confirmed that the Treaty confers wide discretion on the Commission to assess the compatibility of aid measures with the internal market, including the possibility of adopting guidelines spelling out the criteria of compatible aid,¹³ and from the legality point of view, it still remains within the remit of the TFEU to serve as the basis concerning whether a measure constitutes compatible state aid.¹⁴ However, any effect of the communication on the Member States ‘can at most be incidental

⁷ Eugene Stuart, Iana Roginska-Green, *Sixty Years of EU State Aid Law and Policy* (International Competition Law Series, Wolters Kluwer 2018, Alphen aan den Rijn) 11.

⁸ Regulation (EU) 2023/2831 of the Commission [2023] OJ L2023/2831 currently, formerly Regulation (EU)1407/2013/EU of the Commission [2013] OJ L352/1; Regulation (EC) 1998/2006 of the Commission [2006] OJ L379/5; Regulation (EC) 69/2001 of the Commission [2001] OJ L10/30; and in the beginning Commission, ‘Notice on the de minimis rule for State aid’ 96/C 68/06 (1996).

⁹ Oana Stefan, *EU Competition and State Aid Soft Law in the Member States: Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK* (King’s College London Law School Research Paper Forthcoming, King’s College 2020, London) 10.

¹⁰ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart Publishing 2013, Oxford-Portland) 48.

¹¹ Lea Petra Láncoš, ‘A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?’ (2018) 24 (4) European Public Law 771, DOI: <https://doi.org/10.54648/EURO2018042>

¹² Case C-526/14 *Kotnik and Others v Državni zbor Republike Slovenije*, ECLI:EU:C:2016:570.

¹³ Láncoš (n 11) 779.

¹⁴ Láncoš (n 11) 780.

or indirect',¹⁵ as opposed to other unofficial views considering these communications 'factually binding', as the principle of loyalty would and may deter national courts and authorities from departing from such measures fearing an infringement procedure.¹⁶ It is a general accord that the Commission, in practice, forces the Member States to accept its soft law instruments, for instance, because if a Member State opposes a guideline of the Commission, the Commission then is inclined to launch a formal investigation into all relevant existing State aid schemes,¹⁷ as is mentioned later, as well. Formally, soft law binds only the Commission itself as a self-imposed limitation on the power of its discretion;¹⁸ in practice, however, it defines positive criteria for national state aid policies compatible with the common market and leaves little room for Member State aid policies, which seek to deviate from these criteria, and this is a part of the Commission's task concerning the 'negative integration' of the EU.¹⁹ However, its depth is questionable.²⁰ Regarding the TF, it set out the criteria which, if complied with, paved the way for Member States to grant state aid in order to tackle the effects of the COVID-19 pandemic. Point 11 of the TF explicitly states that 'in the overall effort of Member States to tackle the effects of the COVID-19 outbreak on their economy, this Communication sets out the possibilities Member States have under EU rules to ensure liquidity and access to finance for undertakings, especially SMEs that face a sudden shortage in this period in order to allow them to recover from the current situation'. Thereby, the TF unapologetically suggests, in my opinion, that the criteria defined by the Communication ought to be the sole option of the Member States for granting state aid. Point 19 of the TF reinforces this when stating, 'the Commission sets out in this Communication the compatibility conditions it will apply in principle to the aid granted by Member States under Article 107(3)(b) TFEU.²¹ Member States must, therefore, show that the State aid measures notified to the Commission under this Communication are necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned and that all the conditions of this Communication are fully respected'. To emphasise the severeness of this statement, we shall juxtapose the aforementioned wordings with the wording of the TFEU, which merely says that aid to remedy a serious disturbance in the economy of a Member State may be considered to be compatible with the internal market.

¹⁵ Ibid.

¹⁶ Láncoš (n 11) 781.

¹⁷ Stuart, Roginska-Green (n 7) 14.

¹⁸ de Cecco (n 10) 49.

¹⁹ Michael Blauberger, 'From Negative to Positive Integration? European State Aid Control: Through Soft and Hard Law' (2008) Max-Planck-Institut für Gesellschaftsforschung Discussion Paper 2008/4 Max-Planck-Institut, Köln 6, DOI: <https://doi.org/10.2139/ssrn.1660981>

²⁰ Blauberger (n 19) 8.

²¹ In other cases, the TF also mentions the TFEU itself as a direct legal base; however, in a quite inconsistent way, see Point 1.3. of the TF, and the Commission also approved measures directly under the TFEU, see Case T-657/20 *Ryanair v European Commission* ECLI:EU:T:2022:390.

This is not to argue that the Commission has the competence to decide on the compatibility of state aid. However, setting absolute criteria that effectively narrow the scope for granting aid – beyond which an aid measure would seemingly be deemed incompatible – raises doubts. In practice, this has not been the case, as Member States have been, and still are, allowed to notify state aid measures that derogate from the provisions of the TF, TCT and TCTF. However, when doing so, the approval process has taken significantly longer,²² recently ranging from 1 to 2,319 days (almost six and a half years), as the Commission is no longer able to assess notified aid measures in a simple checklist-based manner.

This creates a factual situation in which the Member States are, in fact, obliged to follow every detail of the Communications without any derogations. Legally, this is not the case, but the factual possibilities are different, and they narrow down the room for manoeuvre of Member States, so to say, contrary to what is granted by the TFEU itself. I clearly understand and sympathise with the contemplations of the Commission concerning the desire to respond quickly by setting uniform rules, although these uniform rules do not take into consideration the different environmental and economic differences – for instance, the interest rates in different Member States. Even though the communications afforded a large scale and a wide range of variety of aid schemes and may seem like ‘loosenings’, the legal reality shows that they delineated and limited the Member States’ *actio radiuses* in a way that cannot be foreseen or inferred from the TFEU, as the status of a ‘serious disturbance in the economy of a Member State’ is a *sui generis* legal base on which to address such anomalies by state aid measures. Legal scholars regularly mention that these ‘derogations’ ‘created a generalised sense that a set of exceptional rules allowed aid and cooperation that would normally be prohibited’.²³ I would like to draw attention to the fact that setting frameworks and delineating the room for manoeuvre of Member States may not constitute loosening; on the contrary, such measures may constitute tightening, even in the case that the Commission is more inclined to approve measures based on its own setup agenda than TFEU-based measures, especially if the decisions take longer (eg when it comes to scrutinising a measure that relies on the TFEU directly compared to those relying directly on TF, TCF or TCTF). Nonetheless, while it still remains important to justify the existence of a serious disturbance and its genuine existence affecting the entirety or nearly the entirety of a national economy, I consider that imposing concrete and strict rules on how state aid should be granted in such situations exceeds what is necessary for the Commission to ensure the unity of the internal market. According to the wording of

²² Kai Struckmann, Kate Kelliher, ‘European Union: Practitioners’ Perspective on State Aid and Covid-19’ (2022) White and Case LLP, 24/6 <<https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2023/article/european-union-practitioners-perspective-state-aid-and-covid-19>> accessed 1 April 2025.

²³ Francisco Costa-Cabral, ‘From Crisis Cartels to COVID-19 State Aid and Cooperation: The Non-Exceptionality of Crisis Management by EU Competition Law’ (2023) (6), Tilburg University Tilec Discussion Paper, 2, DOI: <https://doi.org/10.2139/ssrn.4411326>

the TFEU, decisions on granting aid should objectively be left to the Member States, within a reasonable margin, as long as the measures taken are adequate and not merely aimed at improving public sentiment or boosting government trust.²⁴ In practice, however, the Commission's Communications have created a situation in which Member States have no real margin of appreciation to address serious disturbances in their own economies

The vagueness of the Treaty rules creates many conflicts between state aid control and state aid policy. At the same time, the need for interpretation of the Treaty rules and the heterogeneity of Member States' interests have become the major sources of the Commission's power,²⁵ as we shall see in Chapter VI. In reaction to the Council's unwillingness to agree upon secondary legislation, the Commission changed its approach in favour of a flexible strategy of enforcement aiming at utilising the absence of a Council Regulation in the direction of gradually forming a practice founded on the Commission's political sense of possible impact. Along with and besides individual state aid decisions, soft law became the main instrument of this strategy.²⁶ And the Commission does not only restrict the possibilities of Member States to act state-aid-wise; it also, from time to time, expands the wording of the Treaty by introducing, for instance, the Energy and Climate Change Package or the promotion of SMEs, as these moves rather indicate the evolution of the Commission's own state aid policy priorities and they do not follow from the wording of the Treaty provisions.²⁷ Thereby, we may say the soft law of the Commission 'reflect[s] the Commission's desire to publish directions on the approach it intends to follow [...]',²⁸ and in practice, this desire turns into the actual behaviour of Member States in most cases.

III The Formulation of Communication-Based Decisions

If we take a look at the wording of the Commission's decisions approving state aid measures notified by Member States, it formulates its stance as 'the measure is expressly based on Article 107(3)(b) of the TFEU, as interpreted by Sections 2 and 3.1 of the Temporary Framework'.²⁹ The Commission, thereby, communicates that it considers the TF and its content as an interpretation, remaining within the provisions of the TFEU. However, the dilemma remains intact as to whether a row of strict criteria could mean a simple interpretation or, rather, the setting of additional requirements that must be complied with,

²⁴ Penelope Giosa, 'Assessing the Use of the State Aid Covid Temporary Framework with Regard to the Healthcare and Media Sector' (2023) 14 (5) *Journal of European Competition Law & Practice* 274–269, 274, DOI: <https://doi.org/10.1093/jeclap/lpad030>

²⁵ Blauberger (n 19) 12.

²⁶ Blauberger (n 19) 13.

²⁷ Blauberger (n 19) 15.

²⁸ Case T-187/99 *Agrana Zucker und Stärke v Commission*, ECLI:EU:T:2001:149, para 56.

²⁹ The first Hungarian TF-based decision approved on 8 April 2020, State Aid, Hungary (TF scheme) SA.56926 (2020/N) OJEU C/214/2021.

going beyond the provisions of the TFEU. The case law of the EU has also corroborated that soft law (and explicitly the communication of the Commission) ‘must be regarded as being interpretative in nature and not in itself a legislative provision and the criteria applied by the Commission are those which can be inferred from the Treaty and the case law’.³⁰ When assessing the nature of communications, we shall see they cannot alter, limit,³¹ restrict, or expand the Treaties or the decisions of the Court, but when ‘adopting rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion. A limit, whereby it cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations, unless it gives reasons justifying, in the light of those principles, its departure from its own rules’. This soft law approach dates back almost 60 years and emerged out of necessity after the refusal of Member State governments to adopt Council legislation (namely, regulations in the field of regional aid block exemptions³²) in 1966 and 1972, which were officially refused by the Council (comprising the heads of state or government).³³

In its decisions, the Commission – in a uniform way – consistently ran tests, declaring that the measures constituted state aid, then also declaring them to be compatible by stating, for instance, in the first Hungarian TF-based decision³⁴ that:

‘By adopting the Temporary Framework on 19 March 2020, the Commission acknowledged [...] that “the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact undertakings”. The Commission concluded that “State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU”.’

‘[...] The importance of the measure to provide non-refundable direct grants to enterprises during the COVID-19 outbreak is widely accepted by economic commentators³⁵ and the measure is of a scale which can be reasonably anticipated to produce effects across the entire Hungarian economy.’

‘[...] Furthermore, the measure has been designed to meet the requirements of a specific category of aid [...] described in Section 3.1 of the Temporary Framework.’

³⁰ Case T-189/03 *ASM Brescia v Commission* ECLI:EU:T:2009:193.

³¹ Corinne Ruechardt, *EU State Aid Control of Infrastructure Funding* (International Competition Law Series, Wolters Kluwer 2018, Alphen aan den Rijn) 374.

³² Blauberger (n 19) 13.

³³ Michael Blauberger, ‘State Aid Control from a Political Science Perspective’ in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edwar Elgar Publishing 2011, Cheltenham) 31, DOI: <https://doi.org/10.4337/9780857936424.00011>

³⁴ State Aid, Hungary (TF scheme) SA.56926 OJEU C/144/2020.

³⁵ Not well-funded by the Commission; however, see, for instance, Giosa (n 24).

‘The Commission considers that the measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State since it meets all the conditions of Section 3.1 of the Temporary Framework. In particular:

- The maximum amount of aid granted under the measure will not exceed EUR 800 000 per undertaking. The measure therefore complies with point 22(a) of the Temporary Framework;
- Aid is granted under the measure on the basis of a scheme with an estimated budget of EUR 140 million. The measure therefore complies with point 22(b) of the Temporary Framework;
- Aid will not be granted under the measure to undertakings that were in difficulty [...]. The measure therefore complies with point 22(c) of the Temporary Framework;
- Aid will be granted under the measure no later than 31 December 2020. The measure therefore complies with point 22(d) of the Temporary Framework;
- Aid granted to undertakings active in the processing and marketing of agricultural products is conditional [...]. The measure therefore complies with point 22(e) of the Temporary Framework.’

‘[...] The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union.’

As we may conclude, the Commission acknowledges that the base of its decisions is the TFEU itself, however, it then concludes the measure abides by all the criteria set by the TF by even mentioning the particular section of the TF on which the measure was based: thus, the Commission does no less than practically state that the measure is necessary, appropriate and proportionate, since it meets all the conditions of the said section of the TF. The Commission thereby says necessity, appropriateness and proportionality are only met if the Member State meets its specific criteria. A proportionality check is certainly a more lenient test than the balancing of economic effects³⁶ under the TFEU. However, it is another question whether the Commission does not, thereby, unduly limit the possibility of granting compatible state aid, exaggerating the conditions set by the TFEU, even though its basis is undeniably created by the Court. The Commission, as seen above, does not simply refer to the applicable section but also reiterates the provisions of the said section, word by word, emphasising the importance of following its prescriptions to the letter. Then, the Commission concludes that because of the compliance with the TF, it cannot decide other than to declare the measure’s compatibility with the internal market under Article 107(3) (b) TFEU. As is visible, the Commission aims at filling the content of the TFEU with actual and tangible meaning; however, when it does, it does so in a strongly limiting way, forcing Member States to conform to dozens of parameters that they normally probably would not

³⁶ Costa-Cabral (n 23) 3.

comply with as there may be other suitable, Member-State-fit measures that may be taken to address the onerous impacts of a crisis. As mentioned before, the Commission does not and cannot enunciate that a Member State may only notify measures compliant with the TF; however, as a result of the time-consuming manner of the non-expedited procedure, the Member State potentially wishing to have a TF-outsider measure adopted shall be forced to wait several months before receiving a decision, the outcome of which may also entail the Commission's raising of objections as well. This makes the outcome of the decision quite imponderable, thereby increasing the risk of not having an approved measure, consequently leaving the Member States in doubt and frozen in action, thereby pushing the Member States towards availing themselves of the 'boxed and pre-packed solution', which is to follow the criteria of the Commission laid down in advance. This practically results in the actual effect that the Commission does not merely interpret TFEU but extends it and creates additional criteria on top of those the TFEU requires, which raises the issue of whether the Commission, by this, arbitrarily requires certain conditions potentially running counter to the TFEU.

IV Implementing the Commission's Decision in the Hungarian Legal System

The decisions of the Commission, regardless of being based on TFEU, do not equal the Treaties, nor do they equal regulations, therefore, they have to be duly implemented in the domestic legal systems. In the previous chapter, I took the first TF-based decision concerning Hungary as a basis for my inquiry and taking this further, we may see that the abovementioned decision reserves a designated section for the 'National legal basis' in its Section 2.2., where it displays 'the Decree of the Ministry of Foreign Affairs and Trade on aid measures for increasing competitiveness of undertakings in relation with the COVID-19 outbreak'. This leads to the Decree of the Minister of Foreign Affairs and Trade,³⁷ which implements the notified and approved measure in the Hungarian domestic legal system. Section 2(1) of the Decree stipulates that:

'The aid, according to this regulation, is considered state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, and state aid may be granted only in accordance with

a) the European Commission's Communication regarding the transitional framework for state temporary support measures that can be introduced to boost the economy during

³⁷ 7/2020. (IV. 16.) KKM rendelet a koronavírus-járvány következtében szükségessé vált versenyképesség-növelő támogatásról [7/2020 (IV. 16.) Decree of the Minister of Foreign Affairs and Trade on aid measures for increasing competitiveness of undertakings in relation with the COVID-19 outbreak]. Translated by the author.

- the Covid-19 pandemic, under Section 3.1. of the Communication, according to the European Commission's Decisions No. C(2020) 2332 [...] and C(2020)3426 [...] or
- b) the European Commission's Decision No. SA.57375 (2020/N) C(2020)4286 final [...] adopted on the basis of Article 107(2)(b) of the Treaty on the Functioning of the European Union [...] or
- c) Section 3.1. of the Communication adopted in accordance with the conditions of Decision SA.62526 (2021/N) C(2021) 3360 [...] by the European Commission.'

The Decree listed above, according to the Decree itself, encompasses four Commission Decisions that approved state aid measures notified by the State of Hungary. As they are interconnected, domestic legislation pulls them under the same legal source. These measures were notified at different points in time as circumstances evolved swiftly during the onset of the pandemic. Furthermore, the Member States had been monitoring each other's state aid schemes, and consequently, they frequently copied them by notifying brand new measures or amending already existing ones.

The earliest one in time³⁸ introduced the first Hungarian measures for tackling the effects of the pandemic, referring to the *TF*, in which case Hungary obtained the approving decision within six days. It also contributed to the swift approval that the Member States, when notifying, exceptionally agreed to waive their rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958, ie to have the decisions adopted in their official language, therefore, to have the decisions adopted and notified in English.

This scheme granted aid to medium- and large-sized enterprises with a total budget of EUR 140 million. The scheme was modified several times, and finally, for the fifth time,³⁹ followed by due transposition by the Decree of the Minister of Foreign Affairs and Trade. Every single time this decision or the connecting decisions were amended or new connection decisions adopted, the Minister of Foreign Affairs and Trade duly amended its Decree, just like the latter would have regulated a solely internal matter. In this sense, transposing a Commission Decision does not practically differ from regulating a purely internal issue which does not arise from EU law. The only difference is that in the Decree, the general provisions point to EU law instruments (the *TF*, for instance) and not solely domestic affairs. Whether the right and obligation arise from a domestic act or an EU law instrument, its execution by decrees follows the same patterns, which is in correlation with the fact that EU law is a *sui generis* legal system and *ab initio* functions as an immanent legal system of each and every Member State upon accession without further ado. When Hungary notified a new or an amending scheme to the Commission, and the Commission approved it, the competent Minister or the Government adopted an amending decree, amending the original decree and implementing the original approving decision of the

³⁸ State Aid, Hungary (TF scheme) SA.56926 OJEU C/144/2020.

³⁹ State Aid, Hungary (TF scheme) SA.62526 OJEU C/260/2021.

Commission. When the fifth amendment was approved, as mentioned before, it took effect immediately. As a result, the amendments to the original Decree also became effective. The amending decree explicitly justified its necessity based on the Commission's decision to approve the amendment of the original scheme. Thereby, we can state that the Hungarian legal system makes no significant difference between EU law-based and national law-based measures to be regulated and promulgated. This is inherently corroborated by the Act on Law-making, which does not introduce different rules for law-making based on whether a decree implements an EU law instrument or a domestic one.

The 7/2020. (IV. 16.) Decree of the Minister of Foreign Affairs and Trade was also amended upon Decision SA.57375, the speciality of which was that the measure was not based on TF in many ways; it was based, however, solely on 107(2)(b) TFEU, which covers aid to make good damage caused by natural disasters or exceptional occurrences and which grants an automatic *de iure*⁴⁰ exception under the general state aid ban constituted by 107(1) TFEU, unlike in the case of 107(3)(b) TFEU, which only acknowledges the compatibility of the measure with the internal market upon the scrutiny of the Commission and its decision thereof. Regarding this distinction, the Commission seems to handle cases under 107(2) and 107(3) TFEU alike, as it runs a very similar test in both cases regarding the compatibility of each state measure, regardless of whether it falls under an automatic exception or not. Articles 4 and 5 TFEU create an overriding principle⁴¹ under which the EU shall only act within the limits of the competences conferred by the Member States. However, Articles 107(2) and 107(3) TFEU are different in nature, as regarding the former, the Commission has no real discretion as to whether it can actually deny the compatibility of state aid, noting that the 'shall' does not imply totally automatic approval at all – it reserves the right for the Commission to scrutinise whether the measure is in line with the applicable Treaty provision.⁴² If the Commission duly finds that the aid meets these provisions, it decides (ie has to decide) that the derogation laid down in 107(2) TFEU applies, which was reaffirmed in the *Philip Morris* case⁴³ by a *contrario* line of reasoning when the Court stated that 107(2) TFEU is the opposite of Article 107(3), as regarding 107(3) TFEU there is discretion because there is a 'may' in the wording.⁴⁴ Since Member States also notified measures under 107(2) TFEU, the Commission should not have a wider margin of appreciation than when it comes to scrutinising the existence of its checklist correlating with TF, TCF or

⁴⁰ Stuart, Roginska-Green (n 7) 11.

⁴¹ Koen Lenaerts, José Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schutze, Takis Tridimas (eds), *Oxford Principles of European Union Law* (The European Union Legal Order, I, OUP 2018, Oxford) 112, DOI: <https://doi.org/10.1093/oso/9780199533770.003.0005>

⁴² Ramona Ianus, Tim Maxian Rusche, Massimo Francesco Orzan, 'De Jure Compatible Aid under Article 107(2) TFEU' in Herwig C. H. Hofmann, Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016, Oxford) 234, DOI: <https://doi.org/10.1093/law-ocl/9780198727460.003.0013>

⁴³ Case 730/79 *Philip Morris Holland BV v Commission of the European Communities*, ECLI:EU:C:1980:209, para 17.

⁴⁴ Ianus, Rusche, Orzan (n 42) 235.

TCTF. In the *Olympiaki* case,⁴⁵ the Court unapologetically stated that the Commission does not have a right of discretion to impose further restrictions by soft law instruments on top of the wording of 107(2) TFEU. Accordingly, solely based on the non-correlating nature of a measure with the communication of the Commission, the Commission cannot pronounce a measure incompatible with the internal market. Especially because the TF was based on Article 107(3)(b) TFEU and not on 107(2)(b) TFEU, the Commission should certainly not cause a tougher situation for a measure based on 107(2)(b) TFEU to be decided than one based on the TF itself, as at least TF is rooted in 107(3)(b) where the Commission has real margin of appreciation. Therefore, it is even questionable whether the Commission could actually require proportionality when it comes to a measure relying on Article 107(2) TFEU and simultaneously raises the question of whether the Court rightfully accepts and even fortifies it.⁴⁶

V The Significance of the COVID-19 Measures

The TF triggered more than 1,300 decisions, facilitating and opening the doors to a budget of EUR 3.2 trillion, which is equal to about HUF 1,300 trillion or HUF 1.3 quadrillion. Besides this, as mentioned before, as the Commission also approved measures solely under the provisions of the TFEU without their being linked to the TF, the number was even larger.

Here, however, great disparities may be found as to the proportion of the approved budget associated with TF-based measures compared to the GDP of each Member State, as Germany's state aid support budget amounted to 45% of its GDP, while in the case of the Republic of Ireland, this figure remained well below 1%. The EU average was 22%, while only two Member States surpassed this: Germany and Italy, thereby extremely distorting this value upwards. Therefore, relevant scholars state that a relaxation of State aid rules will deepen the economic inequalities between Member States, even though Member State economies have benefitted from that advantageous scheme.⁴⁷ Only eight more Member States reached or exceeded the 10% threshold, so if we cumulate the two extreme outlier Member States and the eight significantly subsidising ones, they still make up only 10 Member States out of 27, one of these being Hungary, with a rate of almost 11%, thereby reaching ninth place in this per-GDP state aid race as of 30 July 2021. There were Member States that channelled more state aid measures to their beneficiaries based on the TFEU than on TF, namely Denmark, the Netherlands, and Belgium, and this value was also high for Germany, Portugal, and Spain. In contrast, there were Member States that did not avail themselves of TFEU-based aid measures, only TF-based ones: Bulgaria, Cyprus, Ireland,

⁴⁵ Joined cases T-415/05, T-416/05, T-423/05 *Greece v Commission* ECLI:EU:T:2010:386.

⁴⁶ See, for instance, Case C-320/21P *Ryanair v Commission* ECLI:EU:C:2023:712.

⁴⁷ Jonatan Echebarria Fernández, 'A Critical Analysis on the European Union's Measures to Overcome the Economic Impact of the COVID-19 Pandemic' (2021) 5 (3) *European Papers* 1399–1423, 1420.

Latvia, Lithuania, Malta and Slovakia. Hungary, as mentioned before, availed itself of both, with TF-based measures being dominant.

If we look at the figures representing how much aid was actually granted from the approved budgets, the global picture changes significantly, with Italy at the top and Germany an also-ran, simultaneously leaving Hungary in fourth imaginary place, amounting to 6.5% of its GDP. The disparity is still huge; if we look at the actually granted aid, this still ranges from over 9% of the GDP to less than 0.5% in Ireland, which shows a great difference, albeit not unequivocally and necessarily in favour of the more developed Member States, as Greece, Poland and Portugal also scored above-average values.

What gives a clearer picture on an internal market level, however, in my opinion, is how much aid was granted per capita as it filters the distortion caused by the differences in development and per capita GDPs across the Member States. This type of measurement makes France and Italy frontrunners and ranks Hungary well below average. Spain, Germany and Denmark also scored above average. I believe the actual interference in the internal market can be depicted by the actual amount of money that was spent, as this is the suitable figure for reflecting the size of the distortion that took place and was put into effect by each Member State. Hungary seems to be a pioneer when it comes to actual spending per nominal GDP. However, this may be explained by its comparative GDP disadvantage, which makes the state aid measures granted by Hungary quite insignificant on a whole internal market level. This compares with the fact that even a relatively small proportion of GDP spent by wealthy Member States may play a significant role in potentially distorting the internal market by placing its own undertakings in an advantageous position compared to how they would have been without such grants of state aid.

I believe it is also important to talk about the nature of the measures introduced, as it is not sufficient to address how much money per capita has been burnt in order to subsidise undertakings, but thoughts have to be articulated on what type of interference occurred, as one euro spent on a guarantee hits the economy differently than one euro spent on direct grants. Undeniably, public guarantees also facilitate economic growth, stability and liquidity since they increase the credibility of undertakings when seeking financing. However, this concerns indirect financing, mostly aiming at enabling the targeted undertakings to take out a loan or to have their bonds subscribed, obtaining capital injections, etc. A stronger measure is when this step is skipped, and the Member States directly support the forms of financing mentioned in the previous sentence, as these are primarily aimed at serving the objectives of providing guarantees, as well. When a Member State does not simply provide the key to the goal in the form of guarantees but immediately provides the goal itself, the advantage it confers upon the undertaking is even more significant, more direct and puts the beneficiary in a more advantageous situation than one that only obtains the 'key' to the target financing, let alone those which do not obtain any kind of state aid measures at all. Therefore, when taking into account Section 3.1. of the TF, which covers the limited amounts of aid providable to recipients, a different sketch seems to emerge, even though this legal

basis may also include guarantees, although not the typical loan guarantees as stipulated by Section 3.2. of the TF. Regarding Article 3.1., Greece leads all Member States by far, followed by Poland, Slovenia, Czechia, Latvia, Cyprus and Germany, where this type of aid amounted to more than half of the TF-based subsidising. The amount for Hungary almost reached 40% in this regard, which ranks the country above the average of 30%. Along with this, if we juxtapose the data regarding the per capita spending and the prevalence of Section 3.1. of the TF, it becomes clear that it is Germany that spent the most euros per capita on measures based on Section 3.1. of the TF, which may suggest that it was Germany that interfered with the internal market the most and the strongest among all the Member States of the European Union. Following the same logic, juxtaposing these two sets of data, Hungary may be ranked in 18th place out of 27, which situates the country in the middle of the field. Here, it is worth noting that compared to the nominal significance of Hungary in the EU, Hungary represented itself in TF-based subsidising equal to its nominal significance, as its share of the EU's nominal GDP leaves the country in 17th place.⁴⁸ Therefore, regarding the most massive intrusion into the internal market in the sense of subsidies, Section 3.1., we may infer that Hungary was not an outlier. If we look at, however, the per capita GDP data of Hungary, of which Hungary is in 22nd place,⁴⁹ Hungary is overrepresented in terms of subsidising compared to its general per capita power and significance.

VI The Significance of the TCF-TCTF Measures

On 23 March 2022, the Commission adopted the Temporary Crisis Framework under Article 107(3)(b) TFEU as a continuation of the TF regime, albeit aiming at the resolution of disparate issues stemming from the closure of business routes and energy pipelines upon the outbreak of war in the neighbouring states of the EU, namely in Ukraine and in the Russian Federation, which crucially affected energy supplies, EU-based investments in the states in conflict and basically all undertakings active in this area, Ukraine on one side and Russia along with Belarus on the other. On 9 March (all the measures were adopted in March 2023 – thereby, we may call them the ‘March Frameworks’ in conjunction⁵⁰), eventually, TCF was replaced – fine-tuned and softly altered – by TCTF, which further clarified and simplified the legal bases for supporting renewable energy solution installations while simultaneously speeding up the process of decarbonisation. Furthermore, it also brought to life new legal bases, like investments aimed at achieving net-zero economies, for which support the TCTF prescribed the end of 2025 as a final date of potential provision, as opposed to the general deadline of 30 June 2024. Therefore, at the time of the completion of the current paper,

⁴⁸ Commission, ‘Competition State Aid Brief’ 1/2022, 1–7.

⁴⁹ Gross Domestic Product per capita in the European Union in 2023, by member state, Statista <<https://www.statista.com/statistics/1373462/gdp-per-capita-eu-member-states-2022/>> accessed 1 April 2025.

⁵⁰ Author's creation.

TCTF is still in force, emphasising that ever since 19 March 2020 – for more than four consecutive years – we have been living in a constant state of aid legal derogation.

Until 30 June 2023, an aid budget of more than EUR 730 million was approved, which is considerably less than the measures approved under the TF regime. However, it should be added that this time, Member States more frequently relied on the TFEU solely, ignoring the TCF-TCTF regime and also more frequently channelled financing to entities that did not constitute state aid, either because they were granted on a market basis or because they were not selective, or because they were granted to natural persons on social grounds. If we were to calculate all these, the support under both regimes would seem to be more convergent regarding the amounts.

Regarding this scheme, we may talk about absolute German hegemony, as Germany, until 30 June 2023, accounted for 48.8% of all amounts approved, while France for 23%, the two together being responsible for almost 72% of all approved amounts. This shows that while aid measures were smaller in volume altogether than under TF, they nonetheless appear to be more distorted as to the allocation of the measures among the Member States. If we look at the data regarding the actual spending that had already been effectuated, the overall picture is even more distorted, as Germany is identified as responsible for 52% of all aid actually granted. Germany, Italy and Spain together were responsible for 88% of the spending. It is mentionworthy, however, that Hungary takes fifth place in absolute terms, with EUR 3.6 billion, elevating it much above its economic potential and strength, thereby making it the greatest aid granter of all Member States compared to its nominal GDP. Due to this, Hungary went from an average performance under the TF regime to a top subsidising Member State under the TCT-TCTF regime.

It is also mentionworthy and quite controversial again that Denmark did not avail itself of any TCF-TCTF-based measures, but only those based on the Treaty itself, just like it did under the TF regime. This stems from the fact that Denmark consistently opposes state aid generally and has not supported any of the ‘March Frameworks’; they argue that state aid eventually distorts competition, even in the country where it is granted, and additionally, the way the Commission opened the gates through the TF, TCF and TCTF does not align with the goals of the internal market, as the Commission should focus on keeping subsidised products and investments – especially from China – out of the internal market, instead of engaging in a never-ending subsidy tug of war, while the EU would be able to compete on a level playing field without state aid.⁵¹ Also, when Denmark exceptionally decided to grant state aid, it consistently effectuated it under Treaty provisions to emphasise that they consider this to be the only and exceptional last resort of Member States wishing to provide state aid. Therefore, Denmark focuses on generally providing a safe environment for business and aims at providing financing, usually by omitting the ‘selective’ element of

⁵¹ Jonathan Packroff, ‘State aid should be “stopped”, Danish industry minister warns’ (2024) Euractiv <<https://www.euractiv.com/section/economy-jobs/news/state-aid-should-be-stopped-danish-industry-minister-said/>> accessed 1 April 2025.

the measures rather than granting state aid. As Denmark's Finance Minister formulated it in February 2024: 'Subsidies can't be the answer to foster long-term competitiveness and growth in the European Union. If you have to compete based on the size of state coffers, Denmark will quickly lose out, and Europe will probably too, given the debt situation in large parts of the region. We'll have to focus on real competitiveness, and that requires a greater willingness in some countries for reforms that support growth and development and is not just a question of investing in new things. It's not conducive to Europe as a whole, if the way we spend the money is just a competition between whether the factory should be located in Poland or Germany or France'.⁵² Denmark remains true to its commitment as the only Member State in the EU in this regard, also at the time of the completion of this paper. On the other hand, exceptionally, Denmark avails itself of state aid granting, as well, mostly in the field of renewable energy, which sector is deemed to be short of market financing on its own, and on the occasion of the latest such state aid (December 2023) the Director of the Confederation of the Danish Industry called this aid a 'necessary evil', and added that Denmark itself does not benefit from state aid and this does not induce a harmful subsidy race among Member States.⁵³

We may say that concerning the TCF-TCTF regime, the two polar opposites are Denmark and Hungary; on the one hand, Denmark spends 0% of its GDP under the regime, and on the other, Hungary spends 1.35% of its GDP under the TCF-TCTF regime as of 30 June 2023,⁵⁴ reminding us that the Member States' approaches to state aid strongly differ, and State Aid Law, as a whole, remains inherently political, both on the policy-objective side and on the enforcement side,⁵⁵ including the legal, economic, and ideological attitude of Member States concerning state aid and its status. Industrial policy traditions greatly differ between EU Member States, ranging from countries with very restrictive state aid policies to other countries in which state aid is not only used to address market failures but also for redistributive purposes, functioning as a social system complementary.⁵⁶

VII The Speed of Approval

Under the 'March Frameworks', by the end of March 2024, there had been 33⁵⁷ approving, amending or correcting decisions concerning state aid measures notified by Hungary. I have

⁵² Sanne Wass, 'Europe Can't Compete with US on State Aid, Danish Minister Says' (2024) Bloomberg <<https://www.bloomberg.com/news/articles/2024-02-23/europe-can-t-compete-with-us-on-state-aid-danish-minister-says?embedded-checkout=true>> accessed 1 April 2025.

⁵³ Af Ritzau, 'Danish government to set aside one billion kroner for green state aid' (2023) Energy Watch <https://energywatch.com/EnergyNews/Policy___Trading/article16705343.ece> accessed 1 April 2025.

⁵⁴ Commission, 'Competition State Aid Brief' 1/2024, 1–9.

⁵⁵ Blauberger (n 33) 29.

⁵⁶ Blauberger (n 19) 11.

⁵⁷ State Aid Register, Commission <<https://competition-cases.ec.europa.eu/search>> accessed 1 April 2025.

scrutinised – using desk research – each one in terms of the duration of the approving decision being made from the time of notification and found that a decision, on average, took 21.66 days to be made regarding the measures notified by Hungary. However, this should be considered from more perspectives, as the modes of the lengths are found to be 6 and 12, respectively, meaning the most frequent durations of a decision being made were 6 and 12 days, thus much shorter than average. The same may be said about the median of these lengths, as the median was calculated to be 12 days. This suggests some extremes that distorted the average, explicitly to the lengthier end, as the longest decision⁵⁸ took 200 days to be made, which is a strong outlier, thereby distorting the value in the row. Only six of the 33 decisions surpassed the calculated average. At the other extreme, I have not identified such an outlier, as the speediest decision⁵⁹ took five days to be made, nesting the mode of 6. The reason for the existence of such outliers is that in those cases, there were debates between Hungary and the Commission ‘behind the walls’, and Hungary had to lodge and submit a revised notification upon additional questions from the Commission. The Commission spent altogether 715 days, ie almost two years, examining the Hungarian measures if we cumulate all days between the notifications and the decisions; this data, however, serves solely for informative reasons as the Commission did not spend all this time exclusively scrutinising the Hungarian notifications. I have scrutinised 250 randomised decisions of the Commission under the ‘March Frameworks’, at least five from each Member State (if there were five), and I have identified that the average length of a decision was 36.28 days, while the modes were 9 and 16 days, respectively, and the median value was 20 days. These data show that the Commission tended to approve the measures notified by Hungary more rapidly than other Member States cumulated. This is corroborated by all values, as the average (21.66 to 36.28), the modes (6 and 12 to 9 and 16), and the median (12 to 20) of the latter all surpassed the data concerning the approvals of the decisions notified by Hungary. The data for the other Member States were also distorted by some outliers at the lengthy end; nevertheless, it took longer to decide about the measures of other Member States.

Under solely the TFEU, I have identified only two state aid measures⁶⁰ notified by Hungary that stemmed from the ever-ongoing crises, and both were based on 107(2)(b) TFEU concerning compensation for damage caused by exceptional occurrences. Other TFEU-based decisions had no causal – or even indirect – link with the crises necessitating the ‘March Frameworks’. These two decisions were made in under 42 and 37 days, respectively, making an average of 39.5 days. Thus, regardless of the lower volume of values, this indicates that it took almost double the time the Commission needed to approve measures fitting into the TF, TCF or TCTF, and it is even more striking when we juxtapose this with the modes and medians of the latter. Nevertheless, it is still mentionworthy that even this length

⁵⁸ State Aid, Hungary (TCTF scheme) SA.104385 OJEU C/276/2023.

⁵⁹ State Aid, Hungary (TF scheme budget increase) SA.57350 OJEU C/187/2020.

⁶⁰ State Aid, Hungary (Amendment to the agricultural risk management system) SA.61783 OJEU C/195/2021 and State Aid, Hungary (TF scheme) SA.57375 OJEU C/302/2020.

cannot be considered long compared to the general duration of such Commission decisions. Therefore, it may be seen that the Commission proceeded with significant haste in the case of TFEU-based measures, as well. I have also examined the speed of the decisions regarding other Member States in order to evaluate whether there was a disadvantage on Hungary's side concerning the length of approvals. I scrutinised all the applicable decisions under TFEU from all Member States (except for Hungary), and my finding is that their average was 45.16 days, with a modus of 56 and a median of 41 days, which shows that the decisions for other Member States took longer than for Hungary, albeit, I did not identify an extreme disparity (comparing 39.5 to 45.16 days). The most rapid decision⁶¹ took one day, which was also the very first decision under 107(2)(b) TFEU, even before the adoption of the TF on 12 March 2020, in relation to event cancellation compensations in Denmark.

VIII The Assessment Problem

The TF, for instance, was an easing in the sense that the Commission generally concluded that the COVID-19 pandemic was worthy of being categorised as a serious disturbance to the economy. However, once the Commission acknowledged this under the TF, it could and does not deviate from it just because a Member State notifies its measure directly based on the provisions of the TFEU. Therefore, I believe that stating and making it an axiom that the pandemic equals a serious disturbance in the national economy is an easing certainly; the doubt that still exists, nevertheless, is whether the Commission is entitled to judge each measure differently solely because one was notified under the TFEU and the other under the TF. Once it was cleared that the serious disturbance is a living reality for the time being, it is questionable whether its handling could be restricted by discriminating based on the basis of the measures and whether handling different from the framework of the Commission could fairly be subject to lengthier scrutiny – just the threat of prolonging its control procedure and ordering the possible recovery of illegal aid creates significant legal uncertainty for firms, and this uncertainty may and could be sufficient to discourage the latter from demanding potentially inadmissible aid in the first place. The actually low rate of negative Commission decisions on state aid thus does not prove the ineffectiveness of European state aid control. Rather, Member States often anticipate Commission control and try to frame their state aid measures in a way that presumably fits the criteria positively defined in state aid soft laws.⁶² The Commission has also developed a second mechanism to force Member States to explicitly approve its soft law and even to adapt existing state aid measures that were declared compatible with the revised rules in the past. If a Member State refuses to accept the revised soft law, the Commission threatens to open formal

⁶¹ State Aid, Denmark (TFEU-based scheme of event cancellation) SA.56685 OJEU C/125/2020.

⁶² Blauburger (n 19) 17.

investigations into all existing state aid measures that fall under the new rules: this will normally have the effect of forcing the Member State concerned to accept the Commission's policy.⁶³

Although the Commission enjoys a wide margin of discretion in this balancing, it must not improperly reduce the scope of Article 107(3)(c), as stated by the Court in *Hinkley Point*.⁶⁴ However, I find this statement problematic, as TFEU does not prescribe this balancing test when applying the abovementioned Article. However, the TFEU suggests some restrictions by using the word 'may', which hands wide discretion to the Commission. While it certainly should not improperly reduce the scope of the TFEU, it also should not balance the positive and negative effects; rather, it should only scrutinise whether proportionality is met and whether the measure necessarily targets and promises a realistic solution for the objective set out by the TFEU. This is why it is also questionable whether the Commission's IPCEI Communication⁶⁵ is in line with the TFEU when requiring the balancing of the positive and negative effects in its communication, thereby stuffing the provision of the TFEU according to a soft law instrument, which may mean it brimming over rather than filling in or simply interpreting it.

The situation is even more questionable in my opinion, when it comes to measures relying on 107(2) TFEU, which states: 'The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division'. What we may infer from these provisions is that, first, these cases fall under the automatically compatible category of state aids, which means the Commission should not have a margin of appreciation besides the margin conferred upon them by the exact wording of the TFEU. Case (a) makes it clear what is needed to be exempted from the prohibition stipulated by 107(1) TFEU: the aid has to be of social character, has to be granted to individuals and cannot be discriminative in relation to the origin of the product. The question instantly arises: if a government decides to provide fully covering direct grants for natural persons living under the poverty line and living in rural areas in dwellings that are at least 1 km away from the nearest public transport station which offers direct services at least five times a day per direction to a city of at least 100,000 inhabitants, up to the gross purchase price of EUR 30,000, to be able to purchase one of any brand of electric cars, could the Commission scrutinise whether

⁶³ Blauberger (n 19) 18.

⁶⁴ Case T-356/15 *Austria v Commission*, ECLI:EU:T:2018:439, paras 21 and 24.

⁶⁵ Commission, 'Communication from the Commission Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest' [2021] OJ C528/10.

these people living under the poverty line actually need electric cars? Or would there be a more efficient way to address the matter of immobility for rural, poor citizens and their indirect access to public services in cities? Could, in this case, the Commission argue that the Member State should deploy more buses and more stops instead of basically providing cars for the poorest and least well-connected citizens? The answer has to be negative in my mind, as the Commission could only scrutinise whether the recipients are really natural persons, whether there is a determinative social element in the measure and whether it does not discriminate on the basis of the origin of the product. The Commission, thereby, may analyse the market of electric cars and may investigate whether it is not just one brand that falls within this price range or whether the measure was not simply tailor-made to exclude the car manufacturers of a certain nation. However, if the Commission concludes that there are six brands from five different Member States that produce types of cars falling within this price range, the Commission's room for manoeuvre is fulfilled, and the Commission cannot go much deeper. This is, however, still not an empty competence, as the Commission has to investigate at least three key issues (natural person, social character, no discrimination) before granting the compatible category. When we move forward to case (c), we also find that the Commission also has a certain list to check whether state aid could be compatible. It has to assess whether the aid is really allocated to an area affected by the German division: for instance, the Commission may conclude that even though the aid is channelled to a company headquartered in Dresden because the real beneficiary is a factory to be expanded is located in Hamburg, the Commission may conclude that the aid has got no connection with the disadvantages of former East Germany and it also shall scrutinise whether the aid is required at all to compensate the disadvantages, which inherently projects some kind of special test of necessity and suitability. However, when it comes to the wording of case (b), TFEU only states that the aid shall make good the damage caused by a natural disaster or other exceptional occurrence. Following the previous argumentation, the Commission, then, shall and may analyse only if there is actually a natural disaster or an exceptional occurrence and whether this aid could potentially remedy this disaster or other exceptional occurrence. This, in itself, does not entail anything in connection with proportionality or necessity. In my opinion, the wording only prescribes the scrutiny of whether the disaster is real and could be considered to be a disaster and whether the measure could, at least *prima facie*, remedy it, which may be inferred from the wording 'aid to make good the damage', therefore it has to be able to make good that damage. This paragraph does not confer any right upon the Commission to require proportionality, necessity, or suitability, in my opinion. Therefore, I believe it should be called into question whether to accept that the Commission recurrently requires this in its decisions and whether to accept that the Commission scrutinises whether the aid may lead to overcompensation⁶⁶

⁶⁶ Antonios Bouchagiar, 'State aid in the context of the Covid-19 outbreak, including the Temporary Framework 2020' (2021) (47) Robert Schumann Centre for Advanced Studies, RSC 21/3, Florence School of Regulation, EUI Working Papers, DOI: <https://doi.org/10.2139/ssrn.3796216>

or not, as this also may be an excess of competence, even though it is supported by case law. This highlights the problematics of this: the Commission shall not confuse its discretion under 107(3) TFEU with its only ‘checklist style’ competence under 107(2); it can only check whether the requirements set out in the Treaty are met.⁶⁷

TF is based upon its discretion [107(3) TFEU (107)(3)(b) and then 107(3)(c), as well]; therefore, it may investigate proportionality and necessity with its wide discretionary power in appraising complex economic facts,⁶⁸ and may even communicate it, and the European Courts may avail themselves of a narrow and marginal review of these decisions,⁶⁹ if we look at Article 263 of the TFEU. What causes discrepancy is that the Commission made decisions about the measures notified under the TF more rapidly, even when the measure was notified under Article 107(3)(b) TFEU. However, the discrepancy is even more striking when we juxtapose it with measures notified under Article 107(2)(b) TFEU, where the Commission does not even possess this kind of competence stemming from the TFEU at all. Therefore, we may argue that the TF, TCF and TCTF may rather be construed as ‘accelerations’ than ‘easings’, thereby inherently discriminatory measures notified under the TFEU itself, especially if notified under Article 107(2)(b) TFEU.

IX Conclusions

In the title of the paper, I have indicated the adjective ‘Janus-faced’, which, I believe, clearly illustrates the situation created by the permacrisis: the Commission was forced by economic events to adapt as rapidly as possible, while the Member States simultaneously had to avail of themselves of state interventions no less rapidly in order to avoid the crashes of their own budgets and national economies. For this reason, no space was left for debating whether the Commission’s way of handling the crises is adequate regarding its competence in the field of regulating state aid law by subtly influencing and expanding the application of Treaty rules through soft law.

The Commission, in my opinion, acted on time and rightfully, and because of the squeeze of time, there was perhaps no more suitable solution to the matter but swift soft law-making in the form of the TF. However, as the COVID-19 pandemic has now subsided, there could have been several chances to alter this way of addressing issues, especially since the

⁶⁷ Alessandro Rosanò, ‘Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law’ (2020) 5 (1) European Papers 627.

⁶⁸ Massimo Merola, Filippo Caliento, ‘Is the notion of aid broadening or shrinking over time, and if so, why? A subjective view on the rationale of the case law’ in Pier Luigi Parcu, Giorgio Monti, Marco Botta (ed), *EU State Aid Law, Emerging Trends at the National and EU Level* (Edward Elgar Publishing 2020, Cheltenham) 24, DOI: <https://doi.org/10.4337/9781788975254.00008>

⁶⁹ Stuart, Roginska-Green (n 7) 60.

EU already had the consequences of the 2008/2009 state aid loosening in mind.⁷⁰ Therefore, there would have been sufficient time and experience to build and fine-tune a better working framework under the provisions of the TFEU that reflects the different needs of the different Member States without maintaining unilateral soft law communications. At the least, by the time of the adoption of the TCF, the Commission should have been set and ready to opt for a system like that if it wished so.

As seen, Hungary availed itself of state aid granting, both based on the soft law instruments and on the TFEU, risking the approvals based on the latter. The measures reshaped the internal market by robust subsidising, which measures have not been independently evaluated even until now, and the potential economic distortion not only has not been analysed, but there are no plans to *ex-post* mitigate these potential consequences in the – hopefully – forthcoming ‘peace and boom times’. The lack of the latter indicates that the Commission is slightly exploiting the justifiable haste with which it acted in March 2020, and because of the squeeze of time on the shoulders of the Member States, which could not reasonably oppose it, the Commission does not wish to complete the accounting of whether it acted optimally and does not wish to balance the results. What is of more concern is that the EU is standing unshielded before a potential new crisis without having significantly revised its policy.

I believe the crises have made the European Commission stronger in its position, and it does not intend to give back any of that power, to the detriment of the European Parliament, the European Council, and eventually, the Member States, and the shift has become undeniably visible, from my personal standpoint. Regardless of any debates about competence,⁷¹ Hungary has acknowledged this shift and transposed all Commission decisions and even all soft law instruments adopted by the Commission, word by word, without delay, which tacitly maintains this said shift.

The Commission, as I envisage, seems to be widening its scope and discretion in every field of competition law by drawing up more and more detailed soft law instruments, interfering with more and more fields of the economy and with the room for manoeuvre of the Member States. This may not necessarily be a negative process, albeit it is a mentionworthy one, but it must be noticed and articulated. One field of this expansion is State Aid Law and crisis management, which constitutes only one part of the evolution in the ‘constitutional system’ (allocation of competences) within and between the institutions and the members of the European Union. I believe we are currently witnessing the accumulation of the power of the Commission, which has never been this influential in the field of competition law in Hungary’s 20 years as a Member State.

⁷⁰ Commission Communication, ‘Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis’ (2009) 2009/C 83/01 OJ C 83, 7.4.2009.

⁷¹ See for instance Juan Diego Arregui Acosta, ‘European Union Backsliding in the Rule of Law: The Hungarian Case’ (2023) 40 Foro Revista de Derecho 143–159, DOI: <https://doi.org/10.32719/26312484.2023.40.8>

The Impact of Exceptional Governance Measures on Democracy and Legal Systems

Abstract

The exercise of exceptional power has long been at the centre of debate, as the process involves essentially breaking away from normality and giving political leader(s), especially the executive, almost unlimited power. Particularly in periods of constitutionalism and under liberal democracies based on checks and balances, when the principle of the separation of powers is temporarily 'switched off' for the time needed to avert an exceptional event, this leads to significant problems. This paper, after clarifying the theoretical starting points, will discuss in a historical context the authoritarian tendencies inherent in executive power that emerged within the history of ideas and politics in the 20th century in relation to the problem of constitutional dictatorship and which have today taken shape in the transformation of philosophies of government – namely, into a kind of permanent crisis-management philosophy of government. Furthermore, in the context of the COVID-19 pandemic, the literature is reviewed to address the democratic problems associated with exceptional governance. The main question underlying this analysis is whether exceptional governance affects democracy and legal systems and what tools and methods can be used to check the authoritarian nature of the executive in a state of exception.

Keywords: state of exception, exceptional governance measures, democracy, autocracy, executive power, legal systems

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I Introduction

One of the major dilemmas of liberal constitutionalism is whether, in the event of a serious threat to public security, the executive can be endowed with extraordinary powers to act swiftly to deal with it, thereby empowering the government to derogate from and at the same time to limit the legal structures that may ultimately be destroyed by the emergency situation, whose protection may require the introduction of the extraordinary legal order itself.¹ The major challenge of exceptional measures is thus how to preserve the status quo (ie the existing 'normality'; the democracy to be defended), which is to be protected by exceptional means while at the same time granting the executive extraordinary powers. The situation is further complicated by the fact that there may be exceptional situations (eg natural or industrial disasters, war or epidemics) which may require rapid and effective mechanisms to deal with them when there is simply not enough time to operate the normal democratic process of constitutional decision-making. It is to resolve this dilemma that the rules of liberal constitutionalism have been developed to ensure that the rule of law and the system of checks and balances apply even in times of emergency, the basic idea being that the executive, when involved in such a situation, cannot make any definitive constitutional changes during the emergency, the main aim being to manage the dangerous situation and 'rescue' normality.²

The constitutional system of the exercise of exceptional power has been significantly influenced by the Roman legal tradition through republican political thought, as the elaborate Roman legal system incorporated a number of fundamental limits and checks and balances on the executive. On the one hand, this ensured the rights to which Roman citizens were accustomed, but on the other hand, it resulted in a rather cumbersome system of responding to various crises, whereby in the event of an emergency, the Roman Senate could order the consuls to appoint a dictator for a period of six months.³ The Roman legal system was rather conservative since a dictator was entitled to suspend rights and various legal procedures and to deploy military and other forces to avert threats to the republic, but when he had finished this work, he had to resign, and his decrees and their legal effects were terminated ie the original 'normal' state had to be restored. Exceptional legal measures in modern constitutional democracies follow a similarly conservative approach: that is, emergency powers are intended to deal with temporary situations and to create a situation in which a normal constitutional system of rights and procedures can be restored.⁴ As Ferejohn and Pasquino have argued, Niccolo Machiavelli, James Harrington and Jean-Jacques Rousseau constitute the theoretical mediators through which the institution of

¹ John Ferejohn, Pasquale Pasquino, 'The law of the exception: A typology of emergency powers' (2004) 2 (2) *International Journal of Constitutional Law* 210–239, 210, DOI: <https://doi.org/10.1093/icon/2.2.210>

² Ferejohn, Pasquino (n 1) 211.

³ Ferejohn, Pasquino (n 1) 211–212.

⁴ Ferejohn, Pasquino (n 1) 212.

the Roman dictator has grounded debates in modern constitutional and political history about the exceptional exercise of power.⁵ Carl Schmitt plays a key role in this debate, which has resurfaced in the context of the crises of our time after the period between the two world wars since the German constitutional lawyer examined the question of exceptional governance within the framework of sovereignty⁶ and linked it to the unlimited nature of the executive.⁷ For this reason, it is crucial to outline the historical circumstances in which the contingency models introduced in the context of COVID-19 are to be assessed: in the second section of this paper, it is argued that both during the inter-war period and contemporary governance regimes, the practice of governing by extraordinary measures (with its many dangers) came to the fore, and thus, while the onset of the pandemic posed an unexpected challenge to nation-state governments, the extraordinary practices that have been adopted in many places are far from without historical antecedents.

In the context of the pandemic, very significant comparative studies have been launched in the Hungarian literature to summarise the experience of exceptional governance. Of particular importance among these is the project Epidemiology and Jurisprudence and the Resilience of the Post-COVID Legal System, implemented by Fruzsina Gárdos-Orosz at the HUN-REN Centre for Social Sciences Institute for Legal Studies.⁸ The research has produced a number of blog posts, workshop papers and two edited volumes,⁹ which have contributed significantly to a more complete social science understanding of extreme situations. In addition, two edited volumes resulted from the comparative law research carried out within the framework of the Ferenc Mádl Institute of Comparative Law, which also dealt with research on the crises caused by the pandemic, mainly in the field of law, in a comprehensive and comparative manner: *The Special Legal Order and National Regulatory Models*, edited by Zoltán Nagy and Attila Horváth¹⁰ and *Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19*, also edited by them.¹¹

⁵ Ibid.

⁶ Carl Schmitt, *Dictatorship. From the origin of the modern concept of sovereignty to proletarian class struggle* (Polity Press 2014, Cambridge).

⁷ Tom Ginsburg, Mila Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2020) 52 Virginia Public Law and Legal Theory Research Paper, 1503, DOI: <https://dx.doi.org/10.2139/ssrn.3608974>

⁸ See <<https://jog.tk.hun-ren.hu/covid19>> accessed 1 April 2025.

⁹ Fruzsina Gárdos-Orosz, Viktor Olivér Lőrincz (eds), *Jogi diagnózisok. A COVID–19-világjárvány hatásai a jogrendszerre [Legal Diagnoses. The Impact of the COVID-19 Pandemic on the Legal System]* (L'Harmattan Kiadó 2020, Budapest); Fruzsina Gárdos-Orosz, Viktor Olivér Lőrincz (eds), *Jogi diagnózisok II. A COVID–19-világjárvány hatásai a jogrendszerre [Legal Diagnoses II. The Impact of the COVID-19 Pandemic on the Legal System]* (L'Harmattan Kiadó 2020, Budapest).

¹⁰ Zoltán Nagy, Attila Horváth (eds), *A különleges jogrend és nemzeti szabályozási modelljei [The Special Legal Order and National Regulatory Models]* (Mádl Ferenc Összehasonlító Jogi Intézet 2021, Budapest), DOI: <https://doi.org/10.47079/2021.nzha.kulon.4>

¹¹ Zoltán Nagy, Attila Horváth (eds), *Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19* (Ferenc Mádl Institute of Comparative Law, Central European Academic Publishing 2021, Budapest, Miskolc) DOI: <https://doi.org/10.47079/2022.znah.epicaee.1>

These studies indicate that there is a complex need in the domestic social science literature to assess the impact of the pandemic, and these papers also provide a starting point for examining the impact of emergency governance on democratic institutions (especially electoral systems). At the same time, international comparative research has been launched with the primary aim of examining the impact of emergency models introduced during the pandemic on democracies. The main aim of this paper is to bring these approaches (which can also be understood as a 'stress test' of democracies) into the domestic social science literature in a comprehensive way. Domestic research thus provides an excellent background for presenting and analysing the foreign literature that focuses on the effects of centralised executive power on democracy as a result of extraordinary governmental measures, how the extraordinary measures that unfolded in each regime contributed to authoritarian trends, and which restrictive and control mechanisms worked (or failed) during the pandemic. This paper, therefore, will attempt to summarise the experiences of the international literature.

It can be seen from the above that the dilemmas of suspending and, at the same time, preserving legal and political normality in times of objective crises are, in fact, contemporary with the issues of political power and power structures, and sovereignty itself. However, the social, political and public health crises caused by COVID-19 have brought this problematic to the fore once again, and at the same time, questions about how political systems should respond to crises – whether individual or group interests, economic or health considerations should be given priority, and how all this can be decided quickly and effectively by a government – have been substantially reassessed.¹² The key dilemma is what rules of control and accountability should be applied to emergency governance, to what extent and how democratic normality can be suspended, and what the dangers of concentrated executive power are. This paper seeks to present and analyse the literature on exceptional governance measures in a summarised manner, both historically and in the current context of COVID-19. Since without ideo-historical context, contemporary trends can be examined in a one-sided way (since the democratic challenges to exceptional governance can be said to be permanent), the second section will show the role of the executive in the emergence of autocracy based on 20th-century experiences and theories, focusing on the concept of Schmittian constitutional dictatorship and the transformation of contemporary philosophies of government. In the third section, the models of emergency governance will be analysed and how they were applied during COVID-19. The literature and research will be investigated here primarily from the perspective of how the pandemic contributed to anti-democratic and authoritarian threats by facilitating concentrated executive power and the control mechanisms that were encountered in comparison. Finally, in summary (and as a basis for further research), it will address the antidemocratic dangers associated with the emergency strengthening of extraordinary governance. COVID-19 can be considered as a frontier in

¹² Przemysław Tacik, 'The Blizzard of the World: COVID-19 and the Last Say of the State of Exception' (2021) 96 *Acta Universitatis Lodziensis* 17–32, DOI: <https://doi.org/10.18778/0208-6069.96.02>

terms of emergency governance; however, as Claudio Corradetti and Oreste Pollicino point out, we cannot yet draw conclusions in all regards, as the emergency powers of the executive have been reorganised primarily in relation to public health concerns.¹³ The main objectives of this paper are, therefore, to examine the tradition of emergency governance in the context of pandemics, to present the emergency models introduced by COVID-19 and the related democratic dilemmas, and to explore the implications of emergency governance for basic democratic functioning in the context of preparing for further crises to come.

II The Role of the Executive in the Emergence of Autocracy: Constitutional Dictatorship and Emergency Governance

The 1990s revolved around the paradigm of democratisation, but in contrast, a completely new situation emerged, and the earlier expectations about democratisation have now led to significant disillusionment: a global turn in democratisation has taken place, and we have entered an era of the proliferation of authoritarian regimes defined by global crises.¹⁴ Long before the COVID-19 crisis, it was already evident that the executive plays a key role in authoritarian reversals and democratic regressions.¹⁵ This is significant in the sense that the executive is able to ‘less spectacularly’ centralise power and gradually dismantle institutions that control government.¹⁶ In the following, it will be argued that the most influential 20th-century approach to centralised executive power in the wake of extraordinary periods and crises is the paradigm of ‘constitutional dictatorship’. This concept is crucial because, although one of the main aims of the democracies that were institutionalised after the Second World War was to limit executive power, the crises of our time (in particular, COVID-19) have highlighted that the anti-democratic dangers inherent in exceptional measure of governance (ie the dilemmas of constitutional dictatorship) did not end with the fall of the authoritarian regimes between the two world wars. It also will be pointed out that the use of extraordinary measures of governance and their embedding in democratic institutions transformed the philosophy of governance long before the current pandemic and that such emergency governance is associated with serious dangers.

¹³ Claudio Corradetti, Oreste Pollicino, ‘The “War” Against Covid-19: State of Exception, State of Siege, or (Constitutional) Emergency Powers? The Italian Case in Comparative Perspective’ (2021) 22 (6) *German Law Journal* 1060–1071, 1063, DOI: <https://doi.org/10.1017/glj.2021.48>

¹⁴ Valeriya Mechkova, Anna Lührmann, Staffan I. Lindberg ‘How much democratic backsliding?’ (2017) 28 (4) *Journal of Democracy* 162–169, DOI: <https://doi.org/10.1353/jod.2017.0075>

¹⁵ Milan W. Svobik, ‘Which democracies will last? Coups, incumbent takeovers and the dynamic of democratic consolidation’ (2015) 45 (4) *British Journal of Political Science* 715–738, DOI: <https://doi.org/10.1017/S0007123413000550>

¹⁶ Michael Coppedge, ‘Eroding regimes: What, where, and when?’ (2017) (57) *Varieties of Democracy (V-Dem) Institute Working Paper Series*, <https://www.v-dem.net/media/publications/v-dem_working_paper_2017_57.pdf> accessed 1 April 2025.

1 The Paradox of Extraordinary Measures and Constitutional Dictatorship

Emergency governance is a more indirect means of centralising executive power and building autocracy than elite replacement through an open military coup.¹⁷ It is no coincidence, therefore, that the literature on the legal and political-philosophical aspects of the special legal order early on located the governance of exceptionalism within the concept of ‘constitutional dictatorship’ and expressed the concern that the government undermines democracy by abusing its powers to use exceptional apparatus in an unconstitutional manner. The theory of constitutional dictatorship became intertwined with the state of emergency. It was during the collapse of European democracies between 1933 and 1948 that this became apparent, and the discourse became associated with Carl Schmitt’s unfolding theory of the exceptional state and took shape with Schmitt’s book *Dictatorship*, first published in 1921.¹⁸

Giorgio Agamben explains that the term ‘constitutional dictatorship’ itself originated with German jurists and was used to describe the exceptional power guaranteed to the Reich President by Article 48 of the Weimar Constitution.¹⁹ According to Agamben, these works and authors, while taking a variety of approaches, reflect the influence of Schmitt’s concept.²⁰ However, they are all important, as they provide a serious and first description (with significant experience for pandemic emergency models) of how democratic regimes were transformed by the continuous and radical expansion of executive power and how exceptional governance emerged during the two world wars and the period that followed. These descriptions capture the process by which exceptionalism has not only become the main thrust of governance techniques (ie no longer used only and not primarily in exceptional situations) but exceptional measures as such have been generally accepted. According to Agamben, the above authors and their reflections were the precursors of Benjamin’s thesis²¹ that ‘the state of exception [...] has become the rule of the exception’.²²

As Michael Hoelzl and Graham Ward point out, the debate between Schmitt and Hans Kelsen was at its height regarding the constitution and the sovereign, with the basic question being who should be the guardian of the constitution in a crisis: Who should be given extra-legal powers to save the constitution and to restore public order and security when

¹⁷ Anna Lührmann, Bryan Rooney, ‘When Democracy has a Fever: States of Emergency as a Symptom and Accelerator of Autocratization’ (2019) (85) Varieties of Democracy (V-Dem) Working Paper Series, 9, DOI: <https://dx.doi.org/10.2139/ssrn.3345155>

¹⁸ Schmitt (n 6).

¹⁹ Giorgio Agamben, *State of Exception* (Kevin Attell tr., The University of Chicago Press 2005, Chicago) 6, DOI: <https://doi.org/10.7208/chicago/9780226009261.001.0001>

²⁰ Ibid.

²¹ Walter Benjamin, *Selected Writings. Vol. 4., 1938–1940.* (Howard Eiland, Michael W. Jennings ed, The Belknap Press of Harvard University Press 2003, Cambridge) 257.

²² Agamben (n 19) 6.

the welfare of the people is under threat?²³ Put another way: who is sovereign? According to Schmitt, in the circumstances that give rise to the imposition of a dictatorship, in the specific emergency, it will be the sovereign who decides to impose a state of exception in order to restore normality afterwards.²⁴ It is, therefore, clear (and this has been shown in the literature on the effects of pandemic emergency measures on democratic regimes) that the state of exception, sovereignty and the threat of authoritarian reversals form an inseparable set of phenomena. This implies that governance by extraordinary measures is fraught with inherent paradoxes: on the one hand, normal rule of law is temporarily suspended in order to ultimately ensure the democratic functioning of the society in question once the emergency is averted/resolved; on the other hand, even during the suspension of law and democratic norms, constitutional systems claim some form of democratic control (all these dilemmas can be called ‘the paradox of extraordinary governance’). In fact, Schmitt’s constitutional dictatorship serves to resolve these contradictions.

In 1926, Schmitt summed up dictatorship as follows: ‘Dictatorship is the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation – in particular, a situation of war and rebellion. Hence, two decisive elements for the concept of dictatorship are, on one hand, the idea of a normal situation that a dictatorship restores or establishes, and on the other, the idea that, in the event of an abnormal situation, certain legal barriers are suspended in favour of resolving this situation through dictatorship.’²⁵ By examining the history of the regulation of the exceptional state, Schmitt arrives at the conclusion that there are two types of dictatorship. On the one hand, the military (commissarial) dictatorship has legal authority and remains within the constitutional framework; the dictator thus has constitutional authority. In contrast, in a sovereign dictatorship, the entire previous legal system becomes obsolete, and a completely new legal structure is outlined, with state power concentrated in the hands of the dictator. The dictator thus becomes sovereign because he has the power to decide on a state of exception, the aim of which is not to ‘make exceptionalism permanent’ but to create a new legal system: ‘The sovereign’s aim in creating the state of exception is to restore or create the normal state of affairs, the state of exception is the means to this end. The relationship between the normal and the exceptional state is thus characterised by a dualism of end-means [...] The normal state is a rational (predictable) order, while the exceptional state is the irrational (unpredictable) basis of this rational order. These two mutually conditional states of the state are, in the domestic political dimension, the validity of the rule of law or the suspension of the rule of law, and, in the foreign and international political dimension, the state of peace or

²³ Michael Hoelzl, Graham Ward, ‘Introduction’ in Carl Schmitt, *Dictatorship. From the origin of the modern concept of sovereignty to proletarian class struggle* (Polity Press 2014, Cambridge, x–xxix) xxiii.

²⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2006, Chicago-London) DOI: <https://doi.org/10.7208/chicago/9780226738901.001.0001>

²⁵ Cited by Hoelzl, Ward (n 23) xxiii.

war.²⁶ This legal decisionism becomes a political strategy according to Schmitt, the essence of which is that the sovereign has unlimited and totalitarian power, not only because the principle of separation of powers does not apply since they are concentrated in one hand but also because the separation of powers does not apply in time, since the dictator's power, which had previously lasted for a certain period of time, becomes unlimited.

Returning to the Schmittian theorists of constitutional dictatorship, one should single out Herbert Tingsten, who addressed the problem of the enabling law and examined the unusually great power of the executive in the exceptional state to be given broad regulatory powers to amend or repeal existing laws by decree. It is for this reason that Tingsten concludes that although, in theory, exceptional power entrusted and controlled for a limited period of time may be theoretically compatible with democratic constitutionalism, the systematic exercise of exceptional power results in the liquefaction of democratic frameworks.²⁷ This is why the constant erosion of legislative power, including by the executive governing by decree, is incredibly dangerous. Carl J. Friedrich, in a similar way to Schmitt's typology of commissarial and sovereign dictatorship, distinguishes between constitutional dictatorship (which aims to preserve the constitutional order) and unconstitutional dictatorship (which seeks to overthrow it).²⁸ According to Agamben, Friedrich has not really been able to draw a convincing distinction between the two types of dictatorship since any theory that seeks to justify constitutional dictatorship is faced with the contradictory situation that exceptional rules that are meant to protect the democratic constitution become themselves the cause of the deterioration of democracy.²⁹ The constitutional dictatorship thus struggles with an insoluble internal contradiction, and these dilemmas manifested themselves for the first time on a global scale in the context of the pandemic.

From an ideological and historical point of view, the extraordinary contradictions of exceptional governance become quite evident in Clinton L. Rossiter's approach, which openly sought to justify constitutional dictatorship. He argued that democratic constitutionalism, based on the separation of powers, is appropriate for normal circumstances but that in a crisis, the rules of the game of democratic governance can be changed to any extent temporarily (the government will have more power and the people will have fewer rights) in order to overcome dangers and restore normality.³⁰ Rossiter was aware that constitutional dictatorship, as a state of exception, had, in fact, already become a paradigm of government in the inter-war period and, like Walter Benjamin's observations, he explained that exceptionalism had become the rule: that is, the dictatorship of the executive, legislation

²⁶ András Körösenyi, 'Carl Schmitt állam- és politikaelméleti alapfogalmai' [*Carl Schmitt's Basic Concepts of State and Political Theory*] (2000) 9 (3–4) *Politikatudományi Szemle* 5–24, 13.

²⁷ Quoted and analysed by Agamben (n 19) 7.

²⁸ Agamben (n 19).

²⁹ Agamben (n 19) 8.

³⁰ Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (The Princeton University Press 1948, Princeton).

by administrative means, was far from temporary, but was also widespread in peacetime. Agamben quotes Rossiter, whose words in 1948 foreshadow the increased danger to democracy of the paradigm of the state of exception, which is still relevant today: 'No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself'.³¹ At the same time, Rossiter also recognized the power of the 'genie out of the bottle' and argued that exceptional governance should be confined within constitutional limits (necessity test, time limit).³²

2 The Changing Philosophy of Governance and the Dangers of Post-Madison Governance

From the foregoing, it can be formulated (and the dilemmas related to pandemic emergency models confirm this) that one of the major anti-democratic dangers inherent in the practice of governance by extraordinary measures is that it begins to transform and define the philosophy of governance even in 'normal circumstances' (ie in the absence of an objective emergency). Agamben (even before the COVID-19 crisis in 2016) pointed out that the theory and practice of modern governance were being fundamentally transformed. In his lecture 'From the State of Control to a Praxis of Destituent Power', the Italian philosopher highlighted that modern states and modern governments put security at the centre of their actions (a trait that first appeared in the great absolutist states after the Peace of Westphalia) and therefore seek to deal with the consequences rather than the causes of a socio-political phenomenon, among other things because crisis management is cheaper (and politically more rewarding) than the very often uncomfortable prevention. Modern governance is not a governance of causes but rather of 'consequences'. This paradigm of governance does not conceive of government as the prevention of problems but rather as the ability to manage problems and disasters (that it may have contributed to happening, whether actively or through inaction).³³

This situation unfolded and became distorted in the context of the totalitarian state and concentration camps, where a system was institutionalised that was governed by means of a perpetuated state of exception. It is here that the exception first became the rule³⁴ and it cannot be a coincidence that governance by extraordinary means is embedded in the horrific experiences of the 20th century today. According to Agamben: 'A formal state of exception is not declared and we see instead that vague non-juridical notions – like [...]

³¹ Agamben (n 19) 9.

³² Ginsburg, Versteeg (n 7) 1503.

³³ Giorgio Agamben, 'From the State of Control to a Praxis of Destituent Power' (2014) ROAR Magazine <<https://roarmag.org/essays/agamben-destituent-power-democracy/>> accessed 1 April 2025.

³⁴ Amy O'Donoghue, 'Sovereign Exception: Notes on the Thought of Giorgio Agamben' (2015) Critical Legal Thinking <<http://criticallegalthinking.com/2015/07/02/sovereign-exception-notes-on-the-thought-of-giorgio-agamben/>> accessed 1 April 2025.

security reasons – are used to install a stable state of creeping and fictitious emergency without any clearly identifiable danger.³⁵ Thus, the modern government, even in the absence of an objective crisis situation which employs extraordinary means, is in a perpetual state of exception, a perpetual state of ‘coup d’état’: it manages crises of its own making and passively tolerates itself. In other words, ‘by placing itself under the sign of security, the modern state has left the political zone and entered a no-man’s land whose geography and borders are still unknown’.³⁶

Lührmann and Rooney also argue, in the context of their research in Varieties of Democracy (V-Dem), that the experience of when and what emergency measures a state is forced to adopt also includes the experience of exceptional measures that fundamentally transform the traditional order.³⁷ Exceptional measures further highlight the extraordinary threats to democratic order and national survival. It also follows from Lührmann and Rooney’s analysis that exceptional governance provisions are fundamentally premised on the external nature of the threats that arise in relation to the nation-state framework, all of which suggests that the paradigm of exceptional governance is related to the instability of the international order.³⁸ The authors also point out that ‘exceptionalism’ and its reality in political communication reduces the political costs for political leaders of rewriting democratic rules (which may be very painful in the normal state) since, in such situations, the expansion of executive power becomes a kind of social expectation.³⁹ However, all this should not necessarily be accompanied by an undemocratic and authoritarian risk that, once the crisis is over, the functioning of the state, and in particular of the executive, will not return to institutional normality. On the basis of Lührmann and Rooney’s approach, we can thus speak of the possibility that, in the context of an emergency, leaders may extend the constitutional and political limits of their power beyond the limits of the extraordinary exercise of power (substantive abuse of exceptional governance) or extend the duration of the emergency (temporal abuse of exceptional governance).⁴⁰ In general, the underlying goals of power concentration may be to regulate political opponents, neutralise obstacles and counterweights to power (including constitutional counterweights and the administration), and eliminate various accountability and accountability options.

Comparing this with what has been said about constitutional dictatorship, we can see that for the proponents of constitutional dictatorship, the non-partisanship (in content and/or time) of extraordinary government is not a problem but rather an opportunity. Those who worry about the strengthening of executive power in emergency situations point out that democratic and constitutional legitimacy can paradoxically be distorted into a means

³⁵ Agamben, ‘From the State...’ (n 33).

³⁶ Agamben ‘From the State...’ (n 33).

³⁷ Lührmann, Rooney (n 17).

³⁸ Lührmann, Rooney (n 17) 6.

³⁹ Lührmann, Rooney (n 17) 10–11.

⁴⁰ Lührmann, Rooney (n 17) 11.

of undermining democracy since it can justify, on the surface, a concentration of power that may indeed be needed with a certain content and duration, but it is precisely this uncertainty that the authoritarian leader exploits.⁴¹

The V-Dem research (before the COVID-19 pandemic) showed that there is a positive correlation between an undemocratic (authoritarian) turn and governance by extraordinary measures: countries affected by emergency measures are 59% more likely to experience regression than those without.⁴² The authors, therefore, proposed to view the state of emergency 'as a potential symptom and accelerator of autocratization processes. Like a fever, they are a strong warning sign that something maybe wrong with the state of democracy and that autocratization might be under the way.'⁴³ In other words, exceptional governance measures and the special legal order can be both a cause and a consequence of democratic decline.⁴⁴ This makes it important to examine the intentions of the leader of the executive when judging the use of exceptional measures of governance and for the public to monitor them continuously so that they do not exceed their mandate in terms of either substance or timing. Further, to use exceptional means genuinely to defend the democratic order (to restore it) and not to reinforce their own position authoritatively.

However, this exceptional form of governance is not only accepted in the context of constitutional dictatorship but also in contemporary contexts: the 2011 joint publication of Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, summarises their theory of the 'unbound executive' in the United States context and situates crisis governance in a neo-Schmittian, post-Madisonian framework.⁴⁵ '[T]hey believe that the Madisonian scheme of checks and balances, wherein different branches and levels of government have the incentives to keep each other in check, fails to operate under such circumstances'.⁴⁶ For the United States, it has been argued that the Madisonian constitution, based on the separation of powers, has now given way to an administrative state headed by the president, over which the courts, the member states and even Congress itself have only slight control.⁴⁷ Posner and Vermeule's argument is formulated in the context of the United States after 11 September 2001, and the global economic and financial crisis of 2008, but Posner sought to develop it further in the context of the pandemic.⁴⁸ According to this post-Madisonian thesis, the key to exceptional governance is necessity since only the government has the resources and flexibility to deal with the situation (and to balance security and civil

⁴¹ Ibid.

⁴² Lührmann, Rooney (n 17) 16.

⁴³ Lührmann, Rooney (n 17) 18.

⁴⁴ Lührmann, Rooney (n 17) 19.

⁴⁵ Eric A. Posner, Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press 2011, Oxford-New York) DOI: <https://doi.org/10.1093/acprof:osobl/9780199765331.001.0001>

⁴⁶ Ginsburg, Versteeg (n 7) 1499.

⁴⁷ Posner, Vermeule (n 45).

⁴⁸ Eric A. Posner, 'The Executive Unbound, Pandemic Edition' (2020) Lawfare Blog <<https://www.lawfaremedia.org/article/executive-unbound-pandemic-edition>> accessed 1 April 2025.

liberties): in an emergency, the judicial and legislative branches transfer huge amounts of power to the executive, thereby abdicating powers and invalidating Madison's notion of separation of powers.⁴⁹ In a crisis situation, immediate and rational action is needed, which the court is not able to provide because its procedure is slow (although every minute counts), public (although national security often requires secrecy), and it lacks the necessary political legitimacy. The lack of information and speed also means that the legislature is not able to act, nor does it have direct control over the executive's apparatus of violence, but the executive can be given prior authority to take extraordinary measures.⁵⁰ However, Posner and Vermeule argue (and this is where the idea that governance by extraordinary measures and its impact on democracy can have an effect essentially without an objective crisis comes in) that the US case shows that the phenomenon of unfettered executive power is by no means limited to emergencies and that in modern administrative and complex governance systems, the system of checks and balances has become formalised.⁵¹ As we saw in the V-Dem study, the issue of the 'unboundedness' of executive power highlights a number of critical aspects, and this is also true of Posner and Vermeule's approach since the unfettered government in emergency situations can, in fact, be understood as an abuse of power. Bruce Ackerman, for example, accepts the approach that the US executive is unfettered but argues that this has severely undermined and plunged the republic in the United States into crisis.⁵²

As can be seen from the above, there is by no means unanimity on the state of exception in modern legal and political theory: its case-specific necessity is accepted, but it is also sharply criticised as it can lead the democratic establishment in an authoritarian direction. These dilemmas have only been exacerbated by the outbreak of the COVID-19 pandemic, which has, at the same time, provided an opportunity to examine the dilemmas of democracy in relation to exceptionalism in a global context.

III Emergency Models and COVID-19

The World Health Organisation declared a pandemic caused by COVID-19 on 11 March 2020. The scale, rapid spread and unknown nature of the pandemic demanded a rapid response from nation-state governments to protect lives, prevent the overloading of health systems and ensure continuity of governance. The year 2020 is, therefore, a significant one in the history of emergency law and emergency governance, as it has forced nation-state governments around the world to implement emergency measures at an unprecedented

⁴⁹ Ginsburg, Versteeg (n 7) 1504.

⁵⁰ Ibid.

⁵¹ Posner, Vermeule (n 45) 4.

⁵² Bruce Ackerman, *The Decline and Fall of the American Republic* (The Belknap Press of Harvard University Press 2013, Cambridge-London).

scale. As Tom Ginsburg and Mila Versteeg point out, the emergency measures that accompanied COVID-19 forced democratic governments to restrict the freedoms of their citizens, which they had previously taken for granted, in ways and to an extent never seen before: nationwide stay-at-home measures, curfews imposed by the military, the suspension of religious services, monitoring of mobile phones, closure of schools and suspension of other public services, travel restrictions and censorship of the news.⁵³

All this has provided an opportunity to study the various responses to emergency governance in a global emergency. However, in the context of a pandemic that threatened human lives and health, the functioning of democratic political and legal systems was also at risk: the constitutionality of the emergency legal frameworks put in place by governments was called into question, as it became common practice for governments 'to disable some ordinary (democratic) procedures and set aside standard political and legal accountability mechanisms part of their Covid-19 response'.⁵⁴ In other words, COVID-19 has highlighted one of the major dilemmas of emergency governance outlined in the history of ideas: the regimes that use them neither fully foresee the long-term effects of the measures on democratic governance nor what the precise intentions of the executive might be beyond the management of a given crisis by extraordinary measures.⁵⁵ As emergency governance is bound by several strands to the legal and political order within which it is established and whose protection it is designed to protect, it is worthwhile expanding on the various emergency models before examining the dilemmas of emergency governance and democracy in relation to the COVID-19 crisis.

1 Emergency Models

There are several possible ways of triggering governance by emergency measures: one main solution is when the constitution itself sets up the extraordinary regime and its limits ('constitutional model'); the other main solution is when the executive itself sets in motion the processes leading to extraordinary powers by setting the legislature in motion ('legislative model'); finally, a separate discussion will be needed of cases where extra-legal solutions lead to extraordinary governance ('extra-legal model').⁵⁶

The 'constitutional model' is the most common, as more than 90 per cent of the world's constitutions today contain provisions for the introduction of various types of extraordinary

⁵³ Ginsburg, Versteeg (n 7) 1499.

⁵⁴ Sean Molloy, 'Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes' (2021) International Institute for Democracy and Electoral Assistance 7, <<https://www.idea.int/sites/default/files/publications/emergency-law-responses-to-covid19.pdf>> accessed 1 April 2025, DOI: <https://doi.org/10.31752/idea.2021.24>

⁵⁵ Ginsburg, Versteeg (n 7) 1499.

⁵⁶ Ginsburg, Versteeg (n 7); Ferejohn, Pasquino (n 1).

legal regimes.⁵⁷ In these cases, the constitution itself empowers the executive, in the event of various emergencies (eg war, natural disaster, insurrection or other situations of public danger), to take extraordinary measures, to govern by decree, or, in these cases, the constitution provides for the suspension of certain freedoms in the manner and to the extent required by the emergency. In the constitutional model, the constitutional arrangement itself suspends the system of checks and balances and temporarily grants the executive power to exercise the powers of other branches of government (in particular, the legislature or, in the case of a federal state, the member states), which may give the executive power very broad options that may be open to abuse.⁵⁸ At the same time, as Ginsburg and Versteeg point out, constitutional provisions not only empower but also, on the basis of historical experience, seek to limit the temporary overreach of government: one of the most important of these guarantees, the limited safeguard on the operation of checks and balances in extraordinary circumstances, is the requirement that parliament declare a state of emergency (Ginsburg and Versteeg's analysis of existing constitutions shows that various constitutional systems have also institutionalised further limitations: for example, during a state of emergency, parliament cannot be dissolved or the constitution cannot be amended; many constitutions specify the length of time for which emergency government can last and its extension is subject to parliamentary approval; constitutions may also list situations that allow for the introduction of emergency measures at all). In addition to the legislature, the judiciary may also exercise control over the implementation of extraordinary measures by continuously monitoring the extraordinary powers and whether the (fundamental rights) restrictions imposed were necessary and proportionate.⁵⁹

Of course (and in very many cases), governance by extraordinary means need not have any constitutional mandate or limitation at all since the executive can be empowered by the legislature itself to take emergency measures, a solution that Ferejohn and Pasquino call the 'legislative model' of exceptional governance, which they argue '[...] handles emergencies by enacting ordinary statutes that delegate special and temporary powers to the executive. This practice implies that emergency powers are to be understood as exceptional to the ordinary operation of the legal system and that, once the emergency subsides, there will be a return to ordinary legal and political processes. In principle, therefore, legislative emergency powers are temporary. They are also aimed at restoring the prior legal constitutional status quo and so, in that sense, are conservative, as is the neo-Roman mode'.⁶⁰ This solution can also be used as a framework for the control of the legislature, which can constantly monitor the exercise of emergency powers, decide to extend them or suspend them if the circumstances that gave rise to them no longer exist, and also has the option of adopting

⁵⁷ Ginsburg, Versteeg (n 7) 1506; Christian Bjørnskov, Stefan Voigt, 'The Architecture of Emergency Constitutions' (2018) 16 (1) *International Journal of Constitutional Law* 101–127, 101, DOI: <https://doi.org/10.1093/icon/moy012>

⁵⁸ Ferejohn, Pasquino (n 1) 218.

⁵⁹ Ginsburg, Versteeg (n 7) 1507.

⁶⁰ Ferejohn, Pasquino (n 1) 217.

the law activating the emergency. Ferejohn and Pasquino argue that the legislative model can achieve more complete control over the executive, with continuity of legislative and judicial control, and further, that parliament can ultimately terminate the government's authority if the reasons and conditions for imposing emergency government no longer exist.⁶¹ With regard to the legislative model, Ginsburg and Versteeg note that the delegation of executive power by the legislature is possible before the occurrence of the extraordinary events that triggered it (*ex-ante*) or after the occurrence of the objective crisis events themselves (*ex-post*). The controlling and constraining nature of the legislature is most effective in the case of *ex-post* solutions, which ensure that the legislature is continuously involved alongside the government in dealing with emergencies.⁶²

Finally, it is also worth referring to aspects beyond constitutional and legislative models, as various crises can encourage unauthorised or even over-empowered action. This model assumes (which was also key to the concept of constitutional dictatorship) that it is, in fact, preferable for the executive to act explicitly without a legal basis (ie without any constitutional or legal constraints) since emergency situations involve a transfer of powers and a restriction of citizens' freedoms, and are therefore inherently illegitimate and more appropriately evaluated after the objective emergency has passed.⁶³ Oren Gross has argued in the context of the terrorist attacks of 11 September 2001 that the traditional solutions to emergency governance (the 'business as usual' model) may not always be the right choice, either from a theoretical or a practical point of view.⁶⁴ Gross has noted the fundamental dilemma that we have seen in the traditional Schmitt-Kelsen controversy ('the paradox of governance by extraordinary means'): how to resolve the contradiction between respecting and going beyond the rule of law in the case of extraordinary governance. In the context of the terrorist attacks in the US, he referred to the contradiction that while terrorists operate outside the sphere of legal principles and norms, democratic governments must be careful not to fight terrorism by illegitimate means. Otherwise, defeating terrorists can only be achieved at the cost of losing the democratic character of the society they are fighting to protect.⁶⁵ Gross explained that in his proposed model of 'extra-legal measures', those exercising public power are explicitly empowered to use extra-legal measures if they feel it is necessary to protect the nation and its population (ie according to Gross, the common good), provided that they openly and publicly acknowledge the nature of their actions.⁶⁶ According to Gross, the only limit to the extraordinary government can be *ex-post*, and that is the potential need to hold society accountable: 'commitment to the

⁶¹ Ferejohn, Pasquino (n 1) 217–218.

⁶² Ginsburg, Versteeg (n 7) 1508.

⁶³ Ginsburg, Versteeg (n 7) 1509.

⁶⁴ Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 (5) The Yale Law Journal 1011–1134, 1021, <<https://www.yalelawjournal.org/article/chaos-and-rules-should-responses-to-violent-crises-always-be-constitutional>> accessed 1 April 2025, DOI: <https://doi.org/10.2139/ssrn.370800>

⁶⁵ Gross (n 64) 1021.

⁶⁶ Gross (n 64) 1023.

violated principles and values. The acting official may be called to answer, and make legal and political reparations, for her actions. Alternatively, the people may act to approve, *ex post*, the extra-legal actions of the public official'.⁶⁷ Such a conception of the extra-legal model thus implies an antecedent commitment that popular sovereignty can legitimise governmental abuses in the course of extraordinary governance. It also follows from this model that courts should refrain from ruling on emergency measures because decisions upholding them may, in hindsight, legitimize the problematic use of emergency powers. In other words, the power-limiting mechanisms, the system of checks and balances, should be temporarily suspended during the emergency and then be fully re-enforced once the emergency has passed.⁶⁸ Uncertainty is also a feature of emergencies in general, and this is heightened in this model, as the executive is put in a situation where it is not immediately certain that it can be legally justified, and this model is precisely the opportunity for the government to buy time to prove its legitimacy.⁶⁹ Gross cautions, however, against confusing this approach with political realism, as realists often argue that democracies must give up their legal and constitutional legitimacy in violent crises. In contrast, the extra-legal means model aims to preserve and control normativity in the long term, and in this, temporary 'small mistakes' help the 'greater good' of maintaining constitutional order. As the model seeks to enforce political and social responsibility and morality and emphasises publicity and honesty over executive action, Gross argues that it can present a suitable barrier to the concentration of government power and authoritarian tendencies.⁷⁰

2 Emergency Governance in Pandemic: Democracy and Institutional Resilience

The pandemic resulting from COVID-19 has thus provided an opportunity to analyse the emergency approaches and models that have been studied previously, as well as the contradictions between democracy and exceptional governance, for the first time in world history in a global context (it is precisely this scale and comparative nature that makes the research discussed here important for the domestic literature). In the following comparative section, country studies will be analysed that provide a complex picture of how the emergency models discussed earlier were applied in the context of COVID-19. The main aim of the study is to gather lessons that can help us understand how and according to which models emergency governance instruments can be applied in future emergencies in an appropriate and democratic way.

One of the most comprehensive studies was conducted by Ginsburg and Versteeg, who compiled a substantial database and collected information on the pandemic response in

⁶⁷ Ibid.

⁶⁸ Ginsburg, Versteeg (n 7) 1509.

⁶⁹ Ibid.

⁷⁰ Gross (n 64) 1024.

some 106 countries until mid-July 2020.⁷¹ The authors examined emergency governance in the context of the pandemic basically in the framework of the emergency models presented above, and one of the main aspects was the state of legislatures and courts during the pandemic. The authors found that the most common response to a pandemic was the use of an element of the legislative model, with 52% of the countries they studied relying on legislation in their response to a pandemic. These include, among others, large democracies such as Germany, France, the Netherlands, Switzerland, Austria, the United States, Australia, Belgium, Taiwan, South Korea, South Africa and Japan.⁷² The vast majority of the countries surveyed by Ginsburg and Versteeg, 89%, have detailed constitutional emergency legislation, while only 43% have declared such a constitutionally based emergency (compared to 40% of the total sample), including Spain, Hungary, the Czech Republic, Armenia, Sierra Leone and Senegal.⁷³ Ginsburg and Versteeg's data collection also highlights another interesting aspect: the activation of emergency provisions in constitutions is not primarily dependent on whether the regime is authoritarian, as 42% of democratic regimes and 33% of authoritarian regimes have made use of this option.⁷⁴ However, there have also been cases (China, Cuba, Cameroon, Belarus, Saudi Arabia, Sudan, Cambodia, Rwanda, Laos and Tanzania) where emergency governance was based solely on executive measures and the legal basis for the measures taken was not clarified.⁷⁵

The investigations were also an opportunity to assess the checks and balances on the executive during the emergency period, namely the legislatures, the courts and the sub-national (eg local officials, municipalities, member states of federal states) checks and balances. In 64% of the countries studied by Ginsburg and Versteeg, the legislature was directly involved in the management of the pandemic (a state of emergency was declared or extended, and new legislation was adopted). In 75% of the countries responding under the constitutional model, the legislature had to declare or extend a state of emergency, while in 45% of the countries responding under the legislative model, the legislature passed new laws to deal with the pandemic, but in 72% of these countries the laws were temporary and only applied to COVID-19.⁷⁶ The strength of democratic controls and institutional resilience is demonstrated by the fact that in 52% of the countries studied, legislatures were continuously involved in the fight against the pandemic (68% in democratic countries, but even 30% in authoritarian regimes) and thus in counteracting the executive.⁷⁷ In 41% of the countries studied by Ginsburg and Versteeg, the judiciary was directly involved in the response to the pandemic. The courts were involved in 55% of democracies and 27%

⁷¹ Ginsburg, Versteeg (n 7) 1513.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ginsburg, Versteeg (n 7) 1517.

of authoritarian regimes:⁷⁸ such control included ensuring compliance with procedural requirements; in the case of disproportionate and unnecessary violations of fundamental rights, the courts could take the initiative to prevent or lift the blockade; further, the courts could call for concrete action by the executive to fulfil its constitutional obligation.⁷⁹ In 34% of the countries surveyed, countervailing forces against extraordinary measures appeared at the sub-national level and even at all three levels (legislative, judicial, sub-national), as one or more of these countervailing factors appeared in 82% of the countries.⁸⁰

A study by Sarah Engler and colleagues focused on European perspectives⁸¹ and looked at the relationship between the quality of democracy in a country and government responses to COVID-19. They focused on emergency measures that impact the values protected in liberal democracies but can be restricted in the event of an emergency. Based on a study of 34 European countries, they found that the state or quality of democracy that is suspended has a significant impact on the quality of emergency governance, as governments in countries where the quality of democracy is higher in times of no emergency were reluctant to adopt measures that potentially run counter to democratic principles.⁸² Research has shown a strong correlation between constitutional protection and effective respect for individual freedoms and a government's reluctance to restrict these freedoms as part of the fight against COVID-19.⁸³ Researchers have also shown that even in a global crisis, country-specific factors are important in determining policy responses.⁸⁴ Stronger democracies were slower to respond to the pandemic because accountable decision-makers were reluctant to make swift public health interventions that violated civil liberties (here, of course, we are faced with the dilemma that adherence to democratic ways of doing things comes at the price of failing to effectively stop the spread of the pandemic), but the authors also saw this as a vindication of the earlier perception that the pandemic could reinforce existing authoritarian tendencies: Namely, where there was already a history of democratic decline, the pandemic opened up an opportunity for power-seeking leaders to further concentrate power.⁸⁵ The authors do not hide the fact (especially in the light of the Swedish experience) that the preservation of democratic procedures and controls is associated with many problems in the field of epidemiology, but they also argue that the involvement of citizens and the maintenance of some kind of democratic normality are crucial for the social

⁷⁸ Ibid.

⁷⁹ Ginsburg, Versteeg (n 7) 1518–1526.

⁸⁰ Ginsburg, Versteeg (n 7) 1517.

⁸¹ Sarah Engler, Palmo Brunner, Romane Loviat, Tarik Abou-Chadi, Lucas Leemann, Andreas Glaser, Daniel Kübler, 'Democracy in times of the pandemic: explaining the variation of COVID-19 policies across European democracies' (2021) 44 (5–6) *West European Politics* 1077–1102, DOI: <https://doi.org/10.1080/01402382.2021.1900669>

⁸² Engler et al. (n 81) 1095.

⁸³ Ibid.

⁸⁴ Engler et al. (n 81) 1096.

⁸⁵ Ibid.

acceptability of and compliance with prevention policies, ie the quality of democracy is, in their view, a necessary tool for managing the pandemic.⁸⁶

Massart and his co-authors draw attention to another important aspect of the dilemmas of extraordinary governance and democracy: their research differs from most approaches that start from the restrictions imposed during the period of emergency. In their interpretation, democratic compensators are decisions that grant exceptional rights to individuals, sub-national or nation-state political institutions, and non-governmental actors to compensate for the negative effects of emergency measures on civil liberties and the rule of law (eg, the temporary nature of emergency decisions and the decision by parliament to incorporate them into the normal legal order, social control over emergency governance).⁸⁷ Massart and his colleagues argue that countries with weak and limited countervailing powers are more vulnerable to violations of democracy and human rights than those with a properly functioning system of checks and balances in normal situations; they also argue that strengthening the resilience of democracies to crises may entail strengthening countervailing powers at the parliamentary and local levels.⁸⁸

Examining governance by exceptional measures during a pandemic, as well as democratic checks and balances, is also key to knowing how we can ensure the institutional resilience mentioned above in preparation for future crises,⁸⁹ of which democratic checks and balances are an important component in an emergency period. Gabriele De Angelis and Emellin de Oliveira have also suggested that, in addition to institutions, we should also include in future investigations the personal and party-political factors that may bias emergency governance in an authoritarian direction.⁹⁰

3 Authoritarian Tendencies and the Pandemic

The V-Dem Institute, which monitors democracy and constitutionalism in Europe and globally, has been particularly interested in examining the broad impact of COVID-19 on the functioning of democracies and how such crises affect the strengthening of autocracies. Maerz and his colleagues looked at the trends highlighted by the first wave of the pandemic in a comprehensive study.⁹¹ The illustrative starting point of the V-Dem

⁸⁶ Engler et al. (n 81) 1096–1097.

⁸⁷ Tom Massart, Thijs Vos, Clara Egger, 'The Resilience of Democracy in the Midst of the COVID-19 Pandemic' (2021) 3 (2) *Politics of the Low Countries* 113–137, 116, DOI: <https://doi.org/10.5553/PLC/000018>

⁸⁸ Massart et al. (n 87) 132–133.

⁸⁹ Gabriele De Angelis, Emellin de Oliveira, 'COVID-19 and the "state of exception": assessing institutional resilience in consolidated democracies – a comparative analysis of Italy and Portugal' (2021) 28 (8) *Democratization* 1602–1621, DOI: <https://doi.org/10.1080/13510347.2021.1949296>

⁹⁰ De Angelis, Oliveira (n 89).

⁹¹ Seraphine F. Maerz, Anna Lührmann, Jean Lachapelle, Amanda B. Edgell, 'Worth the Sacrifice? Illiberal and Authoritarian Practices during Covid-19' (2020) 110 V-Dem Working Paper Series <https://v-dem.net/media/publications/wp_110_final.pdf> accessed 1 April 2025.

study is precisely that violations of democratic norms by several governments (the excessive use of extraordinary powers and restrictions on media freedom) are raising concerns that the COVID-19 epidemic could ‘infect’ democracy itself.⁹² However, this process fits in with the global trend towards autocratisation linked to the zeitgeist of populism. This raises further dilemmas and contradictions, as the authors also point out that those who violate democratic norms of governance by extraordinary means often do so on the grounds of protecting human life, suggesting that in times of crisis, normative preferences for life take precedence over the democratic rules of the game.⁹³ It is at this point that Maerz and his colleagues note the dilemma that is, in fact, the most important dilemma of modern-day extraordinary-means governance and extraordinary law: in the context of the pandemic, the comparison between autocracies and poorly performing democracies such as the United States raises the question of whether democracy is not a handicap in times of pandemics and similar crises.⁹⁴ Indeed, to quote José Antonio Cheibub and his colleagues, when the threat of death became severe enough, many democracies resorted to the same measures as autocracies.⁹⁵

V-Dem’s research on respect for democratic norms and the turn towards autocracy draws on the approach of UN experts who, at the start of the pandemic, called for government responses to be ‘proportionate, necessary and non-discriminatory’.⁹⁶ This approach is based on the International Covenant on Civil and Political Rights (ICCPR),⁹⁷ adopted by the UN at its 21st session on 16 December 1966. According to Article 4 of the Covenant, ‘In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.’ Derogation is, therefore, a legal obligation, a suspension, derogation or termination of commitments to respect political and civil rights. The ICCPR also imposes clear limits on such derogations, including that they must be proportionate and non-discriminatory and that the derogation must be notified to the UN Secretary-General. It follows that, under

⁹² Maerz et al. (n 91).

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Jose Antonio Cheibub, Ji Yeon Jean Hong, Adam Przeworski, ‘Rights and Deaths: Government Reactions to the Pandemic’ (July 7, 2020), DOI: <http://dx.doi.org/10.2139/ssrn.3645410>

⁹⁶ United Nations Experts, ‘COVID-19: States should not abuse emergency measures to suppress human rights’ 2020 <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722LangID=E>> accessed 1 April 2025.

⁹⁷ International Covenant on Civil and Political Rights, adopted 16 December 1966, General Assembly resolution 2200A (XXI) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> accessed 1 April 2025.

international human rights law, emergency measures can only alter democratic institutions, rights and procedures within certain limits.

While the response to COVID-19 may permit physical restraint by restricting freedom of movement and assembly, it cannot violate certain non-derogable rights, such as the right to life or freedom from torture. According to Maerz and his colleagues, derogations from or restrictions on the right to freedom of movement or assembly (eg lockdowns, closure of schools and workplaces) cannot be considered a violation of democratic standards unless such measures are disproportionate, discriminatory or abusive. V-Dem researchers also do not count the postponement of elections as a violation of democratic norms, as it is not always clear how elections and campaigns can or should be organised safely during a pandemic.⁹⁸ The authors argue that authoritarian and illiberal practices can occur in all types of regimes,⁹⁹ which is precisely how the bad practices of democracies and autocracies become captured. Maerz and colleagues, citing Marlies Glasius, argue that two overlapping categories are necessary for analysis because authoritarian practices harm democracy by impeding access to information and thus sabotaging accountability, a fundamental element of democracy, and illiberal practices are primarily a human rights problem because they violate personal autonomy and dignity. Any practice that both undermines accountability and violates personal autonomy and dignity is located at the intersection of the two categories.¹⁰⁰ Maerz and his colleagues set up an analytical model for examining the democratic risks of using extraordinary means of governance. They identified the following as illiberal practices: discriminatory measures, derogations of rights that cannot be limited, and abusive enforcement. Autocratic practices were defined as the time-limited use of extraordinary measures, limitation of legislation and launching misleading government campaigns. The common intersection was seen as the restriction of the media.¹⁰¹

Based on these theoretical and methodological principles, V-Dem created the Pandemic Democratic Violations (PanDem) database and index, which analysed the experience of governance by extraordinary means in response to COVID-19.¹⁰² Maerz and colleagues found that violations of democratic norms were fairly widespread, with 83 of the 143 countries surveyed having at least some level of violations.¹⁰³ Governments in 11 countries had seriously violated democratic norms. Of these, several had violated human dignity through illiberal practices, including discrimination against minorities in Oman, Serbia and Sri Lanka; violations of inalienable rights in El Salvador, the Philippines and Sri Lanka; and abusive enforcement in Uganda. Others include authoritarian practices that have sabotaged

⁹⁸ Maerz et al. (n 91) 3.

⁹⁹ Marlies Glasius, 'What authoritarianism is... and is not: a practice perspective' (2018) 94 (3) *International Affairs*, 515–533, DOI: <https://doi.org/10.1093/ia/iiy060>

¹⁰⁰ Maerz et al. (n 91) 3.

¹⁰¹ Maerz et al. (n 91) 4.

¹⁰² Maerz et al. (n 91) 6.

¹⁰³ Maerz et al. (n 91) 7.

government accountability, including the absence of empowerment deadlines in Brazil, Oman and Uganda; restrictions on the role of the legislature, such as dissolution or suspension, in India and the DRC; and disinformation campaigns, such as in Brazil, Algeria, Serbia, Mexico and the DRC. In these cases, the government's response to the pandemic has also resulted in severe restrictions on the media.¹⁰⁴ Maerz and his colleagues also pointed out that among the illiberal practices observed in 10 countries were explicitly unlawful discriminatory measures and, in 6 cases, derogations from rights that should not have been restricted.¹⁰⁵

The research also shows that the use of illiberal and authoritarian practices has been diffuse, involving both democracies and non-democracies. In fact, authoritarian practices are quite widespread. Twenty-seven countries have used emergency government measures without formal deadlines, covering most major geopolitical regions and including democracies and autocracies (eg Bosnia and Herzegovina, Cambodia, Côte d'Ivoire and the United States). In Eritrea and Zambia, for example, parliament was adjourned without a timetable for resuming session; in other cases, such as Hungary and Ghana, new legislation gave the executive broad powers to govern by decree, which, because of vague wording, could be used in areas not directly related to the pandemic. Finally, there are 14 cases of active government disinformation campaigns, including high-profile cases such as Donald Trump in the US and Jair Bolsonaro in Brazil.¹⁰⁶ As we have seen in the analytical model regarding the intersection of illiberal and authoritarian practices, in terms of the violations of democratic norms on emergency measures, the most frequent is restrictions on media: in quite a large number of countries, 66 serious violations were recorded due to restrictions on the flow of information or harassing journalists.¹⁰⁷

Although violations of democratic norms through emergency measures during the COVID-19 pandemic occurred mostly in autocracies, many democracies were also affected. This suggests that authoritarian and illiberal practices are more prevalent, even if temporarily, in times of crisis. Maerz et al. found no evidence that restrictive and potentially disproportionate emergency measures are needed to achieve better public health outcomes: pandemic-related violations of democratic norms in the name of human life are unjustified and empirically unsound. Governments that violate democratic norms do not appear to fare any better in terms of COVID-19-related mortality when demographic factors are taken into account. Rather, these violations need to be monitored closely, as crisis-driven violations of democratic norms can have long-term effects on the quality of democracy.¹⁰⁸ Since autocracies have not performed better according to research on pandemic-related public concerns, Maerz and colleagues caution against the security techniques deployed

¹⁰⁴ Maerz et al. (n 91) 8.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Maerz et al. (n 91) 9.

¹⁰⁸ Maerz et al. (n 91) 1.

in these regimes.¹⁰⁹ This is because, in weak democracies and hybrid regimes, violations of democratic norms can be a harbinger of autocratisation, as leaders can exploit the exceptional circumstances of a pandemic to consolidate power, marginalise opposition and silence critics.¹¹⁰

In another V-Dem study, Michael Bayerlein and colleagues examined how populist governments have responded to the complex challenges posed by COVID-19.¹¹¹ The researchers' findings, supported by econometric models based on a sample of 42 countries, were that populist governments adopt less far-reaching policies to combat the pandemic, reduce citizens' efforts to combat the pandemic, and are worse affected by the pandemic from a public health perspective.¹¹² The most important finding of the V-Dem research was that the excess mortality associated with populist governments is 10 percentage points (100%) higher than the excess mortality in traditional countries. Bayerlein and colleagues believe that their results have important implications for evaluating the performance of populist governments in general and for anti-epidemic measures in particular, as they provide evidence that opportunistic and inappropriate policy responses, as well as the spread of misinformation and the downplaying of the pandemic, are closely associated with increases in COVID-19 deaths.¹¹³ V-Dem's research has also highlighted the reasons why populist forces perform worse in managing crises.¹¹⁴ Populist governments are less inclined to implement long-term and unpopular policies but are more inclined to short-term, quick fixes, and they influence citizens' behaviour not only through specific policies but also through the means of communicating the severity of the pandemic. Bayerlein et al. argue that populist governments have taken anti-scientific positions and underestimated the severity of the pandemic, making exposed citizens less likely to take the virus seriously and comply with public health regulations.¹¹⁵

IV Conclusion: Dilemmas Regarding the Emergency Strengthening of Executive Power and Its Anti-Democratic Impact

In times of emergency, ecological, public health and social crises, the strengthening of executive power is, therefore, a natural phenomenon, both historically and politically, as is the (constitutional) desire of legal and political systems and communities to limit the use of

¹⁰⁹ Maerz et al. (n 91) 13.

¹¹⁰ Ibid.

¹¹¹ Michael Bayerlein, Vanessa Alexandra Boese-Schlosser, Scott Gates, Katrin Kamin, Syed Mansoob Murshed, 'Populism and COVID-19: How Populist Governments (Mis)Handle the Pandemic' (2021) (121) V-Dem Working Paper Series, DOI: <http://dx.doi.org/10.2139/ssrn.3849284>

¹¹² Bayerlein et al. (n 111) 2.

¹¹³ Bayerlein et al. (n 111) 30.

¹¹⁴ Bayerlein et al. (n 111).

¹¹⁵ Ibid.

extraordinary means of governance. It follows that, in modern constitutional systems, the temporary suspension of normality of the constitutional normal state cannot, in principle, be considered undemocratic since the purpose of this drastic step is precisely to protect the status quo. As we have seen from the literature review, in any objective emergency (especially in the case of a pandemic that is in many respects uncertain and gives rise to doubts), the question of whether governance by extraordinary means is democratic is a very difficult one. All the more so since there can be legitimate disagreements between societies and within societies about the balance between civil liberties and public health, I believe that COVID-19 (and the embedding of emergency models in the ideological and historical debates of the 20th century and beyond) has highlighted the need to fundamentally rethink the paradigm of exceptional governance and that we can by no means rely on unambiguity. In other words, the concentration of executive power is not anti-democratic in principle, but it can easily become so without active (and, of course, extraordinary compared to the normal state of affairs) controls.

As we have examined, before the pandemic, the authors of the V-Dem analysis, Anna Lührmann and Bryan Rooney, found that exceptionalism is not only the cause but also the consequence of the decline of democracy.¹¹⁶ At the same time, as an examination of the exceptionalist rule of law introduced during the pandemic has shown, both democratic and authoritarian regimes have used exceptionalist means of governance, and democracies have generally been able to operate various control mechanisms. With that said, in both Lührmann and Rooney and the studies on COVID-19,¹¹⁷ one of the most important conclusions is precisely that it is not worth starting from the undemocratic effects of exceptional governance alone, but that the first step of the analysis should be to examine the regime in which the strengthening of executive power is applied: that is, the potentially undemocratic strengthening of governance by exceptional means is strongly dependent on the regime in which the exceptional measures are introduced, the democratic quality of the normal state thus strongly determining the exceptional situation.

It is also promising for democratic controls that Ginsburg-Versteeg's studies have shown that despite the exceptional and pervasive nature of the pandemic, executive power in democratic systems has not become unconstrained and that the various interactions between the branches of power and the constraints presented here show the operation of Madisonian, horizontal and vertical mechanisms of power sharing.¹¹⁸ The authors argue that (with their complexity and contradictory nature) the extraordinary governance regimes introduced in the context of COVID-19 have demonstrated that a system of checks and balances between government institutions and mutual cooperation between the branches

¹¹⁶ Lührmann, Rooney (n 17) 19.

¹¹⁷ Ginsburg, Versteeg (n 7); Engler et al. (n 81); Massart et al. (n 87); De Angelis, Oliveira (n 89).

¹¹⁸ Ginsburg, Versteeg (n 7) 1533.

of power can help to determine the right balance between individual interest and broader societal concerns, although of course there is no single, objectively correct solution.¹¹⁹

However, it is also clear from these experiences that complex checks on the executive are necessary to sustain the democratic legitimacy of governance by exceptional means, as the state of emergency functions as a 'predisposing' factor for authoritarian reversals. Lührmann and Rooney have explained that reversals in authoritarian directions are almost 60% more likely to occur in years when a state of emergency is declared.¹²⁰ However, it is also worth noting that the state of emergency cannot be seen as the main cause of authoritarian turnarounds *per se*, as emergency government instruments are a convenient structure through which leaders may dismantle democratic institutions and reduce resistance to authoritarian turnarounds. That is, they are not necessarily the trigger or cause of autocratisation or even democratic breakdown.¹²¹ It is important to draw attention to all of this in the era of the ecological and climate crises because we are faced with more and more profound and overlapping crises, and the (political) historical and contemporary experience of extraordinary governance in the context of COVID-19 shows that it is necessary and possible to find a way back to the original objective of extraordinary governance: namely, to protect the democratic status quo. But this presupposes the effective operation of extraordinary checks on the executive beyond the normal state of affairs.

¹¹⁹ Ginsburg, Versteeg (n 7) 1534.

¹²⁰ Lührmann, Rooney (n 17) 18.

¹²¹ Ibid.

Articles

Regulating the Most Disruptive Technology – Understanding Why AI Should Be Sandboxed

Abstract

Our century has witnessed the emergence and unfolding of disruptive technologies. Regulating these fields poses substantial challenges for law-making entities. The rapid pace of technological evolution does not allow for the application of classical regulatory methods since, by the time a norm is established, the technology often surpasses the provisions. Recently, so-called dynamic regulation methodology has gained wider acceptance. This puts the legislator in a more cooperative role working alongside actors from the innovation ecosystem and, instead of being a rigid ‘ruler’, involves tailoring the legal regime together with the former. Regulatory test environments, also known as sandboxes, are key tools in this modern approach. They have already proven their usefulness in the promotion of innovation and regulation procedures in the fintech sector. I believe that sandboxes are excellent laboratories for forming the legal regime for artificial intelligence, which may be the most disruptive technology of our time. In the present contribution, I will examine why it is hard to regulate disruptive technologies and describe the situation to be resolved in the innovation world that underlines the necessity of using sandboxes. I also depict their operating principles to enlighten readers about their vital role in the age of AI.

Keywords: artificial intelligence, regulation, regulatory sandboxes, disruptive technologies

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I Understanding Disruptive Technologies

1 A Brief Overview

‘Nothing is permanent, only change itself.’ Most people attribute these words, which are still relevant today, to Heraclitus.¹ While the Greek philosopher did not say so, the speed of change also matters: the longer the process takes, the more humanity can prepare for it. However, the last few centuries have seen several inventions and developments that have changed the way we think about the world and the way we do things at an alarming rate. Such groundbreaking solutions are best defined as disruptive technologies.² These include innovations that generate profound, sweeping changes in many layers and subsystems of society in a relatively short period of time. They share the common characteristic of completely transforming existing market structures and dominant actors by being ‘cheaper, simpler and more convenient than the dominant technology.’³ Let’s look at some examples to better define disruptive technologies, understand their characteristics, and establish the starting point we need to embrace in relation to the importance of sandboxes.

I find it unlikely that when British inventors created the first steam engines at the dawn of the 18th century – then used to drain mines – they thought about the long-term impact of their work. Regardless, the device perfected by James Watt in 1765⁴ was the technological starting point for the epochal change we now call the First Industrial Revolution.⁵ Agricultural production was simplified, and the masses moving to the cities were absorbed by mass production in factories that offered them a multitude of new jobs. Social classes were reorganised, and social structures were upended. The change generated a lot of tension, with the emergence of the machine-wrecking movements as early as the 1810s,⁶ and by the middle of the century, new ideologies had been elevated to tackle the related social dilemmas. The discovery and spread of electricity in the first half of the century further increased the speed of change, as the technologies based on it made people’s

¹ Luke Dunne, ‘4 Important Facts about Heraclitus, the Ancient Greek Philosopher’ (11 December 2022) The Collector <<https://www.thecollector.com/heraclitus-philosopher-facts-you-should-know/>> accessed 1 April 2025.

² See Joseph L. Bower, Clayton M. Christensen, ‘Disruptive Technologies: Catching the Wave’ (1995) 73 (1) Harvard Business Journal 43–53, 43.

³ See Clayton M. Christensen, Joseph L. Bower, ‘Customer Power, Strategic Investment, and the Failure of Leading Firms’ (1996) 17 (3) Strategic Management Journal 197–218, 210, DOI: [https://doi.org/10.1002/\(SICI\)1097-0266\(199603\)17:3%3C197::AID-SMJ804%3E3.0.CO;2-U](https://doi.org/10.1002/(SICI)1097-0266(199603)17:3%3C197::AID-SMJ804%3E3.0.CO;2-U)

⁴ Peter W. Kingsford, ‘James Watt’ Encyclopedia Britannica <<https://www.britannica.com/biography/James-Watt>> accessed 1 April 2025.

⁵ The Editors of Encyclopaedia Britannica, ‘Industrial Revolution’ Encyclopedia Britannica <<https://www.britannica.com/money/topic/Industrial-Revolution>> accessed 1 April 2025.

⁶ Smithsonian Magazine and Richard Conniff, ‘What the Luddites Really Fought Against’ Smithsonian Magazine <<https://www.smithsonianmag.com/history/what-the-luddites-really-fought-against-264412/>> accessed 1 April 2025.

lives orders of magnitude easier and enabled the development of many new production mechanisms.

Electricity and Second World War were the catalysts in the 20th century that changed humanity forever. The race for the atomic bomb⁷ boosted the process that eventually led to the development of the computer as we know it today.⁸ The revolutionary significance of the device could not be better illustrated than by the fact that the longest-running patent lawsuits in the US courts were launched in relation to this innovation. It was finally ruled⁹ that the automatic electric digital computer is the most valuable discovery of the 20th century and, therefore, cannot be patented.¹⁰ Another undoubtedly disruptive technology from the last century was the Internet. The spread of the web has opened new horizons in the flow of information around the world and transformed communication structures in a way that nothing has ever done before. I believe it is pointless for the modern thinker to address the implications of the arrival of the computer and the Internet any further than this, as it would be hard to imagine our everyday lives without our PCs, social media platforms or online shopping.

The century we live in is full of innovations that could be classified as disruptive. The proliferation of fintech solutions has transformed the financial world. The name PayPal is now synonymous with sending money, with over 400,000,000 active users worldwide, processing more than 25 billion transactions in the year 2023.¹¹ Alongside offering banking services, Revolut now offers investment and currency exchange services in more than 160 countries¹² and has collected over 40 million users since its launch in 2015. With the rise of blockchain technology, cryptocurrencies have burst onto the scene, opening up a world of independent payment instruments outside of central banking systems. The most successful of these, Bitcoin, is estimated to have a market capitalisation of \$1,300 billion today¹³ which is likely to get higher in the near future. So-called NFTs,¹⁴ also based on

⁷ Probably the most brilliant mathematician, John von Neumann, needed a more advanced computer than the IBM machines of the time for the shockwave-related calculations associated with the first atomic bomb, which is what led to the development of the so-called Neumann principle machines. Original quote from George Marx, *A marslakók érkezése: magyar tudósok, akik nyugaton alakították a 20. század történelmét* (Akadémiai Kiadó 2000, Budapest) 271; English version of the book: George Marx, *The Voice of the Martians: Hungarian Scientists Who Shaped the 20 Century in the West* (3rd rev. edn, Akadémiai Kiadó 2001, Budapest).

⁸ The so-called Neumann principle computer consists of a central processing unit and a memory interconnected by a control unit.

⁹ *Honeywell Inc v Sperry Rand Corp*, 180 USPQ 673 (D Minn 1973).

¹⁰ Ananyo Bhattacharya, *Neumann János – Az Ember a Jövőből* (Open Books 2023, Budapest) 166–167; see in the original book: A. Bhattacharya, *The Man from the Future: The Visionary Ideas of John von Neumann* (W. W. Norton 2022, New York).

¹¹ PayPal official website, <<https://about.pypl.com/who-we-are/history-and-facts/default.aspx>> accessed 1 April 2025.

¹² Revolut official website, <<https://www.revolut.com/about-revolut/>> accessed 1 April 2025.

¹³ Blockworks.co, 'Bitcoin price' <<https://blockworks.co/price/btc>> accessed 1 April 2025.

¹⁴ Non-Fungible Tokens – It is worth reading the comprehensive article on what NFTs are: Mitchell Clark, 'People Are Spending Millions on NFTs. What? Why?' The Verge (3 March 2021) <<https://www.theverge.com>>

blockchain technology, represent the biggest investment hype of the last few years; it is hard to comprehend that some have been bought for a total of \$91.8 million.¹⁵ However, distributed ledger-based solutions have not only enabled hype-driven investments but have also contributed in many areas to a safer life in a digitalising world.¹⁶

2 The Difficulties of Regulating Disruptive Technologies

One may notice that none of these technologies took centuries to transform the world. However, it is interesting to reflect on the increasingly shorter time it took for these solutions to become widespread. Legal professionals must pay attention to a worrying phenomenon – namely, the challenges to regulation posed by the speed of development of disruptive technologies. The classical legislative process is simply not able to keep pace with today's digital revolution and the evolution of technology. Legal certainty¹⁷ and giving legal entities sufficient time to prepare for the application of rules¹⁸ are pillars of the rule of law, but this is simply not feasible in a world where new technology becomes obsolete in a year. By the time the preparatory work starts on the legal framework applicable to a particular area, reality has long since surpassed the previous paradigm, so regulators are immediately at a disadvantage. If, in such a situation, that cannot be handled by the usual cumbersome legislative methods, regulation is nevertheless created, its content must be updated almost immediately, as the market and reality have presumably already exceeded the codification.

To illustrate this, let us have a glance at the recent events in EU technology regulation. The co-decision procedure is not the quickest method; for example, the influential GDPR¹⁹ took four years to create, with an additional two years of preparation before entering into force.²⁰ So, in 'just' six years, our personal data was made relatively safe. In contrast, the

com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq> accessed 1 April 2025.

¹⁵ Crypto.com, 'The Most Expensive NFTs Ever Sold' <<https://crypto.com/en/university/most-expensive-nfts>> accessed 1 April 2025.

¹⁶ For examples from different areas of application, see Michael Nofer and others, 'Blockchain' (2017) 59 (3) Business & Information Systems Engineering 183–187, DOI: <https://doi.org/10.1007/s12599-017-0467-3>; P. Tasatanattakool, C. Techapanupreeda, 'Blockchain: Challenges and Applications', 2018 International Conference on Information Networking (ICOIN) 473–475, DOI: <https://doi.org/10.1109/ICOIN.2018.8343163>; Vahiny Sharma and others, 'Blockchain in Secure Healthcare Systems: State of the Art, Limitations, and Future Directions' [2022] Security and Communication Networks e9697545 (article number).

¹⁷ See Zoltán Tóth J., 'A jogállamiság tartalma' [2019] Jogtudományi Közlöny 197–212, 199.

¹⁸ Péter Tilk, Ildikó Kovács, 'Gondolatok a kellő felkészülési idő számításának kezdőpontjáról' [2015] Jogtudományi Közlöny 549–555, 549.

¹⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 – the Act was proposed by the Commission on 25 January 2012, and was signed by the President of the EP and the President of the Council on 27 April 2016.

²⁰ The GDPR has been effective since 24 May 2016, applied from 25 May 2018 – see: <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32016R0679&qid=1718531283921>> accessed 1 April 2025.

Digital Markets Act,²¹ which regulates the biggest platforms that shape our lives, took just two years to draw up²² and one more to gradually come into effect.²³ The same tedious legislative process marked the Artificial Intelligence Act²⁴ (AI Act). Since April 2021, the initial draft has undergone more than ten discussions²⁵ by the relevant bodies, and the final version was only adopted in mid-May 2024.²⁶ Beside numerous updates and refinements in the text to reflect technological advancements, the Commission established a two-year period before its full implementation²⁷ and its gradual entry into force, which raises a theoretical question: how much will the world have changed by then?

To sum up, the speed of development of disruptive technologies exceeds the capacity and methodology of the current legislative process, which has often remained untouched for centuries; hence, it is unable to keep pace with change in the world in a fast and flexible way. However, society needs the security that only the legal system can provide, which is increasingly in demand due to a storm of technological developments. There is no doubt that there is a greater urge than ever to utilise modern legislative methodologies that can keep up with the rapid change and balance the interests of society, the state and the market while safeguarding the legitimate interests of parties and the rule of law. Disruptive technology requires disruptive legislation.

II Artificial Intelligence – The Most Disruptive Technology?

The impact of artificial intelligence (AI) will undoubtedly surpass all the inventions of the 21st century, and we cannot even begin to estimate its world-changing shockwaves today. Futurologists, gurus and scientists from all fields are trying to understand, analyse and assess the potential benefits of AI. Countless articles, studies and books have been written

²¹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

²² The Digital Markets Act was introduced by the Commission on 16 December 2020 and signed by the President of the EP and the President of the Council on 14 September 2022.

²³ See Article 54 of the Digital Markets Act.

²⁴ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L2024/1689.

²⁵ According to the EU Official Journal – <<https://eur-lex.europa.eu/legalcontent/EN/HIS/?uri=celex:52021PC0206>> accessed 1 April 2025.

²⁶ ‘Artificial Intelligence (AI) Act: Council Gives Final Green Light to the First Worldwide Rules on AI’ <<https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/artificial-intelligence-ai-act-council-gives-final-green-light-to-the-first-worldwide-rules-on-ai/>> accessed 1 April 2025.

²⁷ See ‘Timeline of Developments EU Artificial Intelligence Act’ <<https://artificialintelligenceact.eu/developments/>> accessed 1 April 2025.

on its nature, potential, and, above all, how its spread will completely transform our world. With AI, we are trying to reproduce human intelligence – at least parts of it, for the time being.²⁸ As AI develops, this fact predestines us humans to encounter it in more and more areas that are currently based on human thinking. Whether we are talking about telephone customer service²⁹ or complex healthcare applications,³⁰ sooner or later, most sectors will have an artificial alternative to the usual human workforce.

Hungary is not the largest or wealthiest country, but according to its AI strategy, the take-up of new technology will affect around 900,000 jobs in some way by 2030,³¹ which is approximately 20% of the current total.³² Lawyers, like other professions, sometimes tend to think that their work is so attached to human endeavours that it cannot be replaced, but this is far from the case. Research by Goldman Sachs states that 44% of legal jobs in the US alone are at risk,³³ which, given that ChatGPT 4.0 scores in the top ten per cent on BAR exams,³⁴ does not seem so incredible. In addition, many other studies³⁵ confirm that AI and innovations based on it will radically change society if they have not already. Unfortunately, many people are still waiting for the AI revolution, even though today, we may already be living at the end of its beginning.

²⁸ We are living in the last days of so-called narrow AI when an AI-based algorithm can simulate certain fields of human intelligence – eg speaking, vision, combination or selection – and surpass man. With the emergence of foundation models, generative AI – like ChatGPT and Dall-E – is taking the stage, and we are slowly entering the age of artificial general intelligence (AGI). Then, a single AI model will reach the level of human intelligence. It is not certain when AGI will happen, but the most advanced version of ChatGPT shows signs of this – see in: Sébastien Bubeck and others, ‘Sparks of Artificial General Intelligence: Early Experiments with GPT-4’ <<https://arxiv.org/abs/2303.12712>> accessed 1 April 2025.

²⁹ See Samadrita Ghosh, Stephanie Ness, Shruti Salunkhe, ‘The Role of AI Enabled Chatbots in Omnichannel Customer Service’ (2024) 26 (6) *Journal of Engineering Research and Reports* 327–345, DOI: <https://doi.org/10.9734/jerr/2024/v26i61184>

³⁰ See Ibrahim Kamel, ‘Artificial Intelligence in Medicine’ (2024) 7 (4) *Journal of Medical Artificial Intelligence* 4, DOI: <https://doi.org/10.21037/jmai-24-12>; Chris Varghese and others, ‘Artificial Intelligence in Surgery’ (2024) 30 (5) *Nature Medicine* 1257–1268, DOI: <https://doi.org/10.1038/s41591-024-02970-3>

³¹ Ministry of Innovation and Technology and Digital Success Programme, ‘Magyarország Mesterséges Intelligencia Stratégiája 2020–2030’ [*AI Strategy of Hungary*] (2020).

³² Official statistics of the Hungarian Central Statistical Office, <https://www.ksh.hu/stadat_files/mun/en/mun0098.html> accessed 1 April 2025.

³³ Chris Vallance, ‘AI Could Replace Equivalent of 300 Million Jobs – Report – BBC News’ (2023) <<https://www.bbc.com/news/technology-65102150>> accessed 1 April 2025.

³⁴ OpenAI, ‘GPT-4 Technical Report’ (March 27, 2023) 6; see also: John Koetsier, ‘GPT-4 Beats 90% Of Lawyers Trying To Pass The Bar’ *Forbes* <<https://www.forbes.com/sites/johnkoetsier/2023/03/14/gpt-4-beats-90-of-lawyers-trying-to-pass-the-bar/>> accessed 1 April 2025.; Lakshmi Varanasi, ‘AI Models like ChatGPT and GPT-4 Are Acing Everything from the Bar Exam to AP Biology. Here’s a List of Difficult Exams Both AI Versions Have Passed’ *Business Insider* <<https://www.businessinsider.com/list-here-are-the-exams-chatgpt-has-passed-so-far-2023-1>> accessed 1 April 2025.

³⁵ See Misha Benjamin and others, ‘What the Draft European Union AI Regulations Mean for Business’ (10 August 2021) <<https://www.mckinsey.com/business-functions/quantumblack/our-insights/what-the-draft-european-union-ai-regulations-mean-for-business>> accessed 1 April 2025.; World Economic Forum, ‘Future of Jobs Report’ (WEF 2023) <<https://www.weforum.org/reports/the-future-of-jobs-report-2023/>> accessed 1 April 2025.

The rapid development of disruptive technologies often outpaces legislation, as one can observe in the case of the two tech superpowers. Regarding comprehensive AI regulation, the EU, with its upcoming AI Act, is significantly more advanced than the US. Although during the past four years, several documents³⁶ urging the use of AI in governmental and administrative applications have left the Oval Office, we had to wait until 2022 for the first broad AI policy.³⁷ As mentioned, despite being home to leading global innovators in the field like Google, Meta, and Microsoft, the US has remained in a rudimentary regulatory state for long, seeming to favour a ‘Wild West’³⁸ approach: allowing tech giants to create a quasi-self-governing legal environment and permitting state-level regulation³⁹ instead of federal rules, thereby granting the EU the liberty to set the global industry standard.⁴⁰ However, the recent AI explosion, and particularly the proliferation of generative AI technologies, such as ChatGPT, seems to have shaken even these companies’ belief in the wisdom of *laissez-faire* innovation. An open letter,⁴¹ which was made public last March, is clear evidence of this. The declaration, signed by thousands of scientists and tech gurus – including luminaries such as Elon Musk, Steve Wozniak and Yuval Harari – called on the world’s AI labs to stop developing algorithms more capable than GPT4 for at least six months. The rationale stated that a pause is needed to allow developers to ‘jointly develop and implement a set of shared safety protocols for advanced AI design and development that are rigorously audited and overseen by independent outside experts. [...] In parallel, AI developers must work with policymakers to dramatically accelerate [the] development of robust AI governance systems’⁴² The letter was followed up a month later by a detailed study⁴³ containing the policy recommendations needed to consolidate the situation. To be honest, I find such letters mildly worrying. If even those actors who have hitherto controlled and managed AI developments to a much greater extent than governments are ‘calling time’, how hopeless is the situation? It is perhaps inputs

³⁶ See Executive Office of the President: *Guidance for Regulation of Artificial Intelligence Applications* – Memorandum for the Heads of Executive Departments and Agencies M-21-06, (2020); Donald J. Trump, *Executive Order 13859 – Maintaining American Leadership in Artificial Intelligence* (February 11, 2019) Federal Register <<https://www.federalregister.gov/documents/2019/02/14/2019-02544/maintaining-american-leadership-in-artificial-intelligence>> accessed 1 April 2025.

³⁷ See The White House, ‘Blueprint for an AI Bill of Rights | OSTP’ The White House <<https://bidenwhitehouse.archives.gov/ostp/ai-bill-of-rights/>> accessed 1 April 2025.

³⁸ Paige Lord, ‘The “Wild West” Era of AI’ (27 January 2023) <<https://www.linkedin.com/pulse/ai-its-wild-west-era-paige-lord/>> accessed 1 April 2025.

³⁹ As of June 2024, hardly a dozen states in the USA regulated AI, creating a regulatory patchwork in the United States – see: ‘2024 AI State Law Tracker’ <<https://www.huschblackwell.com/2024-ai-state-law-tracker>> accessed 1 April 2025.

⁴⁰ Robert Seamans, ‘AI Regulation Is Coming To The U.S., Albeit Slowly’ Forbes <<https://www.forbes.com/sites/washingtonbytes/2023/06/27/ai-regulation-is-coming-to-the-us-albeit-slowly/>> accessed 1 April 2025.

⁴¹ Future of Life Institute, ‘Pause Giant AI Experiments: An Open Letter’ Future of Life Institute <<https://futureoflife.org/open-letter/pause-giant-ai-experiments/>> accessed 1 April 2025.

⁴² Future of Life Institute (n 41).

⁴³ Future of Life Institute, ‘Policymaking in the Pause’ (Future of Life Institute 2023).

like this letter that paved the way to an Executive Order⁴⁴ issued by President Biden with the goal of ‘governing the development and use of AI safely and responsibly, and advancing a coordinated, Federal Government-wide approach.’⁴⁵ One thing is for sure: if even the market players are requesting a legal framework, it is high time to develop methods of managing AI regulation in a truly effective way. One such method is the creation of sandboxes, and I will try to explain why.

III Sandboxes – Two Sides of the Coin

The emergence of regulatory sandboxes⁴⁶ has been triggered by the disruptive technologies of the 21st century. There is a need for a legislative method that will allow the regulator to dynamically follow the evolution of technology and create an innovation-friendly regime that reflects its demands. Simultaneously, it should ensure a supportive environment for developers, protect stakeholders – including consumers, users and others impacted by the technology – and provide legal certainty without sacrificing the ability to respond swiftly.⁴⁷ This flexibility or adaptability is very much needed in our world today, where exponential technological progress⁴⁸ is creating paradigm shifts every 1-1.5 years and constantly forcing us to redefine what we know about things. At this pace of change, there is no way we can apply the guarantee-ridden but often excessively bureaucratic and, thus, protracted legislative processes that have crystallised in modern societies over the last few centuries. We need modern legal approaches to deal with this situation effectively. A sandbox is such a construction that combines flexibility, legal certainty and innovation. To grasp the legitimacy of sandboxes and to understand their practicality, we can briefly imagine ourselves in the position of the actors in the innovation process. Through the following strictly fictitious example, I would like to make tangible the tension that underlies the need for such test environments.

⁴⁴ E.O. 14110 of Oct 30, 2023 – Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence 2023 (Federal Register Vol. 88, No. 210, 1 November 2023).

⁴⁵ Ibid.

⁴⁶ The word ‘sandbox’ originates in the IT world, where the importance of testing before application is crucial. Sandboxes are isolated, controlled, usually simulated environments like networks or software emulations. They provide a safe space for experimentation, enabling developers to test and refine their innovations before releasing them into the real world. See eg: Hassan Abdishakur, ‘What Is a Sandbox Environment? (Definition, How To Guide)’ (28 March 2023) Built In <<https://builtin.com/software-engineering-perspectives/sandbox-environment>> accessed 1 April 2025; ‘What Is a Sandbox Environment? Meaning & Setup | Proofpoint US’ (26 February 2021) Proofpoint <<https://www.proofpoint.com/us/threat-reference/sandbox>> accessed 1 April 2025.

⁴⁷ See Thomas Buocz, Sebastian Pfotenhauer, Iris Eisenberger, ‘Regulatory Sandboxes in the AI Act: Reconciling Innovation and Safety?’ (2023) 15 (2) Law, Innovation and Technology 357–389, 362, DOI: <https://doi.org/10.1080/17579961.2023.2245678>

⁴⁸ See Andrea O’Sullivan, ‘Expanding Regulatory Sandboxes to Fast-Track Innovation’ (Policy Brief, The James Madison Institute 2021) 3.

1 The Market Actor

Imagine the situation of an innovative company, a developer of a piece of AI-based medical diagnostic software. As a start-up, they have only a few employees and a ready-to-market product that is about to be launched. The potential of the company is underlined by the fact that they have received significant investment⁴⁹ for development and market entry. Let's look at the challenges they face:

As the founders are responsible individuals, they want to be sure their product fully complies with the law and that they do not encounter any obstacles in obtaining the necessary licenses and certificates. They would also like to rule out the possibility of getting involved in costly legal proceedings or litigation over any shortcoming that has been overlooked. Since there is no lawyer on their team,⁵⁰ they turn to a law firm for advice, where they encounter an astronomical price⁵¹ for maintaining legal compliance, due diligence and counselling, which the young entrepreneurs cannot afford. Without a solid legal background and validation, they are reluctant to enter the market, so their idea sits in a drawer for an extended period.⁵²

In an alternative version of the story, the founders, not caring much about legal compliance, enter the market with an MVP⁵³ but soon find themselves in the crossfire of authority proceedings and lawsuits, as some aspects of their product's operation leave legal issues to be resolved. To make things worse, their early customers – mainly respected doctors and healthcare institutions – are not satisfied with the product because it destroys their patient's confidence by producing misdiagnoses, as there is still a lot of room for improvement. This is all because the start-up has not been able to test the software in real-world conditions with real users and, hence, has no sufficient data and experience to

⁴⁹ Investment in AI has skyrocketed lately, and the volume of global venture capital investment in this area is extreme: according to the OECD, over 430 billion dollars were thrown at the field worldwide last year, mainly from the US and China. Healthcare, including drugs and biotechnology, is the second most funded sector – see: 'Live Data from OECD.AI' <<https://oecd.ai/en/data>> accessed 1 April 2025.; Piyush Gupta, 'How Venture Capital Is Investing in AI in These 5 Top Economies' (24 May 2024) World Economic Forum <<https://www.weforum.org/agenda/2024/05/these-5-countries-are-leading-the-global-ai-race-heres-how-theyre-doing-it/>> accessed 1 April 2025.

⁵⁰ Wolf-Georg Ringe, Christopher Ruof, 'Regulating Fintech in the EU: The Case for a Guided Sandbox' (2020) 11 (3) *European Journal of Risk Regulation* 604–629, 613, DOI: <https://doi.org/10.1017/err.2020.8>

⁵¹ See Hilary J Allen and others, 'Regulatory Sandboxes' (2019) 87 (3) *The George Washington Law Review* 579–645, 587–589, DOI: <http://dx.doi.org/10.2139/ssrn.3056993>

⁵² To get a better grip on the situation, see Jon Truby and others, 'A Sandbox Approach to Regulating High-Risk Artificial Intelligence Applications' (2022) 13 (2) *European Journal of Risk Regulation* 270–294, 276, DOI: <https://doi.org/10.1017/err.2021.52>

⁵³ Minimum Viable Product – is a concept from product development that refers to the simplest version of a product that can be released to the market. It includes just enough features to attract early adopters and gather valuable feedback for future development. The main goals of an MVP are to test a product hypothesis with minimal resources and to learn about the target market's response as quickly as possible.

perfect it. As a result of a major fine related to consumer-protection issues, several lost lawsuits and having to pay damages, there is no alternative but to, unfortunately, declare bankruptcy and put an end to an otherwise promising start-up. Not to mention that the company's situation was worsened by the constant pressure from their investors, who wanted to realise earnings as quickly as possible and did not care about the obstacles the founders had to overcome. As a result of entering the market unprepared and selling an imperfect product, the innovators were eventually pushed into a situation that led to the end of the business.

Unfortunately, similar stories are not rare in the start-up world: in most cases, innovative businesses do not have the stable legal and financial background to make their products a success, so they fail even before entering the market. The legal environment they face, especially the strict liability regime,⁵⁴ consumer protection standards or strict sector-specific⁵⁵ requirements are often an insurmountable barrier⁵⁶ that are complicated and costly to comply with. This prevents them from entering the market and testing their innovative ideas in real conditions with real users and, as a result, perfecting them. Nor should we forget that businesses must often comply with legislation that is either completely unintelligible or outdated and obsolete in relation to the state-of-the-art solutions they create. Of course, not only SMEs but also larger companies are exposed to the risks of an uncertain legal environment that encompasses disruptive technologies.⁵⁷ Though bigger actors already have a solid financial background, legal support, IT infrastructure, and the data assets needed for successful product development, public authorities must validate their innovative products and services before entering the market. In summary, innovative companies of any size that cultivate disruptive technologies are under pressure. The challenges firms face in product development, and particularly the risks arising from uncertain legal surroundings, impose significant burdens on them. These burdens make it more difficult for enterprises to operate to varying degrees and can ultimately stifle innovation.

2 The Regulator

In the meantime, we cannot ignore the difficult situation that public actors, especially legislators and law enforcement authorities, find themselves in as a result of the emergence of disruptive technologies. The incredible speed of innovation today is simply not matched by any legislator – whether national or supranational – conditioned to the relatively slow

⁵⁴ See Truby and others (n 52) 276.

⁵⁵ The primary sectors where disruptive technologies are most extensively utilised include healthcare, transportation, and finance, all of which are subject to rigorous and meticulous regulation.

⁵⁶ It is no wonder that the AI Act has placed emphasis on providing differentiated measures to help SMEs enter the AI market and access sandboxes – see, eg AI Act recitals (8), (109), (139), (143), art 57 (9)(e), art 58(2)(d), art 62.

⁵⁷ CMS Hungary, 'Hungary Data Authority Issues Heavy Fine for the Use of AI in Voice Recording Analysis' <<https://cms-lawnow.com/en/ealerts/2022/04/hungary-data-authority-issues-heavy-fine-for-the-use-of-ai-voice-recording-analysis>> accessed 1 April 2025.

bureaucratic processes. By the time the legislative bodies responsible for technology regulation have detected and understood the situation, assessed its significance, and convened a group of experts to discuss the issues and risks, reality has moved on, leaving them standing. I believe that it would not be fair to place the responsibility solely on public authorities, as there is a substantial information asymmetry between innovative firms and public entities. Thus, the utmost difficulty is often associated with the absence of understanding and forming a correct assessment of the situation. The lawmaker typically has limited knowledge of the nature of the emerging technology and, as a result, has no clear vision of how it should be addressed using legal frames. Having no insight into the development processes and the peculiarities of the operation of innovative companies may lead to the inadequate design of regulation.

Another handicap is the professional or technological incompetence of the legislator, both at individual and organisational levels. A workforce specialised in the management of usually slow-moving administrative affairs is, though no fault of their own, unable to match the speed of rapid development, nor able to assess its impact and consequences, and nor does it have the technological skills and holistic vision that is required. In addition, the public actor often does not receive any input on what rules to create or how to adapt the current regime to follow technological advancements. The lack of cooperative, open communication based on mutual feedback is another major difficulty for the rule maker, making it hard to identify, understand⁵⁸ and effectively regulate disruptive technologies. It is no wonder that state actors in the 21st century are often in the dark, which in turn risks their regulatory decisions not being carefully prepared but promptly taken when they are forced to act on a case. However, such ‘firefighting’ measures like opaque legislation and soft-law provisions such as guidelines or recommendations are rarely appropriate,⁵⁹ and reality often leads to subsequent amendments. We must remember, however, that in the age of the fourth industrial revolution, change is constant, so it would be hypocritical to blame legislators for mishandling problems that are often not even understood by their developers either. Market players and society must, therefore, be much more patient with public ones in regulating these phenomena.

3 Meeting in the Sandbox

It is clear that the situation thus portrayed is burdensome, but what may be done to release the tension? The most promising answer is provided by a new legislative methodology

⁵⁸ See Ringe, Ruof (n 50) 617.

⁵⁹ See the reception of the AI Act in Philipp Hacker, ‘What’s Missing from the EU AI Act: Addressing the Four Key Challenges of Large Language Models’ (2023) *Verfassungsblog* <<https://verfassungsblog.de/whats-missing-from-the-eu-ai-act/>> accessed 1 April 2025.

referred to as dynamic regulation.⁶⁰ Its starting point is that the legal regime applicable to any area is not unilaterally developed by the regulatory entity but defined in cooperation with stakeholders in a continuous consultation process that results in a win-win situation. The emphasis is on cooperation, as instead of rigid imperatives, stakeholders can express their requirements during the legislative process, thus actively shaping the content of the rules by articulating their needs. In dynamic regulation, legislation is an open-ended process⁶¹ whereby, after careful and extensive consultation, the deal agreed by industry is codified, helping actors to ensure that the framework is effective and useful to them rather than an unnecessary bureaucratic burden. The process is characterised by mutual learning, whereby the proactive legislator seeks to get to know first-hand the operation of the actors to be regulated, their needs and the specificities that can only be authentically understood through their interpretation.

The regulatory sandbox is a multipurpose gadget in the toolbox of dynamic regulation. It can be best defined as a legal laboratory or a safe harbour. Strict legislation usually has a chilling effect on innovation, as businesses that fear the risk of retaliation for inappropriate market behaviour often abstain from development and testing activities. The sandbox is the place where innovators can experiment with their developments and products in a real-world environment without fear of sanctions from authorities or posing significant risks to consumers, hence gaining a temporary competitive advantage.⁶² Meanwhile, the establishing authority can keep a close eye on the companies, analysing and interpreting their operation, assessing the specificities of the applied disruptive technology and advising the enterprises on how to comply with the relevant norms. If a sector lacks an elaborated legal framework, as it does with AI, or if there is room for improvement, the real perk of regulatory testbeds emerges: legal experiment. With the input gathered in the sandbox, the regulator decides what approach should be taken to create a safe and supporting legal environment. This process is done together with the stakeholders, resulting in a cooperative law-making experiment and a viable legal environment at the end of the day. A well-constructed sandbox creates a win-win situation whereby society, in addition to the participants, also benefits enormously, as it can benefit from a number of products and services that would otherwise not have been developed.

Today, there are many good practices and positive experiences that help justify the use of sandboxes. In 2015, the Financial Conduct Authority (FCA)⁶³ created the first fintech

⁶⁰ See Mark Fenwick, Erik PM Vermeulen, Marcelo Corrales, 'Business and Regulatory Responses to Artificial Intelligence: Dynamic Regulation, Innovation Ecosystems and the Strategic Management of Disruptive Technology' in Marcelo Corrales, Mark Fenwick, Nikolaus Forgó (eds), *Robotics, AI and the Future of Law* (Springer 2018, Singapore) 81–103, 88, DOI: https://doi.org/10.1007/978-981-13-2874-9_4

⁶¹ Fenwick, Vermeulen, Corrales (n 60) 9.

⁶² See OECD, 'Regulatory Sandboxes in Artificial Intelligence' (13 July 2023) OECD Digital Economy Papers 8, DOI: <https://doi.org/10.1787/8f80a0e6-en>

⁶³ Financial Conduct Authority – United Kingdom.

regulatory testbed,⁶⁴ which has accepted over 180 companies from the 630 applicants⁶⁵ over the course of its operation. The pioneer has since been followed by many others operating in the financial market⁶⁶ sector in more than 50 countries,⁶⁷ with more being set up to address other fields of innovation.⁶⁸ In other sectors that are heavily penetrated by disruptive technologies, such as energetics,⁶⁹ autonomous vehicles⁷⁰ and blockchain technology,⁷¹ testbeds are also set up to promote development and viable regulation. Some authors argue outright that all technology development should be channelled into so-called general purpose or universal sandboxes.⁷² In the rest of this paper, I will scrutinise how a sandbox works and explain why it is so effective when it comes to AI regulation.

IV Sandbox Anatomy

1 Basic Structure, Ecosystem

Let's start by laying the foundations and defining what a test environment looks like. First things first: when we talk about sandboxes, we should not think of an office building or a laboratory isolated from the world. Test environments, in general – whatever disruptive technology they focus on – are grounded on three pillars: regulatory background, testing infrastructure, and governing authority. The legal pillar is the set of norms establishing the sandbox and framing the activity that takes place in it, most importantly determining

⁶⁴ Jayoung James Goo, Joo-Yeun Heo, 'The Impact of the Regulatory Sandbox on the Fintech Industry, with a Discussion on the Relation between Regulatory Sandboxes and Open Innovation' (2020) 6 (2) *Journal of Open Innovation: Technology, Market, and Complexity* 43–60, 45, DOI: <https://doi.org/10.3390/joitmc6020043>

⁶⁵ See the details here: <https://www.fca.org.uk/firms/innovation/regulatory-sandbox/accepted-firms> accessed 1 April 2025.

⁶⁶ See Rolf H Weber, Massimo Durante, 'Artificial Intelligence Ante Portas: Reactions of Law' (2021) 4 (3) *J* 486–499, 496, DOI: <https://doi.org/10.3390/j4030037>

⁶⁷ See Ross P. Buckley and others, 'Building FinTech Ecosystems: Regulatory Sandboxes, Innovation Hubs and Beyond' DOI: <http://dx.doi.org/10.2139/ssrn.3455872>; Tambiana Madiega, Anne Louise Van De Pol, 'Artificial Intelligence Act and Regulatory Sandboxes' (European Parliamentary Research Service, European Union 2022) 2.

⁶⁸ Buocz, Pfotenhauer, Eisenberger (n 47) 362.

⁶⁹ See Sofia Ranchordas, 'Experimental Regulations for AI: Sandboxes for Morals and Mores' [2021] *SSRN Electronic Journal* 12, DOI: <https://dx.doi.org/10.2139/ssrn.3839744>

⁷⁰ Miriam McNabb, 'Estonia Establishes Drone Sandbox: ANRA Technologies to Provide U-Space and CIS Tech' (15 May 2023) *DRONELIFE* <<https://dronelife.com/2023/05/15/estonia-establishes-drone-sandbox-anra-technologies-to-provide-u-space-and-cis-tech/>> accessed 1 April 2025.

⁷¹ 'European Blockchain Regulatory Sandbox | EU Digital Finance Platform' <<https://digital-finance-platform.ec.europa.eu/cross-border-services/ebsi>> accessed 1 April 2025.

⁷² See James Czerniawski, Trace Mitchell and Adam Thierer, "'Sandbox' Everything' (12 October 2020) *RealClear Policy* <https://www.realclearpolicy.com/articles/2020/10/12/sandbox_everything_580391.html> accessed 1 April 2025; Ringe, Ruof (n 50); O'Sullivan (n 48).

the legal facilitations⁷³ that participants enjoy during their testing period. These rules are usually laid down at different levels of national legislation,⁷⁴ defining the conditions for their creation and operation, sometimes including entry and exit criteria and technical details as well. Regulatory sandboxes are typically set up and operated by a public body, such as a governmental or independent public regulator, an agency, or a central bank.⁷⁵ Given that disruptive technologies usually operate globally and know no national borders, it is timely to consider establishing international sandboxes, as exemplified by the AI Act, which allows the creation of European-level AI testbeds.⁷⁶

As a third pillar, test environments, depending on the technology developed in them, may be complemented by different testing facilities or infrastructures where essential product development, testing and validation take place. These infrastructures are vital, as they emulate real-world circumstances without posing significant risks to consumers, such as accidents, data leaks or cyber-attacks; they do this by simulating the environment in which the future product or software will be functioning.⁷⁷ In many sectors, such as self-driving vehicles and drone testbeds, they will include isolated test tracks⁷⁸ where companies can perfect their developments in safe conditions, or server farms, where data can be securely stored.

Of course, the benefits are not for everyone. Only those companies that meet the often very strict selection and eligibility criteria will be admitted to the sandboxes. For example, the FCA has set out the following entry conditions for one of the first fintech sandboxes in the world: the proposal is intended for the UK financial services market, either involving a regulated activity or supporting firms doing regulated activities. It must involve genuine innovation, hence something completely unprecedented, and must benefit consumers without exposing them to undue risk. The firms applying must demonstrate a validated need for a sandbox, be ready for testing, and have a built version of the proposed idea and

⁷³ In Germany, these so-called experimental clauses can be found in a handful of legal sources; see Federal Ministry for Economic Affairs and Energy, 'Making Space for Innovation – The Handbook for Regulatory Sandboxes' (Federal Ministry for Economic Affairs and Energy 2019), Annex, 78–85.

⁷⁴ For example, the legal grounds that are making the Hungarian fintech sandbox possible are established by a decree issued by the president of the National Bank of Hungary: Decree No. 47/2018 (XII. 17.) on The Different Rules for Compliance with Obligations According to Certain MNB Decrees. In Spain, the norm that founded the sandbox for the electricity sector took the form of a Royal Decree (Royal Decree 568/2022 of 11 July 2022) See 'Spain Publishes First Call for Access to Its Electricity Regulatory Sandbox' <<https://www.osborneclarke.com/insights/spain-publishes-first-call-access-its-electricity-regulatory-sandbox>> accessed 1 April 2025.

⁷⁵ For some examples of establishing authority, Buckley and others (n 67) Appendix A; Goo, Heo (n 64) Table 2.

⁷⁶ See AI Act, art 57.

⁷⁷ See 'What Is a Sandbox Environment? Meaning & Setup | Proofpoint US' (n 46); Abdishakur (n 46).

⁷⁸ National Defence, 'Sandboxes' <<https://www.canada.ca/en/departement-national-defence/programs/defence-ideas/element/sandboxes.html>> accessed 1 April 2025.; Sally French, 'These 8 States Are the Perfect Sandbox for Drones' (29 September 2022) The Drone Girl <<https://www.thedronegirl.com/2022/09/29/drone-sandbox-mercatus/>> accessed 1 April 2025.

a clear objective for the experimental procedure.⁷⁹ The terms and conditions of participation in the sandbox are typically laid down in a schedule,⁸⁰ implementation plan⁸¹ or legally binding agreement⁸² between the parties, thus ensuring that the test environment is not just a fancy way to waste time. It is important to underline that the benefits of the sandbox could lead to market and competitive distortions in the long run, as participating companies are in a much more favourable position than their counterparts who are not inside the test environment. To ensure that the creation of a sandbox does not lead to or prolong unfair situations, participation time is limited.⁸³ The typical period of between six months and two years⁸⁴ is sufficient for any company to test and develop its product in detail and gives the public actor the opportunity to observe and learn. It is also possible to transform an innovative idea from the ground up within this timeframe and comply with the applicable legislation. The number of experimenting companies is usually restricted to ensure that every participant gets enough attention, so the entities enter regulatory sandboxes in smaller, manageable groups or so-called cohorts.⁸⁵

Now that we have a concept of what test environments look like from the outside, let's delve into their anatomy. We must not forget that each state is free to design sandboxes under its jurisdiction with different frameworks and content, so depending on the legal culture, the specificities of the areas to be regulated and the needs of the stakeholders, we may encounter different constructions. Therefore, I have tried to gather and generalise the most typical characteristics. In most cases, the regulatory sandbox is described as a safe space or harbour,⁸⁶ which is a meaningful summary of its essential nature. The sandbox gives the legislator the opportunity to learn and analyse the situation while providing guarantees to innovative market players to develop their solutions in peace without fearing

⁷⁹ See Federal Conduct Authority 'FCA Regulatory Sandbox' 5, <<https://www.fca.org.uk/publication/fca/fca-regulatory-sandbox-guide.pdf>> accessed 1 April 2025.

⁸⁰ See Monetary Authority of Singapore, 'Fintech Regulatory Sandbox Guidelines' (Monetary Authority of Singapore 2016).

⁸¹ See Real Decreto 817/2023, de 8 de noviembre, que establece un entorno controlado de pruebas para el ensayo del cumplimiento de la propuesta de Reglamento del Parlamento Europeo y del Consejo por el que se establecen normas armonizadas en materia de inteligencia artificial 2023, art 11(2).

⁸² The AI Act seems to describe such a legal construction, called the specific sandbox plan, that is agreed between the providers of AI-based solutions and the competent authority, see AI Act, art 57(5) and (7).

⁸³ See Allen and others (n 51) 638.

⁸⁴ See Buckley and others (n 67) 68; Goo, Heo (n 64) 4; Christopher Lomax, Angela Attrey, Molly Leshner, 'The Role of Sandboxes in Promoting Flexibility and Innovation in the Digital Age' [2020] Going Digital Toolkit Note No. 2, 10.

⁸⁵ See OECD (n 62) 15; See Financial Conduct Authority (FCA), 'Innovation Hub: Market Insights' (4 January 2023) Graph 1 <<https://www.fca.org.uk/data/innovation-market-insights>> accessed 1 April 2025.

⁸⁶ See Buckley and others (n 67) 83; Chang-Hsien Tsai, Ching-Fu Lin and Han-Wei Liu, 'The Diffusion of the Sandbox Approach to Disruptive Innovation and Its Limitations' (2020) 53 (2) Cornell International Law Journal 261–296, 268; Fenwick, Vermeulen, Corrales (n 60) 10; Saule T. Omarova, 'Technology v Technocracy: Fintech as a Regulatory Challenge' (2020) 6 (1) Journal of Financial Regulation 75–124, 110, DOI: <https://doi.org/10.1093/jfr/fjaa004>; Ranchordas (n 69) 13.

the legal and economic consequences. The main parties are innovative businesses and regulators, but they are often joined by independent experts, consultancies⁸⁷ and NGOs, especially in the legislative process.

The backbone of a regulatory sandbox is a set of measures that the founder provides to the participants. This can include legal facilitation or discounts,⁸⁸ as well as consultation and customised advisory processes⁸⁹ to help businesses develop their products and ensure legal compliance. The name ‘test environment’ also implies the key function of providing the opportunity for testing in real-life conditions. The aim is to enable innovative businesses to improve their products and services by involving not just fictitious but real users and consumers,⁹⁰ while taking only moderate risks compared to the real market situation. A further signature feature of the sandbox is the cooperative process that relies on institutionalised communication⁹¹ to ensure a constant exchange of information between participants and the public sector, helping the latter to learn to really understand⁹² the specificities of the technology and shape its legislative activity and the content of its standards accordingly. Below, we investigate these features and measures in a little more detail.

2 Cooperation

As mentioned, a specific and fundamental characteristic of test environments is the elimination of the unequal relationship between the regulator and the regulated entity, some aspects of which are worth mentioning. In sandboxes, there is continuous communication between the founder – typically an authority or a government agency⁹³ – and the market players, with the aim of shaping the legal framework of the field together. This straight connection to the legislature leverages channelling the feedback from the market actors and other stakeholders without distortion and helps ensure that the final norms will clearly reflect their demands.⁹⁴ Also, participating companies undertake to explain their operations, internal decision-making and product development processes, as well as the innovative product or service they have created, in detail. This helps the legislator to get a grip on their

⁸⁷ See Federal Ministry for Economic Affairs and Energy (n 73) 24–27.

⁸⁸ Chang-Hsien and others (n 86) 264; Buocz, Pfotenhauer, Eisenberger (n 47) 364.

⁸⁹ Ranchordas (n 69) 21.

⁹⁰ Ringe, Ruof (n 50) 605.

⁹¹ See Dirk Zetzsch and others, ‘Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation’ (2017) 23 (1) *Fordham Journal of Corporate & Financial Law* 31–103, 38–39, 61.

⁹² See Truby and others (n 52) 273; Thomas A. Hemphill, ‘Technology Entrepreneurship and Innovation Hubs: Perspectives on the Universal Regulatory Sandbox’ (2023) 50 *Science and Public Policy* 350–353, 351, DOI: <https://doi.org/10.1093/scipol/scac072>; Ringe and Ruof (n 50) 617.

⁹³ See (n 75).

⁹⁴ See Albert Tan, ‘The Digital Banking and Fintech Sandbox – Nepal’ (Open Science Framework 2023) preprint 9, DOI: <https://doi.org/10.31219/osf.io/pze6u>

nature and impact⁹⁵ and ‘contribut[es] to a better understanding of the (in-)adequacy of existing and planned laws in their social context.’⁹⁶ Hence, lawmakers can closely see why and how things are happening and learn about the technology and its specificities from a perspective⁹⁷ that would not be possible under normal market conditions and conditions of commercial confidentiality. Gaining first-hand experience with the nature of disruptive technology and the stakeholders and identifying their needs will shape a regulatory ecosystem that benefits everyone.

Open, honest communication, backed up by legal guarantees, results in changing unilateral, rigid legislation into a cooperative journey, ideally leading to a robust and widely approved legal environment. Disruptive regulation that takes place in a sandbox is never complete and never final,⁹⁸ but always leaves room for adjustments, such as *ex-post* correction, in case the public actor perceives that trends are changing. In this case, a rapid response is ensured since the legislator is directly informed about the current challenges of the innovative companies, eliminating the need for time-consuming situation assessment studies and other decision-preparation processes. This allows the law to keep up with real-life developments almost without delay, which is much needed in our world.

3 Legal Relief

‘The most exciting benefit of regulatory sandboxes is that they may kick-start innovative businesses that might otherwise be stymied by regulatory costs.’⁹⁹ The regulation of disruptive technologies usually seems like an opaque maze. Inventing, developing and bringing an innovative business idea to market requires a lot of legal groundwork. Complying with legal requirements along the way is burdensome or even impossible, but after all, this is what sandboxes are really designed for.¹⁰⁰ For example, imagine a fintech company offering a revolutionary banking service. Before entering the market, it has to comply with a number of banking, financial and consumer protection laws even to test the first working version of its product, which it may not be able to do at the initial phase because sufficient organisational or technological measures are yet to be arranged, and in-house legal proficiency is not available either. The worst case is when the business is not able to evolve the product from blueprint to reality, as there are elements that must be developed from the outset in the strict conditions imposed by law prior to any implementation at all. Take the case of parcel delivery drones,¹⁰¹ which are not possible to perfect without using

⁹⁵ Allen and others (n 51) 632.

⁹⁶ Buocz, Pfotenbauer, Eisenberger (n 47) 388.

⁹⁷ Omarova (n 85) 12–13.

⁹⁸ See Fenwick, Vermeulen, Corrales (n 60) 89.

⁹⁹ O’Sullivan (n 48) 2.

¹⁰⁰ See Ranchordas (n 69) 7–8.

¹⁰¹ See the case study in Federal Ministry for Economic Affairs and Energy (n 73) 42.

airspace and are subject to strict aviation rules and licensing. If the legislator does not provide some kind of loophole to allow experimental solutions to be tested in this airspace, it could significantly discourage the development of this sector and stifle innovation.

In order to avoid this situation, founders provide legal facilitations, so-called experimentation clauses,¹⁰² to companies in sandboxes, strictly for the duration of the participation period. This simplifies the legal compliance required for market entry and allows real-world testing. The benefits are mostly embodied in deregulation, whereby the legislator temporarily exempts the undertakings concerned from compliance with certain legislation or specific provisions thereof. Deregulation can take different forms, such as exceptions to prohibition or the granting of exemptions such as exemption from authorisation,¹⁰³ licensing,¹⁰⁴ waivers,¹⁰⁵ or the issuance of no enforcement letters.¹⁰⁶ Participants may not be completely exempted from the rules but may be subject to simpler, more feasible conditions and lower legal thresholds than the stricter rules that apply to everyone else outside the test environment. In the sandbox operated by the National Bank of Hungary, for example, fintech companies that meet the entry criteria are exempted from remote customer identification, certain payment rules and customer complaint handling rules.¹⁰⁷ By taking advantage of legal relief, the sandbox opens the way to market access for businesses that would otherwise not have been able to overcome the related challenges under normal regulatory circumstances. The partial alleviation of the legal burden and the lower regulatory entry barrier,¹⁰⁸ thus provided by test environments has a very strong innovation-stimulating effect on the market for disruptive technologies.

It is important to note here that although deregulation takes many forms and varies in extent, there is one issue on which the founders do not compromise: participation never exempts a company from liability for damages caused to anyone during the test phase.¹⁰⁹ If a market player causes harm during testing or development – even if this is the result of a bug that was intended to be solved in the sandbox – it must assume the liability provided for in the relevant legal system. Although there are opportunities to cover this risk with liability insurance, ‘it can be difficult to find an insurance company which is willing to take on a risk which is hard to calculate in view of the novel nature of the innovation.’¹¹⁰ Without going into the implications of this circumstance, we should all hope that soon there will be

¹⁰² See Federal Ministry for Economic Affairs and Energy (n 73) 62–63.

¹⁰³ Zoltán Pék, ‘Szabályozási tesztkörnyezet az energetikában: innováció és szabályozás’ (2022) 69 *Közgazdasági Szemle*, 625–642, 631, DOI: <https://doi.org/10.18414/KSZ.2022.5.625>

¹⁰⁴ See Allen and others (n 51) 598; OECD (n 63) 15.

¹⁰⁵ FCA, ‘Regulatory Sandbox’ (Financial Conduct Authority 2015) 9.

¹⁰⁶ Buocz, Pfotenbauer, Eisenberger (n 47) 362.

¹⁰⁷ See <<https://www.mnb.hu/en/innovation-hub/regulatory-sandbox>> accessed 1 April 2025.

¹⁰⁸ See Fenwick, Vermeulen, Corrales (n 60) 81.

¹⁰⁹ Such an approach is followed by the European AI Regulation, See AI Act, art 57(12).

¹¹⁰ Federal Ministry for Economic Affairs and Energy (n 73) 45.

a satisfactory solution to this problem. Otherwise, it may be the main factor that moderates the interest of companies in sandboxes and stifles disruptive innovation.¹¹¹

4 Guidance

Inside the sandboxes, the public entity is not only an observer but also an advisor, a quasi-mentor that helps to navigate the legal maze.¹¹² No matter how beneficial the relaxed legal conditions may be for developers, if they get lost in the labyrinth, their participation in the test environment can easily become counterproductive. To prevent this, sandboxes involve carefully designed advisory processes to help participants comply with the legislation that applies to them and to get both their product and internal organisation ready for successful take-off. ‘Through powers to provide legal guidance, the competent supervisory authority and the innovator can determine whether the product or service in question complies with current legal requirements and, if it does not, what a legally compliant product design could look like.’¹¹³ General or bespoke guidance¹¹⁴ for businesses may include not only legal compliance advice or guidance for technology development but also market-entry mentoring by the founding authority. The primary goal of the business while participating in a sandbox is to ensure that the product or service is working, viable on the market and clearly compliant with the relevant legislation, which is greatly facilitated by focused attention and tailored advice.

Given that companies in the sandbox are in constant consultation with the public authority plus undergo a series of tests and evaluations,¹¹⁵ their internal operations, processes, and products will indeed meet legal requirements at the time they exit. To crown the process, the sandbox operating authority may issue an exit certificate to prove that the company complies with the rules that apply to it and the disruptive technology they have developed. Such certificates provide an official guarantee to the market actor that it will not be penalised for illegal behaviour or activities. In addition, they give the holder a significant competitive advantage by conveying reliability, credibility and quality to consumers. The AI Act follows an approach like this in introducing the exit report system,¹¹⁶ which hopefully will serve as a model for other sandboxes.

¹¹¹ See Truby and others (n 52) 272.

¹¹² See O’Sullivan (n 48) 2.

¹¹³ Buocz, Pfotenhauer, Eisenberger (n 47) 362.

¹¹⁴ Ranchordas (n 69) 21; FCA (n 105) 9.

¹¹⁵ See Fenwick, Vermeulen and Corrales (n 60) 81; See examples of the evaluation measures: Jon Truby, Andrew Dahdal, Imad Antoine Ibrahim, ‘Sandboxes in the Desert: Is a Cross-Border “Gulf Box” Feasible?’ (2022) 14 (2) Law, Innovation and Technology 447–473, 472–473, DOI: <https://doi.org/10.1080/17579961.2022.2113674>

¹¹⁶ See AI Act, art 57(7).

5 Testing

As mentioned, one of the perks of sandboxes is that they allow participants to test the performance and effectiveness of their products in real market conditions, with real customers and real user behaviour,¹¹⁷ but without any serious threat or danger to them.¹¹⁸ Companies can analyse the feedback and lessons learned during experiments and can still adapt or fine-tune innovative products accordingly. Depending on the nature of disruptive technology, different kinds of testing environments are set up in most sandboxes where practical product development is facilitated. For example, a cybersecurity sandbox usually has isolated servers and ‘its own network and typically doesn’t have a physical connection to production resources. The purpose of the sandbox is to execute malicious code and analyse it. [...] Because of this, the sandbox must not have access to critical infrastructure.’¹¹⁹ Meanwhile, transportation test environments may need a whole city to function properly, like the one in Hamburg, Germany.¹²⁰ The four-year-long HEAT¹²¹ regulatory sandbox project investigated ‘how fully automated or self-driving electric minibuses can be safely deployed to transport passengers on urban roads.’¹²²

If sufficient transparency is provided, testing in a sandbox not only hugely benefits public authorities and innovative market actors but also contributes to raising public awareness and the understanding of disruptive technologies on a wider societal level.¹²³ The tests carried out may be logged in detail, and the results are made public (of course, protecting trade secrets and without any loss of interest to the parties involved). Such an approach is foreseen in the AI Act, as it opens up the possibility of making exit reports public¹²⁴ on a single information platform.¹²⁵ These reports will, of course, inform civil stakeholders as well as innovative companies and developers outside the sandbox who are active in a disruptive field. The lessons learned in the test environment can be used to develop use cases and good practices that will make life easier for other market players, as they will help to avoid dead ends and prevent unnecessary developments. The burden of this publicity is typically borne and accepted by the participating market players, as the benefits of engaging in a test environment still far outweigh the required sacrifices and transparency.

¹¹⁷ Truby and others (n 52) 277.

¹¹⁸ See Ringe, Ruof (n 50) 606, 616, 629.

¹¹⁹ What Is a Sandbox Environment? Meaning & Setup | Proofpoint US’ (n 46).

¹²⁰ HEAT | Renewable Mobile’ <<https://www.erneuerbar-mobil.de/projekte/heat>> accessed 1 April 2025.

¹²¹ Hamburg Electric Autonomous Transportation.

¹²² Federal Ministry for Economic Affairs and Energy (n 73) 11.

¹²³ See Fenwick, Vermeulen, Corrales (n 60) 12.

¹²⁴ AI Act, art 57(8).

¹²⁵ According to Art. 62 (3) (b) of the AI Act, this platform should be developed and maintained by the AI Office to provide easy-to-use information in relation to the AI Act for all operators across the Union.

6 Sandboxes in the AI Act – The Spanish Trailblazer

Considering AI a disruptive technology that needs to operate between legal boundaries, having well-designed, efficiently functioning AI regulatory sandboxes is foundational. The European Union correctly perceived this in relation to the journey towards the age of AI. The EU recognised early on that supporting AI innovation with legal measures at a community level would bolster the development and widespread deployment of the technology. The Commission declared its intention in a Communication in April 2018¹²⁶ to establish and promote testbeds in line with the European approach to AI. This objective now seems to be materialising, as the AI Act has laid down a detailed sandbox design and ecosystem,¹²⁷ making it mandatory at the national level and allowing the creation of AI sandboxes at the Community level. The AI Act leaves the detailed rules of test environments, like eligibility criteria, internal procedures, terms and conditions,¹²⁸ to so-called implementing acts.¹²⁹ This guarantees the flexibility and the ability to closely follow technological development, hence making regulatory sandboxes in the EU future-proof. This approach opens the way for the Commission to react rapidly and refine the sandbox norms without initiating bureaucratic and slow ordinary legislative procedures. Such regulatory logic indeed makes the AI Act an innovation-friendly piece of law.

The Presidents of the EU Council and the Parliament signed the AI Act in mid-June,¹³⁰ and the comprehensive legislation entered into force in August. Indeed, it will take another two years to become fully applicable.¹³¹ Spain has long taken action to support AI innovation. In mid-2022, the Ministry of Economic Affairs and Digital Transformation of the European state, together with the European Commission, set up a pilot for the European AI sandbox.¹³² The main goal was to ‘connect competent authorities with companies developing AI in order to define together best practices to implement the future European Commission’s AI regulation.’¹³³ The general objectives were to transfer compliance know-how to companies, enable the development of innovative, trustworthy AI systems and share best practices across the EU. The pilot was open to all EU Member States so that countries could join the

¹²⁶ Commission, ‘Artificial Intelligence for Europe’ COM(2018) 237 final.

¹²⁷ AI Act, arts 57–61.

¹²⁸ See AI Act, art 58(1).

¹²⁹ Implementing and Delegated Acts – European Commission’ <https://commission.europa.eu/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts_en> accessed 1 April 2025.

¹³⁰ See the Official Journal of EU ‘Regulation - EU – 2024/1689 – EN –EUR-Lex’ <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32024R1689&qid=1722334924394>> accessed 1 April 2025.

¹³¹ AI Act, art 113.

¹³² Launch Event for the Spanish Regulatory Sandbox on Artificial Intelligence | Shaping Europe’s Digital Future’ (27 June 2022) <<https://digital-strategy.ec.europa.eu/en/events/launch-event-spanish-regulatory-sandbox-artificial-intelligence>> accessed 1 April 2025.

¹³³ Ministro de Asuntos Económicos y Transformacion Digital, ‘The Government of Spain in Collaboration with the European Commission Presents a Pilot for EU’s First AI Regulatory Sandbox’ (2022) 1.

controlled environment and obtain practical learning experience to support the development of standards, guidance and tools at national and European levels.¹³⁴ During the Spanish EU presidency in the second half of 2023, the pilot project came to fruition when Spain officially established the first EU AI regulatory sandbox with a dedicated law.¹³⁵ Although two test environments had already been set up, one focusing on the financial system and another one on electricity,¹³⁶ establishing a dedicated AI sandbox put the country among the leaders of global AI regulatory innovation. Being the first of its kind,¹³⁷ we can only hope that the pioneering initiative will set the standard for the AI sandboxes of the future both in Europe and globally or at least act as a point of reference for them.

V Conclusion

When the wheel, one of the most ancient disruptive technologies, was invented, it was probably not considered that it needed to be tested, proven and perfected in a ‘contemporary sandbox’ before it was brought to market. Of course, this was not only because there was no such thing as a sandbox but also because there were few technologies as simple as the wheel. Its usefulness was obvious to everyone, and its clear mode of operation made it unnecessary to scrutinise and understand its risks before application. The disruptive technologies of our time, however, are no longer associated with such an easy path.

As I have stressed, artificial intelligence – which may be the most disruptive technology of the present times – is not nearly so simple and straightforward, especially when it comes to regulation. While it is fundamentally reshaping our world and permeating more and more spheres of our lives, the operation and nature of AI often remain obscure, even to experts and developers. The possible directions of its progression are unpredictable, and the speed of its growth is exponential, so its irresponsible use and development may be particularly challenging and dangerous for mankind. What is even more concerning is that even the law cannot compete with the soaring speed of its development, and AI regularly operates in an environment without a robust legal framework because of the lack of regulatory understanding and delayed acting. Nevertheless, we have a common interest and need to exploit the wide potential of AI and create legal frameworks that protect the interests of all

¹³⁴ See (n 133) 1–3.

¹³⁵ Real Decreto 817/2023, de 8 de noviembre, que establece un entorno controlado de pruebas para el ensayo del cumplimiento de la propuesta de Reglamento del Parlamento Europeo y del Consejo por el que se establecen normas armonizadas en materia de inteligencia artificial.

¹³⁶ Garrigues-Javier Fernández Rivaya, Anxo Vidal, ‘Spain: The Artificial Intelligence Regulatory “Sandbox” Has Arrived’ (29 September 2023) Lexology <<https://www.lexology.com/library/detail.aspx?g=99939c25-d7bb-4d06-b154-4a972eb71e9b>> accessed 1 April 2025.

¹³⁷ There are plenty of AI-related sandboxes – See OECD (n 61) Annex B., but the Spanish one is the first to solely and explicitly focus on AI.

affected parties, such as users, developers and sovereign public entities. Sandboxes are the perfect places for this work.

This contribution had the aim of presenting how all the players in the disruptive innovation ecosystem – like the AI universe – benefit from the sandbox approach. Participating in a testbed ensures secure and human-centric development, thorough testing possibilities, and the perk that this is done in a secure environment, where developers do not have to fear innovation-stifling legal risks. AI developers working in the sandbox take advantage of being able to test and improve their AI-based solutions in a real-world environment, with real feedback, and without facing any major legal risks, while supported by tailored advice and legal exemptions. In the meantime, lawmaker entities can learn first-hand how this often mysterious technology works and cooperate with developers to create a desirable legal environment that supports innovation while ensuring that the risks associated with AI are managed and mitigated.

Although the global roll-out of dedicated AI sandboxes is still in its early stages, seeing the forward-looking Spanish initiative, we can be optimistic about their future uptake and success in the long run. This aspiration is strengthened by the AI Act that establishes mandatory sandboxes in at least 27 EU Member States, and we may only hope that it will create an example to follow and trust and that the so-called ‘Brussels effect’¹³⁸ will do its job and make the European process a global standard.

¹³⁸ See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020, Oxford) DOI: <https://doi.org/10.1093/oso/9780190088583.001.0001>

Handling Jurisdictional Problems in Civil Procedure – Based on Hungarian and EU Legislation

Abstract

In my study, I analyse jurisdiction, a fundamental concept in civil procedural law, primarily in relation to civil procedural law issues concerning jurisdiction. Thus, I shall examine in detail how jurisdiction appears as an absolute impediment to litigation and how the legal institution of intervention prevails. In my work, I also review the relationship between jurisdiction and sets of claims, as well as the transfer of jurisdiction as a new legal institution in Hungarian procedural law to the courts of another state. In my analysis, I consider not only Hungarian but also EU legislation, and I evaluate the jurisprudence of both the Hungarian courts and the Court of Justice of the European Union. As a result of my research, I consider it to be possible to conclude that the Hungarian procedural law system relies to a large extent on the norms of EU law and is in accordance with them (with the exception of the norms of the Brussels IIb Regulation on interference in proceedings and Section 106 (2) of the NMJTV).

Keywords: jurisdiction; domestic law, admission, counterclaim, pool of actions

I Introduction – The Concept of Jurisdiction

Jurisdiction is one of the defining legal institutions of international civil procedure law and necessarily of national (internal and state) procedural law. Jurisdiction fundamentally determines which state's courts may hear a civil dispute. The existence or absence of jurisdiction essentially determines the *locus standi* of a court of a state. The absence or exclusion of jurisdiction renders it unnecessary to examine the jurisdiction of any court in that state.

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The aim of this study is to identify possible jurisdictional issues that arise and to find answers to them, focusing specifically on Hungarian civil procedure. In doing so, this article will rely primarily on the analysis of the provisions of the Hungarian Act on Private International Law (hereinafter: NMJTV)¹ and the Hungarian Code on Civil Procedure (hereinafter: CPC)² and, to the extent necessary, the main EU jurisdictional regulations (Brussels Ia,³ Brussels IIb,⁴ Succession Regulation⁵ and Maintenance Regulation⁶).

With regard to the concept of jurisdiction, several approaches can be read in the legal literature. Thus, competence⁷ and jurisdiction in international sense can be distinguished.⁸

István Szász considered competence to be a question of jurisdiction, ie, in his opinion, the court must have jurisdiction over the procedure in relation to several aspects.

First, under international law, the courts of the state should have jurisdiction to exercise judicial power, being one of the branches of state power – ie the courts of the state should have the power to apply the law and judge in the specific case (*Gerichtsbareit, facultas iurisdictionis*). In other words, judicial competence means the state's ability to apply

¹ 2017. évi XXVIII. törvény a nemzetközi magánjogról (Act XXVIII of 2017 on Private International Law).

² 2016. évi CXXX. törvény a polgári perrendtartásról (Act CXXX of 2016 on the Code of Civil Procedure).

³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

⁴ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1.

⁵ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/1.

⁶ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

⁷ Miklós Kengyel, 'Keresetindítás' [*Filing for Action*] in Németh János, Kiss Daisy (eds), *A polgári perrendtartás magyarázata* [*Commentary on the Code of Civil Procedure*] (Complex Kiadó 2006, Budapest) 778; Ágnes Zsitva, 'Perindítás' [*Bringing Action*] in Zsuzsa Wopera (ed), *Kommentár a polgári perrendtartáshoz* [*Commentary on the Code of Civil Procedure*] (Wolters Kluwer 2019, Budapest) 440; Vilmos Ébner, 'Perindítás' [*Bringing Action*] in Varga István (ed), *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja* [*Commentary on the Code of Civil Procedure and Related Legislation*] (HVG-ORAC 2018, Budapest) 707, para 1829; László Névai, Jenő Szilbereky, *Polgári eljárásjog* [*Civil Procedural Law*] (Tankönyvkiadó 1974, Budapest) 169; Katalin Gombos, 'A Brüsszel Ia rendelet és a készülõ nemzetközi magánjogi törvény egymáshoz való viszonya' [*Relationship between the Brussels Ia and the Forthcoming Private International Law*] in Barna Berke, Zoltán Nemessányi (eds), *Az új nemzetközi magánjogi törvény alapjai – Kodifikációs előtanulmányok* [*Fundamentals of the New Private International Law – Codification Preliminary Studies*] (HVG-ORAC 2016, Budapest) 181.

⁸ Imre Juhász, 'Gondolatok a Brüsszel Egyezményről' [*Reflections on the Brussels Agreement*] in Daisy Kiss, István Varga (eds), *Magister artis boni et aequi – Studia in honorem Németh János* (ELTE Eötvös Kiadó 2003, Budapest) 389; Miklós Világhy, *Bevezetés a nemzetközi magánjogba* [*Introduction to Private International Law*] (Tankönyvkiadó 1966, Budapest) 71–72; István Szász, *Nemzetközi polgári eljárásjog* [*International Civil Procedure Law*] (Közgazdasági és Jogi Könyvkiadó 1963, Budapest); Gombos (n 7) 181.

international law, the counterpart of which in private international law is the state's ability to legislate under international law; its legislative right. It is also necessary that the courts of the state have jurisdiction under international and domestic state law *vis-à-vis* foreign courts to decide the dispute in a specific case. So judicial jurisdiction under international law and domestic state law means judicial jurisdiction under international law and domestic state law in the narrower sense (*iurisdictio internationalis, staatliche, abstrakte Zuständigkeit*). It is also a prerequisite that the case must be subject to civil proceedings, ie that the civil courts of that state must have jurisdiction to decide the dispute. The fourth criterion to be examined is the classic question of jurisdiction in civil procedure (*sachliche Zuständigkeit*), ie, which level of the judicial system is competent to act in the dispute. Finally, territorial jurisdiction (*örtliche Zuständigkeit*), which is referred to in Hungarian civil procedure law as jurisdiction, should be included here.⁹

Miklós Világhy regards jurisdiction as the right of the state, flowing from its sovereignty, to act by state means (either administratively or judicially) in assessing legal relations containing foreign elements. Világhy also points out – in explaining the uncertainties regarding the conceptual definition – that the conceptual basis of jurisdiction is the distinction known in the domestic legal system of each state between competence on the one hand and jurisdiction on the other. It is important that while competence classically allocates cases within a single state, experience shows that the distribution of cases occurs not only within individual states but also between individual states, so some rules are required to distribute individual cases internationally among the various bodies of states. Világhy calls this international division of cases. In his view, this latter division of cases expresses 'the same kind of territorial distribution of cases as jurisdiction implies under domestic law'.¹⁰

Within the framework of the present article, it is not possible to process and present in detail the concept of jurisdiction, but it can be stated that states do not enter into a hierarchical relationship with each other in connection with jurisdiction, and the horizontal division of labour shall not be interpreted either. It is rather the area-based division of cases that can be interpreted.

To sum all this up, it can be stated that jurisdiction means the international division of cases and the subordination of the forum of one or another state to the decision-making power. Thus, 'jurisdiction feeds on the sovereignty of the state; it means the right of the state, flowing from sovereignty, to act in court with the help of state resources in disputes involving a foreign element'^{11, 12} It is important to note that jurisdiction in this study refers

⁹ In detail: Szászy (n 8) 315–316.

¹⁰ Világhy (n 8) 71. Translation of the author.

¹¹ Translation of the author.

¹² Ferenc Mádl, Lajos Vékás, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga [Private International Law and International Economic Relations Law]* (ELTE Eötvös Kiadó 2012, Budapest) 457–458, para 598.

only to judicial jurisdiction in the form of the decision-making power of the courts of a given state in a given case;¹³ ie we do not examine the issue of jurisdiction from an administrative or legislative point of view.¹⁴

II Date of Determination of Jurisdiction

The key question is which date is relevant for determining whether the Hungarian court has jurisdiction. This also means that the principle of *perpetuatio fori* applies, ie while competence (*hatáskör/illetékesség*) is governed by the date of filing of the application [§ 23(1) CPC; § 30(1) CPC], it is questionable whether the same principle applies in the assessment of jurisdiction.

Closely related to this is the question of whether the facts necessary to determine jurisdiction change during the course of the litigation and, as a result, the jurisdiction existing at the time of the application is lost or, on the contrary, previously missing jurisdiction is created, thereby affecting the determination of jurisdiction in any way. According to István Szászy's argument, this is a condition that prompts the question whether, in accordance with the principle of *perpetuatio fori*, the principle of *perpetuatio iurisdictionis* must be admitted, ie whether jurisdiction must exist only at the time of lodging the application or also at the time of judgment.¹⁵

The CPC does not expressly provide for this issue, and nor does the NMJTV offer any further guidance in this regard. However, it may be a starting point if the date of the filing of the application is the relevant date for competence (*hatáskör/illetékesség*), then also when determining jurisdiction, and if the originally missing jurisdiction is deemed to exist due to a change in circumstances during the litigation, the jurisdiction of the Hungarian court may be established.

In essence, this principle is the basis of the legal institution of entering the proceedings since jurisdiction is absent when the application is lodged, and only a positive statement by the defendant (submission of a written defence) creates jurisdiction. Otherwise, the proceedings must be terminated *ex officio* [Section 240(1)(b) CPC]. However, if, during the litigation, the circumstances necessary to establish jurisdiction change and the jurisdiction existing until then ceases to exist, this does not constitute an obstacle to litigation in the absence of an express rule of litigation; it does not result in the termination

¹³ In detail: Juhász (n 8) 389–390.

¹⁴ To the definition of jurisdiction see also: Andreas Heldrich, *Internationales Zuständigkeit und anwendbares Recht – Beiträge zum ausländischen und internationalen Privatrecht* (J.C.B. Mohr, Paul Siebeck 1969, Tübingen); Bernd von Hoffmann, *Internationales Privatrecht* (Verlag C.H. Beck 2001, München); Haimo Schack, *Internationales Zivilverfahrensrecht* (Verlag C.H. Beck 2010, München); Peter Schlosser, 'Jurisdiction and International Judicial and Administrative Co-operation' (2000) 284 *Recueil des Cours de l'Académie de droit international* 284–307.

¹⁵ Szászy (n 8) 408.

of the proceedings. In other words, the answer to the question posed by István Szászy is, in my view, that Hungarian law recognises the principle of *perpetuatio iurisdictionis*.

It is interesting to note that contrasting views have also appeared in previous Hungarian civil litigation literature, according to which if the defendant's domicile changes during the duration of the litigation, thereby reducing the jurisdiction of the Hungarian court, the lawsuit shall be terminated.¹⁶

It may seem clear, but in fact, it is questionable why questions concerning a lack of jurisdiction must be examined *ex officio* by the court. What has been written about the concept of jurisdiction shows that it is linked in its dogmatic nature to competence and/or jurisdiction. In view of the fact that the court also takes into account the lack of jurisdiction and jurisdiction of its own motion, it can be argued that the absence of international competence/jurisdiction must also be examined *ex officio* by the court [Section 24(1) CPC; Section 30(2) CPC]. This is also laid down at the normative level in Section 240(1) CPC when it declares that the lack of jurisdiction must always be detected *ex officio* by the court, which, if necessary, shall terminate the proceedings.

III Jurisdiction as an Absolute Obstacle to Litigation – Excluded Jurisdiction and the Exclusive Jurisdiction of a Court of Another State

1 General Overview

Based on the above definition of jurisdiction, it can be concluded that the lack of the latter may result in an impediment to litigation, ie it may arise as a condition for litigation.¹⁷

According to István Szászy's approach, however, the term 'litigation condition' is not precise enough because the existence of jurisdiction is not an existential prerequisite for the establishment of the entire litigation relationship (ie, the litigation legal relationship), bearing in mind that a lawsuit may also be brought before a court without jurisdiction, and

¹⁶ István Arató, *Joghatóság a külföldi állam magánjogi ügyletei felett [Jurisdiction over the Private Law Transactions of a Foreign State]* (Taizs József Könyvnyomda 1942, Pécs) 35.

¹⁷ The conditions of litigation are the conditions in the absence of which the application must be rejected [Section 176 (1) to (2) of the CPC]. For their detailed, dogmatic analysis: Géza Magyary, *A magyar polgári peres eljárás alaptanai (A perbeli cselekmények tana) [The Foundations of Hungarian Civil Litigation (The Doctrine of the Procedural Acts)]* (Franklin Társulat 1898, Budapest); Géza Magyary, *Magyar polgári perjog [Hungarian Civil Litigation Law]* (Franklin Társulat 1913, Budapest); Jenő Bacsó, *A jogvédelem előfeltételei a polgári perben [Prerequisites for Legal Protection in Civil Proceedings]* (1910, Máramarossziget); Sándor Plósz, *A keresetjogról [About Right of Action]* (1927, Budapest); Névai, Szilberek (n 7); Miklós Kengyel, *Magyar polgári eljárásjog [Hungarian Civil Procedure Law]* (Osiris Kiadó 1998, Budapest).

the court must decide on the question of jurisdiction. Therefore, Szászy argues that the existence of jurisdiction is a condition for the admissibility of litigation.¹⁸

At the same time, it is essential that the absence of jurisdiction is not the same as an obstacle to litigation because, in the system of Hungarian civil procedure, only excluded jurisdiction or the exclusive jurisdiction of a foreign court can result in the rejection of the application as an obstacle to litigation (absolute obstacle to litigation) [Section 176(1)(a) of the CPC]. In cases of excluded jurisdiction, the CPC refers to applicable laws, binding acts of the European Union, and international conventions. In other words, on the basis of these sources of law, the court must decide whether jurisdiction is excluded on the side of the Hungarian courts.

This is why I share Szászy's opinion that the absence of jurisdiction in itself is not an obstacle to litigation; it is not a condition for litigation, unlike excluded or exclusive jurisdiction; in all other cases, the admissibility of litigation depends on the defendant's conduct, ie in the absence of judicial jurisdiction, the legislator gives the defendant the right to choose whether to accept (at least implicitly) the jurisdiction of the state of the given court, that is, the law presumes such acceptance represents the 'implied agreement of jurisdiction' of the defendant.¹⁹

When defining cases subject to excluded (averted)²⁰ jurisdiction, the legislature takes into account only the nature of the case to be adjudicated, which is why it can be called unconditional. It is independent of the fact that there may be a domestic court competent to hear the case. By contrast, competing (parallel) jurisdiction already implies conditional, jurisdictional jurisdiction. As a general rule, jurisdiction is excluded in matters in which the domestic state has no judicial capacity to adjudicate under international law and when it lacks any territorial or personal connection whatsoever with the territory and citizens of the domestic state or with its substantive law.²¹

Hungarian judicial practice emphasises that, a lawsuit may only be terminated if the jurisdiction of the Hungarian court is excluded from the action pursuant to a provision of law or international convention. This does not apply in cases where a jurisdiction clause fails to clearly designate the courts of a foreign state or a specific foreign court.²²

The judicature is clear: an application can only be rejected if Hungarian jurisdiction is excluded. However, upon the defendant's objection, the court is required to examine *ex officio* whether grounds exist to establish its jurisdiction.²³

It is important that excluded or exclusive jurisdiction is an absolute obstacle to litigation, ie this must be taken into account at any stage of the proceedings, so if the court notices

¹⁸ Szászy (n 8) 399.

¹⁹ Juhász (n 8) 401.

²⁰ Szászy (n 8) 322.

²¹ Szászy (n 8) 322–328.

²² BH 2004. 153. I.

²³ Budapest-Capital Regional Court of Appeal 9.Pkf.25.572/2020/2.

the absence of this condition after the notification of the claim [Section 179(1) of the CPC], the proceedings shall be terminated *ex officio* [Section 240(1)(a) of the CPC]; this rule also applies in redress proceedings [in appeal proceedings: Section 379 of the CPC; in review proceedings: Section 379 CPC applicable under Section 405(1) CPC].

2 Excluded Jurisdiction in Domestic Law

Within the scope of excluded jurisdiction, the source of domestic law is Section 89 of the NMJTV, which exhaustively lists proceedings in which the jurisdiction of the Hungarian court is excluded, which simultaneously means the recognition of the jurisdiction of the foreign court.

The areas of regulated by Section 89 of the NMJTV overlap to a large extent with the rules of exclusive jurisdiction laid down in Section 88 of the NMJTV, so the interpretative framework valid in this area also applies in relation to excluded jurisdiction.

However, the situation is complicated by the fact that while the Brussels Ia Regulation establishes exclusive rules of jurisdiction but not expressly excluded rules of jurisdiction, the exclusive rules of jurisdiction of the regulation only constitute excluded jurisdiction in relation to other EU Member States. Consequently, rules of jurisdiction excluded in relation to a third state should be laid down in domestic law.²⁴ When interpreting of the NMJTV, it is advisable to take into account the case law related to the Brussels Ia Regulation, as referred to later.

Where there is no explicit need for different rules, the Act reproduces the rules under EU law in order to ensure that, despite the different sources of private international law, the Hungarian judge or authority must examine their jurisdiction on the basis of the most uniform set of rules possible to facilitate their task.²⁵

In the present paper, however, we will analyse certain rules of excluded jurisdiction regulated by the NMJTV only to the extent necessary, and for reasons of content and scope, we will refrain from examining them in detail. As a matter of fact, it can be stated that the grounds of excluded jurisdiction are justified by the public interest linked to the legal relationship concerned or by the exclusive domestic aspects of the legal relationship. In view of the fact that Section 89 of the NMJTV and Section 176(1)(a) of the CPC deny the Hungarian court the right to act, the reasons listed in the NMJTV must therefore be interpreted restrictively.²⁶

Pursuant to Section 89(a) of the NMJTV, the jurisdiction of a Hungarian court is excluded in proceedings concerning a right *in rem* on real estate situated abroad or the lease or sale of such real estate. The exclusion of rights *in rem* in relation to immovable property is also justified because the resolution of such disputes often requires checks or expert or other

²⁴ Bill T/14237 on Private International Law 87 ('the Proposal').

²⁵ Proposal 86.

²⁶ Proposal 86.

examinations that must be carried out on the spot, and the resolution of such disputes is often influenced by consumer habits which is best known to the courts of the Member State in which they are situated. It justifies the transfer of jurisdiction to a state that data, facts and rights relating to immovable property are recorded in the state in which it is located.²⁷ It is worth highlighting, based on case law, that the Hungarian court had no jurisdiction over an action aimed at replacing the legal declaration required for the registration of real estate ownership in Croatia by a court judgment. In the present action, the claim sought to be enforced is not a claim *in rem*; however, the jurisdiction of the Hungarian court is excluded, given that the proceedings concern the registration of rights, facts and data in a public register maintained in Hungary.²⁸

It is relevant, however, that that ground of jurisdiction does not cover, for example, disputes relating to a contract resulting in succession in the person of the holder of a right *in rem*.²⁹ The Court of Justice of the European Union (CJEU) clarified the condition relating to ownership of immovable property in the *ČEZ* judgement, stating³⁰ that exclusive jurisdiction does not extend to all actions which have as their object a right *in rem* in immovable property, but only those actions which concern the territory of immovable property that are intended to establish the existence of its condition, property, possession or other right *in rem* and to secure the prerogatives of rightsholders by virtue of their title.³¹

The second phrase of Section 89(a) of the NMJTV applies to the lease and sale of real estate. An action falls under this clause only if its object is a right or obligation arising from the tenancy itself. The legal policy justification for this is that the rental of immovable property is generally governed by specific laws in the national legal canon, which are more appropriately heard by the courts of the state where they are in force. The excluded jurisdiction covers disputes between a landlord and tenant concerning the existence and interpretation of a lease agreement, as well as compensation for damage caused by a tenant to rental property, but it does not apply to issues related to the payment of rent.³² In the CJEU's view,³³ a contract which does not exclusively provide for the partial rights of use of a holiday resort but also concerns the provision of other services with a value exceeding the value of that holiday use right cannot be regarded as a contract for the rental of immovable property and is therefore not subject to the rules of exclusive jurisdiction.³⁴

²⁷ Adél Köblös, 'A kizárólagos joghatóság' [The Exclusive Jurisdiction] in Zsuzsa Wopera, Lajos Wallacher (eds), *Polgári eljárásjogi szabályok az Európai Unió jogában [Rules of Civil Procedure in European Union Law]* (Wolters Kluwer 2005, Budapest) 110.

²⁸ BH 2014. 47.

²⁹ Proposal 86.

³⁰ Case C-343/04 *Land Oberösterreich v ČEZ*, EU:C:2006:330.

³¹ András Osztovits, 'Joghatóság' [Jurisdiction] in Zoltán Csehi (ed), *Magyarázat a nemzetközi magánjogról [Commentary on Private International Law]* (Wolters Kluwer 2020, Budapest) 871.

³² Köblös (n 27) 113.

³³ Case C-73/04 – *Brigitte and Marcus Klein v Rhodos Manamegent Ltd*, EU:C:2005:607.

³⁴ C-73/04 *Klein* (n 33).

According to Section 89(b) of the NMJTV, the jurisdiction of a Hungarian court is excluded in probate proceedings concerning the foreign estate of a non-Hungarian citizen. The rule can be justified by the speciality of probate proceedings, but only in the case of purely foreign inheritance relationships not settled by the decree due to the temporal effect of the Succession Regulation.³⁵

According to Section 89(c) of the NMJTV, the jurisdiction of a Hungarian court is excluded in proceedings for the destruction of documents or securities issued abroad. In this context, it should be borne in mind that the destruction of securities falls within the scope of the Brussels Ia Regulation if the subject matter of the proceedings falls within the material scope of the regulation, but this does not apply to the destruction of other documents.³⁶

Section 89(d) of the NMJTV stipulates that the jurisdiction of a Hungarian court is excluded in proceedings relating to the grant, content and termination of foreign industrial property rights. When interpreting the rule, it should be noted that the granting of industrial property rights actually results from the exercise of state sovereignty, and these rights may be exercised in the territory of the state where they are registered.

Thus, according to the case law of the CJEU, this includes disputes concerning the existence, validity or extinction of a patent or a priority right based on a previous deposit. However, it does not include claims arising from patent infringement or disputes between an employer and an employee based on an employment contract concerning the right to patent protection over an invention developed by an employee during their employment.³⁷

Pursuant to Section 89(e) of the NMJTV, the jurisdiction of the Hungarian court is excluded in proceedings relating to the establishment or dissolution of a legal person or legal entity without legal personality established abroad (hereinafter collectively referred to as 'legal person' for the purposes of the topic of discussion) in proceedings relating to the validity of the contract or articles of association on the basis of which the legal person was registered, or in proceedings for the review of decisions taken by the organs of the legal person.

The purpose of the rule is clear: to avoid conflicting and incompatible decisions and to ensure that data, facts, rights and changes thereto relating to individual legal persons are recorded and published in the home state that is best placed to adjudicate on these disputes.³⁸

Pursuant to Section 89(f) of the NMJTV, the jurisdiction of the Hungarian court is excluded in proceedings concerning the registration of rights, facts and data in a public register kept abroad. It is important that this provision applies only in relation to the registration of rights, facts and data directly in connection with the proceedings of the court or authority keeping the public register (such as an action for annulment of the order of registration order). If, on the other hand, the subject matter of the proceedings is not the

³⁵ Proposal 87.

³⁶ Osztovits (n 31) 877.

³⁷ Case C-288/82. *Ferdinand M.J.J. Duijnste v Lodewijk Goderbauer*, EU:C:1983:326.

³⁸ Köblös (n 27) 116.

registration itself but the right, fact or data on which the registration is based, that ground of jurisdiction shall not apply.³⁹

Pursuant to Section 89(g) of the NMJTV, the jurisdiction of the Hungarian court is excluded in proceedings concerning foreign enforcement. The exclusion of jurisdiction in proceedings concerning foreign enforcement also follows from international law since the enforcement of judgments is a very close consequence of state sovereignty and public authority. The excluded Hungarian jurisdiction is also supported by the relationship between the forum acting and the applicable foreign substantive law.⁴⁰

In addition to the excluded jurisdiction rules presented so far, the relationship between immunity and the exclusive jurisdiction rule should be examined. Should Section 86(2) of the NMJTV, according to which no Hungarian court may act in proceedings against a foreign national acting as diplomatic representative in Hungary or otherwise exempt from jurisdiction, be interpreted as a rule of jurisdiction unless the foreign state or the employing international organisation has expressly waived immunity?

Although formally, this rule appears to be a jurisdictional norm, in my view, it is more correct to interpret it as an immunity issue. The problem of immunity is related to the ability to judge (*facultas iurisdictionis*). In Hungarian jurisprudence, István Szászy called judicial capacity an independent litigation condition distinct from jurisdiction. In his view, judicial capacity ‘means the judicial power vested in the state, ... which shall not be vested in the state unless the legal relationship to be adjudicated involves a foreign sovereign state or any of its organs or institutions acting in the exercise of legal authority’⁴¹.⁴²

Tibor Szócs points out that judicial capacity essentially concerns the immunity from Hungarian judicial power of foreign states, state bodies or persons enjoying diplomatic or other international legal immunity, which, however, has not been specifically regulated procedurally but has merged into the system of rules of jurisdiction.⁴³ That is, the question of immunity arises as a lack of jurisdiction – excluded jurisdiction – and thus results in the rejection of the application. Kinga Timár also emphasises in her study that ‘the absence of state immunity is a prerequisite for the applicability of European jurisdictional regulation’⁴⁴.⁴⁵ That

³⁹ Proposal 87.

⁴⁰ Detailed explanatory memorandum relating to Section 1 of Act CX of 2000 on the amendment of certain laws on jurisdiction and the recognition and enforcement of foreign judgments.

⁴¹ Translation of the author.

⁴² Szászy (n 8) 328.

⁴³ Tibor Szócs, ‘A magyar nemzetközi polgári eljárásjogi reformja – szabályozást igénylő kérdések’ [Reform of Hungarian Civil Procedure Law – Issues Requiring Regulation] in János Németh, István Varga (eds), *Egy új polgári perrendtartás alapjai [The Foundations of a New Civil Procedure]* (HVG-ORAC 2014, Budapest) 678.

⁴⁴ Translation of the author.

⁴⁵ Kinga Timár, ‘Immunitás és joghatóság az Európai Bíróság aktuális gyakorlatában’ [Immunity and Jurisdiction in Current Practice of the European Court of Justice] 58. <https://edit.elte.hu/xmlui/static/pdf-viewer-master/external/pdfjs-2.1.266-dist/web/viewer.html?file=https://edit.elte.hu/xmlui/bitstream/handle/10831/35148/Jogi_tan_2010_3_Timar_Kinga_p_45-60.pdf?sequence=1&isAllowed=y> accessed 1 April 2025.

is, the assessment of immunity must necessarily precede the jurisdictional examination.⁴⁶ In line with this, during the codification of the NMJTV, Katalin Gombos stated that it is justified to separate issues related to public international law elements related to diplomatic law and state sovereignty from the scope of exclusive and excluded jurisdiction rules.⁴⁷

Accordingly, we do not interpret Section 86(2) of the NMJTV as a rule of jurisdiction but as a provision relating to immunity. This is based on the fact that the NMJTV clearly distinguishes between jurisdiction in the sense of public international law and jurisdiction in the sense of private international law since these are different legal institutions built on each other.⁴⁸

A jurisdiction agreement within the meaning of Section 99 of the NMJTV results in excluding the jurisdiction of the Hungarian courts once the parties prorogate the jurisdiction of a foreign court. Section 99(7) of the NMJTV states that the jurisdiction stipulated by the jurisdiction agreement is exclusive unless otherwise agreed by the parties. That is, if the statement of claim is filed in a property action affected by the jurisdiction agreement, the court must reject the application on the basis of Section 176(1)(a) CPC since the jurisdiction clause of the courts of a state or one or more specific courts simultaneously means the excluded jurisdiction of the Hungarian court.

It should be noted that, under the NMJTV, having regard also to the material scope of the Act [Section 1 of the NMJTV], the parties may not stipulate the jurisdiction of a foreign court in a purely domestic case.⁴⁹ *Nota bene*: the opposite position is also known in legal literature, so: 'To permit the prorogation of jurisdiction, it suffices that the prorogated and derogated courts are different even if the parties are domiciled in the same country. The international element is created through the choice of a foreign forum.'⁵⁰ According to the latest practice of CJEU, this might change with the *Inkreal* judgment⁵¹ at least under the scope of Brussels Ia.⁵²

⁴⁶ Zoltán Nemessányi, 'A nemzetközi szervezetek immunitása és a joghatóság polgári kereskedelmi ügyekben' [Immunity of International Organisations and Jurisdiction in Civil Trade] in Lajos Vékás, András Osztovits, Zoltán Nemessányi (eds), *Nemzetközi magánjogi rendelekek az Európai Unió Bírósága gyakorlatában* [Private International Law Regulations in the Practice of the Court of Justice of the European Union] (HVG-ORAC 2021, Budapest) 107.

⁴⁷ Gombos (n 7) 188.

⁴⁸ In detail: Szabolcs Boreczki, 'Eljárásjogi rendelkezések' [Procedural Provisions] in Lajos Vékás, András Osztovits, Zoltán Nemessányi (eds), *A nemzetközi magánjogról szóló törvény kommentárja* [Commentary of the Law on Private International Law] (HVG-ORAC 2020, Budapest) 384–388.

⁴⁹ Proposal 91.

⁵⁰ Tamás Szabados, 'The New Hungarian Private International Law Act: New Rules, New Questions' (2018) 4 The Rabel Journal of Comparative and International Private Law 999.

⁵¹ Case C-566/22 *Inkreal s.r.o. v Dúha reality s.r.o.*, EU:C:2024:123.

⁵² Article 25(1) of Brussels Ia must be interpreted as meaning that an agreement conferring jurisdiction by which the parties to a contract who are established in the same Member State agree on the jurisdiction of the courts of another Member State to settle disputes arising out of that contract is covered under that provision, even if that contract has no other connection with that other Member State.

3 Excluded Jurisdiction in Sources of EU Law

Article 24 of the Brussels Ia Regulation governs exclusive jurisdiction. This includes proceedings relating to the rental or lease of rights *in rem* or immovable property (point 1), disputes concerning the organisation and decisions of legal persons (point 2), the validity of entries in a public register (point 3), proceedings relating to the registration or validity of patents, trademarks, designs or similar rights requiring deposit or registration (point 4), proceedings relating to the enforcement of judgments (point 5).⁵³ I will not analyse the individual points in detail, but I will refer back to what was explained in point 3.2.

The fact that the Brussels Ia Regulation regulates only exclusive jurisdiction is a necessary consequence of EU legislation since the latter can only regulate exclusive jurisdiction, not excluded jurisdiction, so Hungarian courts can also establish the exclusion of jurisdiction by applying Article 24 of the Brussels Ia Regulation accordingly. Similarly to Section 99 of the NMJTV, the exclusion of jurisdiction by the courts of a Member State to which the agreement does not apply results from Article 25 of the Brussels Ia Regulation.

The Brussels IIB Regulation also recognises exclusive jurisdiction so that a court of a Member State has exclusive jurisdiction if the parties, as well as any other holder of parental responsibility, have expressly declared acceptance of that jurisdiction during the proceedings and the court has ensured that each party is informed of their right to object to that jurisdiction and that the exercise of jurisdiction is in the best interests of the child [Brussels IIB Regulation, Article 10(4); Article 10(1)(b)(ii)].⁵⁴

This includes exclusive jurisdiction introduced by Article 5 of the Succession Regulation so that where the testator has chosen the law of a Member State pursuant to Article 22 as the law applicable to succession to them, the parties concerned may agree that the court or courts of that Member State shall have exclusive jurisdiction to decide on successions.⁵⁵ The rule allows the forum to follow the law of its choice. Exclusive jurisdiction is based on a jurisdictional agreement concluded between the parties, which has a dual effect: it establishes the jurisdiction of the Member State of the law chosen by the testator

⁵³ A detailed analysis of the rules of exclusive jurisdiction of the Brussels Ia Regulation: Peter Mankowski, 'Art. 24. Brüssel Ia-VO' in Thomas Rauscher (ed), *Europäisches Zivilprozess-und Kollisionsrecht EuZPR / EuIPR – Kommentar* (Otto Schmidt 2021, Köln); Thomas Pfeiffer, 'Art. 24. Brüssel Ia-Vo.' in Hanns Prütting, Markus Gehrlein (eds), *ZPO – Kommentar* (Luchterhand 2023, München); Peter Schlosser, Burkhard Hess, *EuZPR – EU-Zivilprozessrecht* (C.H.Beck 2021, München); Jan Kropholler, Jan von Hein, *Europäisches Zivilprozessrecht* (Fachmedien Recht und Wirtschaft, Deutscher Fachverlag GmbH 2023, Frankfurt am Main); Hans-Joachim Musielak, Wolfgang Voit, *ZPO – Zivilprozessordnung* (Verlag Franz Vahlen 2023, München).

⁵⁴ A detailed analysis of the rules of exclusive jurisdiction of the Brussels IIB Regulation: Zsuzsa Wopera (ed), *A Brüsszel IIB rendelet kommentárja [Commentary on Brussels IIB]* (ORAC 2023, Budapest); Thomas Garber, Katharina Lugani (eds), *Die Brüssel IIB Verordnung* (Verlag Österreich 2022, Wien).

⁵⁵ A detailed analysis of the rule of exclusive jurisdiction of the Succession Regulation: Astrid Deixler-Hübner, Martin Schauer (eds), *EuErbVO-Kommentar* (2nd edn, Manz Verlag 2020, Wien); Tibor Szócs, *A nemzetközi öröklési jog szabályainak kommentárja [Commentary on the Rules of International Succession Law]* (HVG-ORAC 2021, Budapest).

(prorogation), and it terminates the jurisdiction of the courts that would otherwise have jurisdiction under the Succession Regulation (derogation). Those effects are binding on the tribunal, which would otherwise have jurisdiction.⁵⁶

The stipulated jurisdiction, ie the agreement of the parties, may also give rise to exclusive jurisdiction in relation to the Maintenance Regulation [Article 4(1)]. It is important that the parties' right of choice in maintenance disputes is severely restricted, as the Maintenance Regulation limits the connecting principle of jurisdiction in disputes relating to maintenance obligations. As a general rule, the jurisdictional connecting factor may be the Member State of habitual residence or nationality of one of the parties [Article 4(1)(a) and (b)]. However, a dispute between spouses or former spouses concerning maintenance obligations may relate to a court having jurisdiction over the matrimonial dispute (stipulated adhesive jurisdiction), or the dispute may be subject to the jurisdiction of the last Member State of habitual residence common to at least one year.⁵⁷

4 Exclusive Jurisdiction of a Foreign Court

Furthermore, it is an absolute obstacle to litigation if a foreign court has exclusive jurisdiction. In this context, a question of interpretation emerges: while the CPC clarifies that excluded jurisdiction serves as an obstacle to litigation – based on law, a binding act of the European Union, or a source of law recognised as part of Hungarian law through an international agreement – it does not link the obstructive nature of a foreign court's judgment to any source of law considered to be part of Hungarian law.

The judgment of the foreign court as an obstacle to the proceedings is provided for in Section 176(1)(a) of the CPC. However, in my opinion, Section 176(1)(a) has not been properly codified. Based on a grammatical interpretation of the law, a question may arise: can a judgment issued by any state and any of its courts result in the dismissal of an application on the grounds of exclusive jurisdiction? If the answer is yes, then any judgment issued by any court of any state would have legal effect in Hungary, as the judgment would constitute a negative precondition for bringing proceedings. In my view, the correct interpretation is that an explicit provision in a statute, a binding legal act of the European Union, or an international treaty is required for any judgment of a foreign court to constitute a bar to litigation under Hungarian procedural law.

⁵⁶ Tibor Szöcs, 'Az Európai Öröklési rendelet' [The European Succession Regulation] in Varga (n 7) 2678.

⁵⁷ Károly László Simon, 'Az Európai Tartási rendelet' [The European Maintenance Regulation] in Varga (n 7) 2753; For details on the jurisdiction rules of the Maintenance Regulation, see: Philip Reuß, 'Kommentar zu EuUntVo' in Reinhold Geimer, Rolf A. Schütze (eds), *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (C.H.Beck 2014, München); Burkhard Hess, *Europäisches Zivilprozessrecht* (C.F. Müller 2010, Heidelberg); Wolfgang Hau, 'Die Zuständigkeitsgründe der Europäischen Unterhaltsverordnung' (2010) (3) *Zeitschrift für das gesamte Familienrecht*; Matthias Abendroth, 'Choice of Court in Matters Relating to Maintenance Obligations' in Paul Beaumont, Burkhard Hess, Lara Walker, Stefanie Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing 2014, Oxford).

5 Lack of Jurisdiction as a Relative Obstacle to Litigation – Entry into Litigation

In addition to Section 176(1)(a) CPC, the lack of jurisdiction arises as a relative impediment to litigation of a special nature. The special nature of the relative obstacle to litigation is that its actual effectiveness depends on the conduct of the defendant. In other words, the court must already realise, when examining the application, that although excluded or exclusive jurisdiction cannot be established, the Hungarian court nevertheless does not have jurisdiction to decide on the given lawsuit (case). In other words, the entry into litigation ‘may be significant in cases where, although Hungarian jurisdiction is not excluded, there is not a single ground of jurisdiction in the law that would provide a Hungarian judicial forum for the given case.’⁵⁸

Although the court notices this *ex officio*, its legal consequence, ie the termination of proceedings *ex officio*, can only result from the defendant’s passivity [Section 240(1)(ba) CPC] or a well-founded objection to jurisdiction [Section 240(1)(bb) of the CPC]. The rule is also special because the application can only be notified if it is deemed suitable for initiating a lawsuit [Section 179(1) of the CPC]. In other words, by notifying the claim to the defendant, the court determines that the application is appropriate for taking legal action. Nevertheless, subsequent conduct by the defendant may result in the termination of the proceedings, thereby declaring, with retroactive effect, that it was not suitable for litigation even at the time when the application was lodged.

Section 240(1)(b) CPC contains a rule that is easy to apply at first reading, but it is actually a complex norm consisting of several elements. Namely, the proceedings may be terminated if:

- there is no excluded jurisdiction over Hungarian courts, nor does any other state have exclusive jurisdiction (because in that case, Section 176(1)(a) CPC would apply);
- the jurisdiction of Hungarian courts cannot be established under any ground of jurisdiction;
- however, the establishment of jurisdiction by the defendant’s entry into litigation is not precluded (positive condition);
- the defendant does not wish to enter into a lawsuit
 - or by expressly raising a challenge to jurisdiction [Section 240(1)(bb) CPC – active provision];
 - or by remaining completely passive and not submitting a written defence [Section 240 (1) (ba) of the CPC – passive provision].⁵⁹

⁵⁸ Detailed explanatory memorandum relating to Section 1 of Act CX of 2000 on the amendment of certain laws on jurisdiction and the recognition and enforcement of foreign judgments.

⁵⁹ Vilmos Ébner, ‘A perfelvételi szak és az érdemi tárgyalási szakban alkalmazandó közös rendelkezések’ [Common Provisions Applicable to Case Stage and Hearings as to Merits] in Varga (n 7) 1012, para 2585.

An important interpretative rule for Section 240(1)(b) CPC is that for the purposes of subsection (ba), an opposition to the order for payment shall not be considered as a written defence. According to judicial practice, in proceedings following the European order for payment procedure conducted before a Hungarian notary, which has turned into a lawsuit due to an objection, the defendant may also lodge a challenge to jurisdiction in their written defence. The court may also examine the existence or absence of jurisdiction of its own motion in the cases provided for in the Brussels Ia Regulation (BH 2019. 3.80.). It is essential that the defendant may lodge their objection to jurisdiction under subsection (1)(b)(bb) at the latest in their written defence at the same time as the substantive defence [Section 240(2) CPC]. Section 240 of the CPC does not expressly stipulate that the court, if the defendant has no legal representative, must inform him of the possibility of objection under subsection (1)(b)(bb); however, this provision was clearly laid down in Section 157/A(2) of the earlier Code of Civil Procedure [Act III of 1952 on the Code of Civil Procedure]. It is questionable whether this is still the duty of the court. It can be argued that given that there is no express provision in this regard in the CPC and, moreover, that it did not expressly maintain the previous regulation, it is not necessary to inform the party acting with legal counsel of the possibility of a challenge to jurisdiction. At the same time, however, it is not excluded that according to Section 111 of the CPC, the court must inform the party who does not have legal representation of their procedural rights, ie the right to object, since the lack of jurisdiction is a fundamental procedural obstacle, ie the party must be aware that the Hungarian court has jurisdiction only in the case that they make a statement on the merits of the suit. In the case of jurisdiction, this issue cannot arise because the court is always required to take procedural action regarding the lack of jurisdiction *ex officio*, even at the initiation stage. As a general rule, this results in a referral (Section 174 of the CPC), but, in exceptional cases, it may lead to the rejection of the application [Section 176(1)(b) of the CPC]. On the other hand, the absence of jurisdiction, unless it is excluded or exclusive, does not in itself result in the rejection of the application (cf. Section 176(1)(a) CPC). In my view, the more correct solution is to inform the defendant of the right to object under Section 111 CPC since the lack of jurisdiction deprives the state and thus all its courts with potential jurisdiction and jurisdiction to act, and therefore, it is justified from a guarantee point of view that the defendant should be properly informed.

According to Hungarian case law, only pleas of jurisdiction which are manifestly late and, therefore, likely to be abusive should be rejected on the grounds of entry into litigation. This includes objections to jurisdiction raised at second instance⁶⁰ or at first instance after several hearings and numerous substantive statements.⁶¹ It may be pointed out from recent practice that in a lawsuit brought by the Hungarian buyer against a Belgian seller in Hungary, the court established its jurisdiction on the basis of the seller's entry into the

⁶⁰ Debrecen Regional Court of Appeal 3.Gf.30.259/2014/3.

⁶¹ Supreme Court Gf.VI.31.805/2001/2.

lawsuit because it raised its objection to jurisdiction only after the defendant entered the substantive proceedings.⁶² It is not considered to be an entry into court if the party objects to the order for payment but does not yet raise a challenge to jurisdiction,⁶³ nor if the defendant first raises a plea of *pendens* and only then lodges a plea of jurisdiction.⁶⁴ In particular, the case-by-case decision that the entry of proceedings must be examined individually for each defendant is irrelevant, while the party's objection to jurisdiction on behalf of the other parties is irrelevant.⁶⁵

a) The relationship between admission and set-off

It raises a question of interpretation how to deal with the defendant when they do not submit a written defence but a document containing a set-off or a counterclaim. The answer is also not simple because these pleadings are documents [Section 7(1)(16) CPC], ie each pleading has an independent function and role as a document of admission. However, Section 240(1) (b) CPC only mentions the written defence.

A written defence is a classic means of defence against the claim, where the right sought to be enforced by the defendant is a substantive objection [Section 7 (1) (1) of the CPC], in which the latter only presents a defence against the claim. In the document containing the set-off, the defendant asserts a counterclaim by means of set-off as a right since 'the substantive effect of the defendant's declaration of set-off is the termination of the claim, ie the exclusion of the possibility of performance being claimed. It is against this background that it constitutes a substantive objection from a substantive point of view, that is to say, a plea leading to the unfoundedness of the claim'^{66 67}

In assessing the set-off, consideration should be given to the rule of Section 91 of the NMJTV, which settles the entry into proceedings in such a way that the jurisdiction of the Hungarian court is also established by the fact that the defendant, without objecting to the lack of jurisdiction, submits a counter-application without objecting to the lack of jurisdiction. According to the related legislative objective, Section 91 of the NMJTV inserts the phrase 'lodges a counterclaim' in order to achieve greater consistency with the CPC (according to Section 199(2) of the CPC, a written defence may include a formal defence or substantive defence, and under paragraph (6), even an acknowledgement of the action). The provision thus clarifies that the jurisdiction of the Hungarian court is established by entering the action even if the defendant contests the action only on formal grounds other than lack of jurisdiction (eg *res iudicata*, failure to comply with the time limit for bringing an action),

⁶² Győr District court P.21.711/2015.

⁶³ Debrecen Regional Court of Appeal 4.Gf.30.317/2008/4.

⁶⁴ Budapest-Capital Regional Court of Appeal 14.Gf.40.317/2013/2.

⁶⁵ Budapest-Capital Regional Court of Appeal 8.Pf.22.390/2013/8.

⁶⁶ Translation of the author.

⁶⁷ Bill T/11900 on the Code of Civil Procedure 345. (CPC Proposal).

but not on the merits and even if the action is admitted. In essence, therefore, a defence means a statement made in relation to the case outside the objection to jurisdiction.⁶⁸

It is possible that the legislature was guided by the intention in drafting the NMJTV that the entry into proceedings establishes the jurisdiction of the Hungarian court if the defendant makes any statement on the merits of the action. That is, following the terminology of the CPC, the defendant enters the litigation not only by submitting a written defence but also by submitting a document containing a set-off. All this is confirmed by the fact that by setting off, the defendant waives the right of formal defence since only a written defence could be used to submit an application for termination of proceedings [cf. Section 199(2)(a)(aa) CPC].

b) Relationship between admission and counterclaim

By means of a letter containing a counterclaim, the defendant initiates a 'counter-suit', which is why the CPC treats the counterclaim as an independent procedural legal institution.⁶⁹ That is, through the counterclaim, the defendant asserts an independent claim against the plaintiff, which involves a right to be enforced that is distinct from the right sought to be enforced in the original claim [Section 7(1)(11) of the CPC].

Therefore, if the defendant only makes a counterclaim this is to be interpreted as not wishing to enter into litigation, ie the passive provision of Section 240(1)(b)(ba) CPC applies, and the proceedings are terminated *ex officio* due to the failure to submit a written defence.

6 No Access to Litigation

According to Section 240(1)(c) of the CPC, the court terminates the proceedings *ex officio* at any stage if the jurisdiction of a Hungarian court cannot be established on any ground of jurisdiction and the jurisdiction of the court cannot be established by the defendant's entry into the litigation.

That is, Section 240(1)(c) CPC regulates cases where no excluded or excluded jurisdiction can be established, and thus the application cannot be rejected, while the legislature does not provide the defendant with the establishment of jurisdiction by entering into litigation in view of the subject matter of the dispute. The legislature expressly excludes the possibility of bringing proceedings in certain types of cases where this is expressly justified by 'the nature of the proceedings and/or legal relationships concerned'^{70, 71} Thus, concerning participation in litigation in insolvency proceedings [Section 100(3) of the NMJTV], cases concerning the establishment of origin [Section 104(2) of the NMJTV] are excluded; additionally, adoption

⁶⁸ Proposal 88.

⁶⁹ CPC Proposal 344.

⁷⁰ Translation of the author.

⁷¹ Proposal 88.

cases [Section 105(2) of the NMJTV], cases concerning parental authority, contact and guardianship [Section 106(2) of the NMJTV], cases concerning guardianship and other protection measures [Section 107(3) of the NMJTV] and cases concerning the declaration of death or the establishment of death [Section 108(2) of the NMJTV].

This rule is all the more remarkable because, although the Hungarian court does not have jurisdiction, and at the same time, excluded or exclusive jurisdiction cannot be established, the legislature nevertheless – *de facto* – regards the absence of jurisdiction as an absolute obstacle to litigation, even if it cannot be established even by entering litigation. In other words, in this case, the court must not reject the application without notifying the application but must terminate the proceedings *ex officio*.

In connection with Section 240(1)(c) CPC, the relationship between the Brussels Ia Regulation⁷² and the entry into litigation should be analysed separately. Pursuant to Article 12(1)(b) of the Brussels Ia Regulation, the courts of a Member State having jurisdiction pursuant to Article 3 in an application for divorce, legal separation or marriage annulment shall also have jurisdiction in matters of parental responsibility relating to that application where: at least one of the spouses has parental responsibility for the child; and the spouses and holders of parental responsibility have expressly or otherwise unambiguously accepted the jurisdiction of the courts at the time the court is seised, and this is in the best interests of the child.

According to the related Hungarian legal practice, there is no place in a child responsibility (custody) action for termination of proceedings due to lack of jurisdiction if, although there are no other grounds for jurisdiction, the defendant has clearly expressed through their statements in court that they accept the jurisdiction of the Hungarian court and that this is also in the best interests of the child.⁷³ In this case-by-case decision, the Supreme Court stated that by implicitly but unequivocally acknowledging the jurisdiction of the Hungarian court with regard to child custody, as well as in relation to the defence and counterclaim, the defendant had implicitly but unequivocally recognised the jurisdiction of the Hungarian court. This conclusion was reached with the understanding that the question of jurisdiction could only arise once a Hungarian court had been determined to have jurisdiction to hear the case. The court's reasoning thus clearly accepted the jurisdiction of the Hungarian court, which also serves the interests of the integrated child who has lived in Hungary for a long time, ie the jurisdiction of the Hungarian court exists under Article 12(1)(b) of the Brussels Ia Regulation.

It is questionable how this relates to the legal concept of litigation, especially in view of the fact that Section 91 of the NMJTV merely requires a defence to be made in order to establish jurisdiction on that basis, while Section 106(2) of the NMJTV clearly excludes the

⁷² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1.

⁷³ BH 2010. 2141.

application of Section 91 of the NMJTV in the context of parental authority. In other words, while *de facto* litigation may prevail in the case of the application of the Brussels IIa and Brussels IIb Regulations, if the NMJTV applies, it does not, pursuant to Section 106(2), and the proceedings must be terminated *ex officio* [Section 240(1)(c) of the CPC].

Next, the relationship between the Brussels IIb Regulation and the litigation procedure must also be examined. Article 10(1)(b)(ii) of the Brussels IIb Regulation essentially maintains the rules of the Brussels IIa Regulation by making specific provision for the obligation of the court to inform the court of the right to object to jurisdiction. In my view, the Brussels IIb Regulation provides for the possibility of entering litigation. At the same time, however, there is also the anomaly that while Section 106(2) of the NMJTV clearly excludes entry into litigation, the defendant already has this right in cases concerning the EU. The divergent regulation is difficult to justify, so the position of the legislator would be justified in this regard.

IV Relationship between Jurisdiction and the Pool of Actions

Paragraph (2a) was added to Section 242 of the CPC from 1 September 2022, according to which, if, in the case of a set of actions, the jurisdiction of the Hungarian court can only be established in respect of individual actions, the court may partially terminate the proceedings in respect of the actions concerned by the grounds for termination.

The reason for the regulation can be traced back to the fact that cases involving divorce, parental responsibility and maintenance have been characterised by divergent judicial practices. The key issue is whether, in such cases, where Hungarian jurisdiction is partially established, the entire procedure should be terminated or only the part where the Hungarian court does not have jurisdiction (partial termination of proceedings). Based on the examination of the jurisprudence analysis group, judicial practice⁷⁴ has adopted three positions regarding the assessment of the set of claims: on the one hand termination of proceedings or rejection of the application if jurisdiction exists only for divorce but not for parental responsibility and maintenance of the child, on the other hand extending existing jurisdiction and adjudicating on pools of actions in a single procedure, finally partial termination of proceedings pursuant to Section 242 (1) CPC.

In the opinion of the jurisprudence analysis group studying the judicial practice of Act XXVIII of 2017 on Private International Law, the correct procedural solution is to partially

⁷⁴ Győr District Court P.21.531/2020/21; Győr Regional Court 2.Pkf.50.746/2020/2; Szolnok District Court 2.P.21.608/2020/7; Gödöllő District Court 4.P.21.433/2020/5; Bonyhád District Court 5.P.20.016/2019; Tapolca District Court 4.P.20.399/2018/22; Veszprém Regional Court 1.Pkf.20.527/2019/3; Budapest-Capital Regional Court 50.Pkf.640.257/2018/5; Veszprém Regional Court 1.Pkf.20.527/2019/3; Kecskemét District Court P.20.593/2018; Kecskemét District Court 7.P.21.701/2018/39; Kecskemét Regional Court 1.Pkf.20.487/2020/4.

terminate the procedure on the basis of Section 240(1)(b) and (c) of the CPC.⁷⁵ However, it may be justified to amend the CPC to harmonise domestic law with EU regulations by means of a special rule for international situations.

The legislature adopted the opinion of the jurisprudence analysis group and inserted Section 242(2a) CPC. This breaks with the principle of treating the application as a whole for the purpose of terminating proceedings, even in the case of a set of actions, as regards disputes with a foreign element. In civil and family law cases with a foreign element, it may occur that, under the legislation determining the jurisdiction of Hungarian courts, the court's jurisdiction applies only to certain individual claims within a set of claims, and jurisdiction cannot be established simply by the defendant entering into litigation. In such cases, it is appropriate to provide for the possibility of the partial dismissal of proceedings because, under the legislation in force, the entire proceedings are terminated on the basis of the principle of unity of action, even in cases where the court has jurisdiction to hear certain actions.⁷⁶

In my view, too, the only correct solution is the partial termination of the proceedings, which, however, clearly followed from the CPC even without the amendment of the CPC. Section 242(1) CPC stipulates that if the reason for terminating proceedings *ex officio* or on application exists only in respect of the claim or counterclaim or only in respect of one of the parties, the court shall partially terminate the proceedings in respect of the claim or counterclaim or the party affected by the cause of termination.

That is, according to Section 242(1) CPC, if, in the case of a pool of actions, the termination of proceedings *ex officio* or on application exists only in respect of individual actions in the pool, the proceedings shall be partially terminated. This standard also applies without further ado to a set of claims concerning divorce, parental responsibility and maintenance. It should be noted that since the legal basis for partial termination of proceedings in this case is Section 240(1)(b) or (c) CPC, there is no obstacle to partial termination. This emphasis is justified because if the legal basis for termination of proceedings for lack of jurisdiction is Section 240(1)(a) CPC, then only the termination of the whole proceeding is possible since Section 240(1) CPC refers back to Section 176 CPC, where Section 176(3) CPC excludes partial dismissal of the application and thus partial termination of proceedings *ex officio*. For this reason, I do not consider correct the statement of reasons that 'under the legislation in force, on the basis of the principle of unity of action, the entire proceedings are terminated even in cases where the court has jurisdiction to hear certain actions'^{77, 78} It is precisely Section 242(1) CPC and Section 240(1)(b) and (c)

⁷⁵ Jurisprudence analysis group studying the judicial practice of Act XXVIII of 2017 on Private International Law 23–24, paras [60]–[61] and [63].

⁷⁶ Detailed justification for Sections 176–185 of Act XXIV of 2022 on the establishment of Hungary 2023 central budget.

⁷⁷ Translation of the author.

⁷⁸ Detailed justification for Sections 176–185 of Act XXIV of 2022 on the establishment of Hungary 2023 central budget.

CPC that refute this assertion since they expressly authorise the courts to partially dismiss proceedings even in the absence of jurisdiction.

Against this background, I consider that the amendment is functional, and in contrast to the related explanatory memorandum, it does not in any way suggest that it applies only to disputes with a foreign element or that it is a special standard applicable in those litigations. If this had been the aim of the legislature, this standard should have been placed in Part Nine of the CPC, among the rules of international civil procedure, since this Part lays down certain provisions governing certain aspects of civil proceedings with an international dimension.⁷⁹

V Transfer of Jurisdiction to a Court of Another State

Section 473/A CPC settles the transfer of jurisdiction to a court of another state. Accordingly, if there is a foreign element in the case and a binding act of the European Union or an international convention provides for the possibility of transferring jurisdiction to a court of another state before taking the measures prescribed in this connection, the trial court shall issue an order on the admissibility of the transfer, against which a separate appeal may be lodged. Measures relating to the transfer of jurisdiction may be taken after this order has become final. Once jurisdiction has been transferred to a court of another state, the court shall terminate the proceedings *ex officio*.

Section 473/A CPC was codified in connection with Article 12 of the Brussels IIB Regulation, but with the proviso that it may apply not only in relation to the EU Regulation but also in relation to Articles 8 to 9 of the Hague Convention on the Protection of Children.⁸⁰ If the Hungarian court decides to transfer jurisdiction, it shall issue an order on its admissibility, and only after it has become final may the provisions of Article 12(1) (a) or (b) of the Brussels IIB Regulation be carried out, to make arrangements for transfer.

If the court of another Member State takes over jurisdiction, the proceedings may be terminated *ex officio*, taking into account the lack of jurisdiction [Section 473/A(2) CPC, Article 12(2) of the Brussels IIB Regulation]. The right of appeal against the order of the Hungarian court is guaranteed under Section 240 (6) CPC.

The published case law on the rule is not yet available concerning either Article 12 of the Brussels IIB Regulation or Article 473/A CPC. However, it is worth reviewing the case law relating to the Brussels IIA Regulation, among which the *Child and Family Agency v J.D.* decision should be highlighted.⁸¹ The CJEU stated in principle that Article 15(1) of the

⁷⁹ CPC Proposal 477.

⁸⁰ Adrienn Várai-Jeges, 'Joghatóság más tagállam bíróságának való átadása' [Transfer of Jurisdiction to a Court of another Member State] in Wopera (n 54) 119–120.

⁸¹ Case C-428/15 *Child and Family Agency v J. D.*, EU:C:2016:819.

Brussels IIa Regulation (identical in substance to Article 12 of the Brussels IIb Regulation) must be interpreted as follows:

On the one hand, in order to assess whether a court of another Member State with which the child has a special connection is better placed to hear the case, the court having jurisdiction should ascertain whether the transfer of the case to such a court may have actual and concrete added value for the examination of the case, having regard, *inter alia*, to the procedural rules applicable in that other Member State;⁸²

On the other hand, in order to assess whether such referral is in the best interests of the child, the court having jurisdiction should ensure, *inter alia*, that there is no risk of adverse effects on the child's situation in the event of such referral;⁸³

Finally, when implementing Article 15 in a particular case relating to parental responsibility, the court having jurisdiction in a Member State shall not take into account either the effect of a possible transfer of that case to a court in another Member State on the right to the free movement of the persons concerned other than the child in question or the reason why the mother of that child exercised that right before bringing the matter before going to court unless those considerations adversely affect the situation of that child.⁸⁴

Although not included in the operative part of the judgment, the declaration of the CJEU ruling states that the court with jurisdiction must assess whether transferring the case to another court could offer real and tangible added value to the decision concerning the child, compared to keeping the case within its own jurisdiction.⁸⁵

In this context, it may take into account, among other factors, procedural rules of another Member State similar to those applicable to the taking of evidence necessary for the adjudication of the case. On the other hand, the court having jurisdiction is not required, in the context of that assessment, to take into account the substantive law of that other Member State, which the court of that Member State may have to apply if the case is referred to it. Taking that into account would be contrary to the principles of mutual trust between Member States and the mutual recognition of judicial decisions underlying Regulation No 2201/2003.⁸⁶

The CJEU has also laid down the principle governing Article 473/A CPC, according to which Article 15 of the Brussels IIa Regulation must be interpreted as not applicable in a situation where pursuant to Articles 12 and 8 of that Regulation, both courts seized have jurisdiction over the substance of the case (*IQ v JP*).⁸⁷

⁸² *Child and Family Agency* (n 81) Para 61.

⁸³ *Child and Family Agency* (n 81) Para 61.

⁸⁴ *Child and Family Agency* (n 81) Para 61.

⁸⁵ *Child and Family Agency* (n 81) Para 57.

⁸⁶ Case C-403/09 *Jasna Detiček v Maurizio Sgueglia*, EU:C:2009:810 para 45; Case C-256/09 *Bianca Purrrucker v Guillermo Vallés Pérez*, EU:C:2010:437, para 70 and 71.

⁸⁷ Case C-478/17 *IQ v JP*, EU:C:2018:812.

VI Summary

After reviewing the Hungarian procedural issues related to jurisdiction, it may be concluded that the Hungarian procedural system relies heavily on and is in line with the norms of EU law (with the exception of the standards of the Brussels IIb Regulation on entering litigation and Section 106(2) of the NMJTV). This necessarily means that, in addition to Hungarian case law, the CJEU's legislation must also be taken into account.

It is also relevant that the domestic (internal) sources of law address questions arising with jurisdiction – with one exception – either through an explicit and unambiguous rule or they can be resolved dogmatically based on the rules of jurisdiction in Hungarian civil procedure. In my opinion, the exception is the second phrase of Section 176(1)(a) CPC, where clear legislative intervention would be required, which would resolve questions of legal interpretation beyond doubt.

Furthermore, it can be stated as a fact that procedural questions relating to jurisdiction are also constantly changing, and this must be addressed primarily by the legislator in each case [cf. Section 242 (2a) of the CPC; Section 473/A of the CPC]. Due to the prominent role of jurisdiction, it is appropriate that disputes be clarified by clear legal provisions.

Case Note

The Greek Bronze's Journey Home to Italy: The European Court of Human Rights' Decision in *Getty v Italy*

Abstract

In the spring of 2024, the European Court of Human Rights (ECHR) rendered a significant judgment concerning the restitution of cultural property in the case of *Getty v Italy*.¹ This case highlights the complex interplay between state sovereignty and international cultural heritage obligations. The decision represents a landmark in the ECHR's jurisprudence on cultural property since it affirms that states have discretion in protecting cultural heritage. At the same time, one must consider whether the Court has perhaps left the door for states' restitution claims too widely ajar.

This study aims to elucidate the significance of this decision in the context of international trends concerning legal disputes over cultural property. To achieve this, we will first outline the emergence of cultural heritage law within human rights instruments. Our analysis will then highlight critical issues addressed by the Court in *Getty v. Italy*, including the assessment of export regulations, the enforceability of national provisions aimed at protecting cultural heritage and the temporal scope of such regulations. Finally, we will underscore the broader significance of the decision.

Keywords: *Getty v Italy*, European Court of Human Rights, right to property, cultural property, cultural heritage, restitution

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¹ *The J Paul Getty Trust and Others v Italy*, no. 35271/19, ECHR 2024-V.

I Introduction

Italy's fifty-five-year effort to reclaim the ancient Greek bronze statue known as the *Victorious Youth* reflects a longstanding commitment to recovering cultural heritage artefacts.² Attributed to the Greek sculptor Lysippus, this remarkable relic dates back to the fourth century BC. Italian fishermen discovered it in the international waters between Italy and Yugoslavia in 1964. Soon afterwards, the bronze left Italy and passed through several hands before being acquired by the J. Paul Getty Trust in 1977, despite lingering questions over its legal status.³ At that time, the criminal proceedings against the purchasers had concluded without establishing that they had been involved in any illegal export, as there was 'no direct and convincing evidence of the origin and location of the discovery of the Statue [...]'.⁴

In 1989, Italy requested the return of the sculpture on ethical grounds, arguing that it had become Italian when it was captured in the fishermen's net and had been illegally exported. The Italian authorities made multiple attempts to recover it, and it became a symbol of the ongoing restitution disputes between museums and countries of origin. Ultimately, in 2019, the Court of Cassation of Italy issued a confiscation order.

Following decades of out-of-court negotiations and the court proceedings in Italy, the case was eventually submitted to the ECHR. The Getty Trust showed no willingness to negotiate with the Italian authorities, and the enforcement of the National Stolen Property Act concerning the statue was approaching an uncertain outcome.⁵

² For the background to the negotiations, and the challenges to the enforcement of foreign decisions, see: Derek Fincham, 'Transnational Forfeiture of the Getty Bronze' [2014] *Cardozo Arts and Entertainment Law Journal* 471, DOI: https://doi.org/10.1163/9789004280540_017

³ Given that Italian court rulings had concluded that Italian ownership could not be established, as the statue had been caught in the net of Italian fishermen in international waters rather than within Italian territorial waters, the Getty Trust did not perceive that there were any issues with the acquisition. Jeanine M. Cryan, 'The Battle of the Bronze: International Law and the Restitution of Cultural Property' (2019) 47 (1) *Syracuse Journal of International Law and Commerce* 173, 178–179.

⁴ See (n 1) § 14. The claim was based on a 1939 law asserting that the Italian state possesses ownership of all cultural property found within its territory. Proceedings were brought against the purchasers for receiving and handling stolen goods in connection with the theft of a protected archaeological object belonging to the State. This charge presupposed that the object had been unlawfully taken from Italian territory.

⁵ The Italian government could have requested that the US courts enforce the Italian cultural patrimony laws on American territory in accordance with the National Stolen Property Act. In order to establish the illegal export or trafficking of stolen goods, which carries a minimum sentence of ten years in prison, the Italian government would have needed to prove in the proceedings that the statue was considered stolen under US law and that ownership belonged to the Italian state. See Alessandro Chechi, Raphael Contel, Marc-André Renold, 'Case Victorious Youth – Italy v. J. Paul Getty Museum' Platform ArThemis, unige.ch/art-adr, Art-Law Centre, University of Geneva. One objection to enforcement under the National Stolen Property Act was that the contested statue had never been in the actual possession of the Italian state, and no evidence confirmed its discovery within Italy's borders. Furthermore, there had been no convictions for theft or unlawful export. US courts are generally hesitant about applying foreign nations' export laws that grant exclusive ownership

The Trust contended that the confiscation order issued by the Italian courts infringed its right to the possession and peaceful enjoyment of its property, as guaranteed by Art. 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). Additionally, it claimed that the confiscation measure was unlawful according to this provision because of the lack of foreseeability regarding its legal basis. Furthermore, the Trust argued that the confiscation order did not serve a legitimate purpose, as the Victorious Youth was not part of Italy's cultural heritage.

The legal battle concluded on 2 May 2024, when the ECHR unanimously ruled that there had been no violation of Art. 1 of Protocol No. 1 to the Convention. This study aims to elucidate the significance of this decision in the context of international trends concerning legal disputes over cultural property. To achieve this, we will first outline the emergence of cultural heritage law within human rights instruments and then provide an analysis of the ECHR's ruling in *Getty v Italy*. Our analysis will highlight critical issues addressed by the Court, which have also been contentious points in prior case law related to the restitution of cultural property, including the assessment of export regulations, the enforceability of national provisions aimed at protecting cultural heritage and the temporal scope of such regulations. Finally, we will underscore the broader significance of the decision.

II The Right to Cultural Heritage as a Human Right

The field of the law on cultural goods is undeniably linked to human rights law. The right to cultural heritage encompasses the enjoyment of the intangible value of cultural heritage possessed by individuals, communities, nations and the public.⁶ Since the first international human rights conventions in the post-war period, cultural heritage has been framed within the context of human rights. The Universal Declaration of Human Rights (1948) states that 'everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits'.⁷ Moreover, the engagement of the United Nations in this area is crucial. The establishment of the International Covenant on Economic, Social and Cultural Rights in 1966 recognised, with binding effect, the right of everyone to participate in cultural life.⁸ The 1948 Declaration was supplemented by the 1966 International Covenant on Civil and Political Rights, the International Covenant on

of archaeological troves to states. The enforcement of other states' export regulations is most assured when these provisions are also reflected in American import laws. Alessandra Lanciotti, 'Claiming Restitution of Underwater Cultural Heritage: The Getty Bronze Case' (2021) 50 (2) *Gdanskie Studie Prawnicze* 68, 75–78.

⁶ Ding Guangyu, 'Cultural Heritage Rights and Rights Related to Cultural Heritage: A Review of the Cultural Heritage Rights System' (2023) 9 (2) *Santander Art and Culture Law Review* 167, 187, DOI: <https://doi.org/10.4467/2450050XSNR.23.027.18647>

⁷ Universal Declaration of Human Rights, UN Doc A/RES/217(III) (10 Dec 1948) Art. 27(1).

⁸ International Covenant on Economic, Social and Cultural Rights, UN Doc A/RES/2200A(XXI) (16 Dec 1966) Art. 15(1)(a).

Economic, Social and Cultural Rights and a series of other multilateral treaties with legally binding force.⁹ The UN Special Rapporteur in the Field of Cultural Rights, initially appointed as an Independent Expert in 2009 and later granted the status of Special Rapporteur, works to enhance the visibility of cultural rights within the human rights framework, with support from UNESCO. The UN General Assembly has also acknowledged the protection of cultural property as a human rights issue; a sentiment echoed in the resolutions of the Human Rights Council.¹⁰ It is important to note that the terminology used in international documents is multifaceted, encompassing various specific rights, including the right to access, protect and enjoy cultural heritage.¹¹

Parallel to the UN human rights treaty system, a series of regional human rights agreements has emerged, the most significant of which is the Convention. Although the right to culture is not explicitly stated in the Convention,¹² a substantial body of case law has developed in this area. These cases vary in nature, as they address the conflict between state measures aimed at protecting cultural goods and the property interests of owners.¹³

It is essential to emphasise the interdependent nature of cultural heritage law as a human right: its implementation typically occurs in conjunction with other rights. In this context, the ECHR has recognised several substantive rights, which can be categorised as rights with a cultural dimension or related to cultural heritage. However, state measures aimed at protecting cultural goods often infringe upon private parties' rights to peacefully enjoy their possessions and must therefore adhere to the provisions of Art. 1 of Protocol No. 1 to the Convention.¹⁴ This article reads as follows:

⁹ Mark Hirschboeck, 'Conceptualizing the Relationship between International Human Rights Law and Private International Law' (2019) 60 (1) Harvard International Law Journal 181, 185.

¹⁰ For details, see Evelien Campfens and others, 'Protecting Cultural Heritage from Armed Conflicts in Ukraine and Beyond' European Union, Policy Department for Structural and Cohesion Policies Directorate-General for Internal Policies, PE 733.120, March 2023, 27–29. Additionally, the UNESCO World Conference on Cultural Policies and Sustainable Development (MONDIACULT 2022) and Art. 15 of the Committee on Economic, Social and Cultural Rights, General Comment No. 21, can also be noted.

¹¹ The scope of this right is therefore closely shaped by the specific context of each case in which an individual seeks legal protection of their interests. Mateusz Bieczyński, 'The "Right to Cultural Heritage" in the European Union: A Tale of Two Courts' in Andrzej Jakubowski, Kristin Hausler, Francesca Fiorentini (eds), *Cultural Heritage in the European Union. A Critical Inquiry into Law and Policy* (Brill NV 2019, Leiden) 114, DOI: <https://doi.org/10.1163/9789004365346>

¹² Andrzej Jakubowski, 'Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights' in Andreas Joh. Wiesand and others (eds), *Culture and Human Rights: The Wroclaw Commentaries* (De Gruyter 2016, Berlin) 156, DOI: <https://doi.org/10.1515/9783110432251>

¹³ Fabian Michl, 'The Protection of Cultural Goods and the Right to Property Under the ECHR' in Evelyn Lagrange, Stefan Oeter and Robert Uerpman-Witzack (eds), *Cultural Heritage and International Law. Objects, Means and Ends of International Protection* (Springer 2018) 110, DOI: <https://doi.org/10.1007/978-3-319-78789-3>

¹⁴ Tamás Szabados, 'Right to Property and Cultural Heritage Protection in the Light of the Practice of the European Court of Human Rights' (2022) 3 (2) Central European Journal of Comparative Law 159, DOI: <https://doi.org/10.47078/2022.2.159-181>

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.'

In several rulings, the Court has elaborated on the specific requirements associated with the right to property. Art. 1 of Protocol No. 1 establishes two fundamental conditions that must be met if a person is to be deprived of property: the existence of a public interest and compliance with the substantive and procedural requirements of the law.¹⁵ These requirements have three components. The first establishes the protection of property, as outlined in the first sentence of Art. 1 of Protocol 1. Any limitation imposed on property rights must be assessed considering this initial principle, which serves as the cornerstone of property protection. The second component addresses the deprivation of property. It is worth noting that the ECHR has long maintained that this provision is merely a particular instance of a general rule. Consequently, the Court did not delve into this aspect in the case under review. The third component pertains to the regulation of property use.¹⁶ This requirement ultimately leads to a proportionality test, which the Court has applied with varying degrees of rigour, allowing for the margin of appreciation that a state may exercise in an individual case.¹⁷

Although the ECHR has asserted that Art. 1 of Protocol 1 covers the three aforementioned rules, it has also clarified that these rules should not be considered in isolation; rather, they collectively constitute a unified concept of property protection.¹⁸

III Key Elements of the Reasoning

In addressing the issue, the Court assessed whether the Italian regulation was in alignment with the general principles outlined in Art. 1 of Protocol No. 1 of the Convention, focusing on three criteria: lawfulness, alignment with the public interest and proportionality.

In *Getty v. Italy*, questions arose that are typical of those that are encountered in matters relating to cultural heritage within the ECHR's case law. These included the temporal scope of relevant international conventions and protective legislation, the determination of

¹⁵ Michl (n 13) 109.

¹⁶ See (n 1) § 277.

¹⁷ Michl (n 13) 113.

¹⁸ Michael Rikon, 'Property Rights as Defined and Protected by International Courts' (2017) 6 Brigham-Kanner Property Rights Conference Journal 329, 333–334.

whether a particular artefact constitutes part of a country's cultural heritage, and the degree of diligence required from the parties involved. Building on this perspective, the following section will examine the key cornerstones of the Court's reasoning.

1 Lawfulness: Export Provisions

The assessment of whether an intervention by a public authority in the peaceful enjoyment of possessions is lawful is primarily concerned with compliance with the requirements of Art. 1 of Protocol No. 1. To comply with the principle of lawfulness, states must not only respect and apply their enacted laws in a foreseeable and consistent manner but must also ensure the necessary legal and practical conditions for their implementation. The legal basis must, therefore, be sufficiently accessible, precisely applicable, and aligned with the rule of law while also ensuring adequate procedural safeguards against arbitrariness.¹⁹

When the Court evaluated lawfulness in this case, it examined the Italian decision to issue a confiscation order. This confiscation order was grounded in the following provisions of Italian law: the regulation prohibiting illegal exports, the rule mandating notification to the relevant authorities upon discovery, and the import regulations stemming from the circumstances surrounding the finding.²⁰

The Getty Trust argued that the Italian regulation underlying the confiscation decision lacked clarity and foreseeability. The ECHR, in this regard, examined whether confiscation can be applied even if there has been no judicial finding of an underlying criminal offence – the offence of the unlawful export of cultural property – and whether its statute of limitations can be established. In this context, it emphasised that 'these types of confiscation, whether or not meted out by courts of criminal jurisdiction, [... are] restorative in nature'.²¹ Since the aim of the measure in question is the recovery of the object in the public interest, confiscation can be applied even if the third party possessing the object has not participated in criminal proceedings.

In the Court's case law, a crucial aspect is often whether the party defending their right to the peaceful enjoyment of property can be considered its lawful possessor.²² In this instance, however, the Court found it unnecessary to examine this question, focusing instead on national legislation prohibiting the export of items considered to be cultural heritage. In the context of this case, it was sufficient for the application of the measure that the fact of the unlawfully acquired possession had been objectively established.²³ Since the

¹⁹ See (n 1) § 294.

²⁰ See (n 1) § 116.

²¹ See (n 1) § 312.

²² The concept of possessions in Art. 1 of Protocol No. 1 has an autonomous meaning. For an overview of the Court's case law, see: ECtHR Research Division, 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights – Protection of Property' (2022) 7–10.

²³ See (n 1) § 313.

aim of the confiscation order was to regain control over objects that were owned by the state, the Court considered that the measure was 'consistent with the essence of the provision and could therefore have been reasonably foreseen'.²⁴

This very approach can be considered novel, as there are no cases in the Court's jurisprudence that challenge the legality of restrictions imposed on the export of cultural goods. However, as Jakubowski points out, such controls may represent a significant interference with an individual's right to use and enjoy their property.²⁵ On the other hand, this pertains to the primary issue discussed in the academic literature on the legal aspects of cultural property.²⁶ Restrictions imposed on the transfer of cultural materials, and particularly on their export abroad, represent a critical area in which national and international frameworks for the protection and preservation of cultural heritage are frequently in conflict.²⁷

Regarding the applicant's complaint concerning the absence of a time limit for enforcing the measure, the Court referred to its previous ruling, stating that a domestic legal provision may fail to satisfy the requirement of foreseeability if it does not establish a time limit for the exercise of certain powers or actions by the authorities.²⁸ As for the statute of limitations, the Court noted that states have a wide margin of appreciation in cultural heritage matters and that the absence of a statute of limitations is a distinctive characteristic of many countries' regulations for cultural heritage protection. The lack of a time limit did not automatically imply that the interference was unforeseeable or arbitrary.²⁹

2 Public Interest: The Protection of Cultural Heritage as a Legitimate Interest

Any interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public interest, as the principle of fair balance – fundamental to Art. 1 of Protocol No. 1 – implicitly requires a broader community interest.

The ECHR, in its examination, considered the general principles of international law and the Convention's 'living' nature, which allows the Court to account for evolving national and international legal developments.³⁰

The Court considers the protection of cultural and artistic heritage a legitimate aim under the Convention, acknowledging the national authorities' margin of appreciation in defining the community's general interest.³¹ This protection ensures not only the

²⁴ See (n 1) § 316.

²⁵ Jakubowski (n 12) 167.

²⁶ Szabados (n 14) 324.

²⁷ Jakubowski (n 12) 164.

²⁸ See (n 1) § 321.

²⁹ See (n 1) § 324.

³⁰ See (n 1) § 338.

³¹ See (n 1) § 340.

preservation of historical, cultural and artistic roots but also promotes public access to cultural works, underscoring the essential role of public authorities in safeguarding heritage against unlawful export and facilitating its recovery when necessary.³²

This point is illustrated by the case of *Beyeler v Italy*, in which the European Court examined Art. 1 of Protocol No. 1 in relation to state-imposed restrictions on transferring movable cultural property.³³ In this case, the applicant, a private Swiss individual, had purchased a van Gogh painting in 1977 from an Italian collector. The Italian state held a right of pre-emption over the painting under national heritage legislation that was intended to protect cultural and artistic assets. The facts were that the owner had not fully complied with the notification obligations to the Italian authorities, and nor had the authorities exercised their rights in a reasonable timeframe. The central issue was whether Italy's restriction on the transfer was proportionate.³⁴ Despite concluding that Italy's interference, based on the right of pre-emption, was disproportionate to the applicant's right to peaceful enjoyment of possession, the Court recognised that national controls over transfers of cultural objects serve the legitimate purpose of preserving the state's cultural heritage, consistent with Art. 1 of Protocol No. 1.³⁵

In *Beyeler*, the ECHR acknowledged that state regulation of the art market served the legitimate aim of preserving national cultural heritage. Although van Gogh's painting had been created in France, the Court recognised the legitimacy of Italy's efforts to facilitate public access to artworks lawfully located within its borders as part of the shared cultural heritage.³⁶

When considering in *Getty v. Italy* whether the measure served the public interest in protecting cultural heritage, the Court noted that national authorities generally have a broad margin of discretion in assessing the general interest, especially in cultural heritage matters.³⁷ The Court defers to domestic authorities' judgments unless it finds such assessments to be manifestly unreasonable.³⁸ The Court found that the domestic authorities

³² Ibid.

³³ *Case of Beyeler v Italy*, no. 33202/96, ECHR 2000-I.

³⁴ Michl (n 13) 113–114.

³⁵ Szabados (n 14) 168.

³⁶ See (n 33) § 113.

³⁷ As for the location of discovery of the statue, its relevance lay in whether the statue belonged to Italy. The Court held that the vague circumstances of the statue's discovery were not decisive. The Italian court clarified that the statue was considered part of Italy's cultural heritage and, as such, belonged to the state. The court emphasized that the statue had been discovered by a vessel flying the Italian flag and was later brought into Italy without the required reporting. Consequently, the legitimacy of the measures taken in response to these circumstances could not be called into question. Under Italian regulations, unlawful export measures can also apply to privately owned objects, which, despite their cultural significance, are exported without compliance with the relevant customs procedures. See (n 1) § 357.

³⁸ See (n 1) § 347.

had reasonably demonstrated that the aim of the measure was to protect cultural heritage, with no indication of manifest error or arbitrariness in its application.³⁹

3 Proportionality: Temporal Evolution of Legal Expectations

In the ECHR's practice, the principle of proportionality requires public authorities to balance competing public and private interests in cases involving cultural property.⁴⁰ In *Getty v Italy*, the Court assessed the applicant's due diligence, whether the response of the domestic authorities was timely and consistent, and whether the lack of compensation imposed an excessive burden on the applicant.

The owner's behaviour was deemed an important issue in the Court's evaluation within the overall context. The Court ascertained whether the domestic authorities had investigated the available evidence regarding the applicant's negligence and whether the applicant had access to remedies to defend their position. The Court decided both questions in the affirmative, concluding that the Getty Trust representatives had compelling grounds to question the statue's legitimate provenance.⁴¹

The Court found that the Getty Trust representatives had not conducted a thorough and objective assessment of the statue's provenance. Moreover, they had not requested, and nor did the suppliers provide, evidence of the lawful export of the statue from Italy, despite their awareness of relevant domestic regulations requiring an export permit. Legal scholars question the fairness of applying today's due diligence standards to acquisitions made decades ago.⁴²

The market for cultural objects is a unique one. There is no established rule or custom that defines the exact elements of provenance or sets a standard for how museums, traders, or buyers should conduct provenance research. Without concrete guidelines, opinions vary widely regarding addressing gaps in ownership records and the historical depth needed for clear title.⁴³ Since the provenance of many items remains uncertain,⁴⁴ there is a continual risk of restitution claims. Consequently, the standards of due diligence in this field are shaped by

³⁹ See (n 1) § 359.

⁴⁰ For more on this consideration, see Kristina Trykhlil, 'The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights' (2020) 4 EU and Comparative Law Issues and Challenges Series 129, DOI: <https://doi.org/10.25234/eclic/11899>

⁴¹ See (n 1) § 390.

⁴² Evelien Campfens, 'The Restitution of Cultural Heritage', presentation at 'International Cultural Heritage Law' training provided by the British Institute of International and Comparative Law, 21 October 2024.

⁴³ For the same argument, see Carrie Betts, 'Enforcement of Foreign Cultural Patrimony Laws in U.S. Courts: Lessons for Museums from the Getty Trial and Cultural Partnership Agreements of 2006' (2007) 4 (1) South Carolina Journal of International Law and Business 73, 74–75.

⁴⁴ As Gerstenblith notes, it is estimated that approximately 80 to 90 per cent of the antiquities on the market lack sufficient provenance: Patty Gerstenblith, 'Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past' (2007–2008) 8 (1) Chicago Journal of International Law 169, 178.

specific circumstances, and despite the increasing adoption of soft law recommendations in the area,⁴⁵ court reasoning on these matters still appears unpredictable.

In terms of the second aspect of the proportionality assessment, the Court determined that the conduct of the Italian authorities could not raise any doubts within the Getty Trust regarding Italy's intention to recover the statue or the accusation of failing to pay customs export duties.⁴⁶ The Court noted that, unlike in the *Beyeler* case, there was no clear determination of the possessor's ownership status; there were occasional errors by the domestic authorities in responding to the applicant's actions. The Court noted that the Italian authorities were acting in the absence of a clear legal framework, as no international legal instruments were in force at the time to support their efforts in reclaiming unlawfully exported cultural property.⁴⁷

As for the third aspect of the proportionality test, even assuming that the Getty Trust had acquired valid ownership, which was strongly disputed, the Court held that the applicant must have been aware that no compensation is granted for enforcement measures against owners deemed to have acted in bad faith or negligently. The applicant's careless purchase of the statue, without evidence of its lawful provenance and despite being aware of the Italian authorities' claims, demonstrated a disregard for legal requirements. Consequently, the Court believed that the applicant tacitly accepted the risk of confiscation without compensation, and thus, the Court considered the lack of compensation to be not disproportionate considering the public interest at stake.⁴⁸

IV The Significance of the Decision

The approach to the origins of cultural property is today shifting, and the change is resonating through the entire international legal landscape. The role of museums is also evolving; restitution gestures covered in the press and soft law due diligence recommendations bear witness to this transformation. However, certain longstanding legal disputes over specific artefacts remain unresolved. This is the case with the Parthenon Marbles and the Victorious Youth statue. For many decades, a dialogue – alternately tense and constructive – unfolded

⁴⁵ International Council of Museums (ICOM), 'Standards on Accessioning of the International Council of Museums' 2019. CAMD, CAAMD, ICOM Australia, Museums Australia, 'Ethics and Provenance in Collections Acquisitions' 2014. Nancy Yeide, Konstantin Akinsha, Amy Walsh, 'American Alliance of Museums: Guide to Provenance Research' (American Alliance of Museums 2001, Washington D.C.).

⁴⁶ See (n 1) § 392.

⁴⁷ The passage of time frequently emerges as a contentious issue in disputes over cultural objects with uncertain provenance. Ownership claims regarding such objects are often deemed inadmissible in the regular courts, making human rights law principles increasingly significant. Evelien Campfens, 'Restitution of Looted Art: What About Access to Justice?' (2018) 4 (2) *Santander Art and Culture Law Review* 185, 211, DOI: <https://doi.org/10.4467/2450050XSNR.18.024.10378>

⁴⁸ See (n 1) § 401–404.

between the Getty Trust and Italy regarding the fate of unlawfully exported cultural assets.⁴⁹ As Fincham stated in 2019, '[i]n the press and in cultural property circles, the Bronze is considered nearly un-repatriatable given this convoluted history'.⁵⁰

In recent decades, there has been a noticeable increase in states' activity regarding the ratification of international agreements aimed at protecting cultural property, as well as other forms of cooperation with other countries. The effectiveness of applicable domestic laws is constrained without the cooperation of other states and the broader international community.⁵¹ This international collaboration has proceeded in parallel with advances in human rights law, inevitably shaping and redefining initiatives aimed at combatting the illicit trafficking of cultural goods.⁵²

Discussions on the restitution of cultural property often frame the issue as a conflict between, in Merryman's terms, 'cultural nationalism' and 'cultural internationalism'.⁵³ These conflicting perspectives raise the question of whether cultural heritage objects should be repatriated to their countries of origin or remain globally dispersed, based on broader guiding principles.⁵⁴ This decision highlights the fact that states enjoy substantial discretion in defining measures to safeguard their cultural heritage. Examining the history of an object and the context of its discovery raises a fundamental question: can everything that has ever left a country without a license be rightfully reclaimed? The Bronze, found in international waters, is thought to have first entered Italian territory when it was accidentally caught in a fishing trawler's nets, complicating the traditional ethical and moral foundation typically underpinning restitution claims.⁵⁵

Restitution disputes typically arise from past injustices, which complicate the legal assessment of ownership.⁵⁶ If the object was stolen from its original owner – whether

⁴⁹ Cryan (n 3) 174.

⁵⁰ Fincham (n 2) 101.

⁵¹ Ana Filipa Vrdoljak, 'Human Rights and Illicit Trade in Cultural Objects' in Silvia Borelli, Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law* (Nijhoff 2012, Leiden) 107, DOI: https://doi.org/10.1163/9789004228382_006

⁵² Vrdoljak (n 51) 108.

⁵³ John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 (4) *American Journal of International Law* 831, DOI: <https://doi.org/10.2307/2202065>

⁵⁴ Pauno Soirila, 'Indeterminacy in the Cultural Property Restitution Debate' (2022) 28 (1) *International Journal of Cultural Policy* 1, DOI: <https://doi.org/10.1080/10286632.2021.1908275>

⁵⁵ Luis Li Munger, Amelia L. B. Sargent, 'The Getty Bronze and the Limits of Restitution' (2017) 20 (1) *Chapman Law Review* 25, 45–46.

⁵⁶ The role of morality in restitution proceedings has been widely examined, with arguments both supporting and opposing its use. Nonetheless, it remains evident that moral considerations influence case outcomes and are reflected in various soft law instruments. See: John H. Merryman, 'Thinking About the Elgin Marbles' (1985) 83 (8) *Michigan Law Review*, DOI: <https://doi.org/10.2307/1288954>; Lyndel V. Prott, 'Epilogue' in Brigitta Hauser-Schäublin, Lyndel V. Prott (eds), *Cultural Property and Contested Ownership. The trafficking of Artefacts and the Quest for Restitution* (Routledge 2016, Abingdon) 210–212, DOI: <https://doi.org/10.4324/9781315642048>; Debbie De Girolamo, 'The Conflation of Morality and "the Fair and Just Solution" in the Determination of Restitution Claims Involving Nazi-Looted Art: An Unsatisfactory Premise in Need of Change' (2019) 26

a private individual or a museum – and ended up with a bona fide purchaser through a chain of transactions, the dispute is essentially between ‘two innocent parties’.⁵⁷ If the object was removed from a state’s territory through illegal excavations or wartime looting or was taken in the course of colonial annexation, the moral grounds for the state of origin’s ownership claim tend to be stronger.⁵⁸ Legally, the situation is somewhat simpler in such cases if the public-law rules prohibiting export were already in force in the state of origin, and the object’s cultural and historical characteristics clearly connect it to that country.⁵⁹ In the current case, the statue’s connection to Italy emerged when Italy declared it part of its cultural heritage under heritage protection regulations in force at the time of discovery. The mere fact that an Italian-flagged vessel retrieved it from the high seas, thereby subjecting it to Italy’s heritage protection rules, was not deemed decisive by the court. Even if public law provisions formally establish such a link, the moral basis that usually underpins restitution claims is less clear-cut in this instance. This gives rise to a potential set of problems: if another claimant emerges at a later stage – for instance, the Greek government, which may have a stronger connection to the artefact – the court could face significant challenges in resolving the matter.⁶⁰

Viewed within this framework, the decision can be aligned with a step towards cultural internationalism. Jakubowski described the ECHR system as a ‘living’, ever-evolving organism.⁶¹ Although there may be no hierarchy among human rights norms, their articulation in various instruments often provides a pathway for resolving perceived conflicts.⁶² The Court’s prior decisions reflect a trend that recognises the public interest

(4) International Journal of Cultural Property, DOI: <http://10.1017/S0940739119000316>; Evelien Campfens, ‘The Bangwa Queen: Artifact or Heritage?’ (2019) 26 (1) International Journal of Cultural Property, DOI: <http://10.1017/S0940739119000043>

⁵⁷ Derek Fincham, ‘How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property’ (2008–2009) 32 (1) The Columbia Journal of Law & the Arts 32, 150.

⁵⁸ Stahn Carsten, *Confronting Colonial Objects: Histories, Legalities, and Access to Culture. Cultural Heritage Law and Policy* (Oxford Academic 2023, Oxford) 414–415, DOI: <https://doi.org/10.1093/oso/9780192868121.001.0001>

⁵⁹ It should be noted that, despite the clarity of ownership regulations and the likelihood of cultural affiliation, the state of origin often fails to substantiate its ownership claim before the court. See the case of the Sevso Treasure: Vanda Vadász, ‘Lessons of the Sevso Case – Restitution Challenges of Illegally Exported Cultural Property’ in Marcel Szabó, Petra Lea Lángos, Réka Varga (eds), *Hungarian Yearbook of International Law and European Law 2016* (Eleven International Publishing 2017, The Hague) 39–58, DOI: <https://doi.org/10.5553/HYIEL/266627012016004001003>

⁶⁰ A similar issue was encountered in Hungarian practice when the scope of claimants involved in the restitution of cultural objects held in public collections was expanded: claimants were only required to provide a likelihood of ownership, making the verification of numerous ‘probable owners’ an almost Herculean task. The regulation has since been amended. See: Vanda Vadász, Viktória Verebélyi, ‘At the Borderline of Public and Private Law: The Restitution of Cultural Property Held in Public Collections in Hungary’ (2024) 10 (2) Santander Art and Culture Law Review 186–193, DOI: <https://doi.org/10.4467/2450050XSNR.24.017.20828>

⁶¹ Jakubowski (n 12) 158.

⁶² Vrdoljak (n 51) 127.

in protecting cultural heritage as a legitimate aim,⁶³ even when it encroaches on individual property rights.⁶⁴ However, it is crucial to recognise that the primary justification for restrictions on the export of cultural objects, along with other limits on property disposal rights, is increasingly associated with upholding collective rights to access and enjoy cultural heritage rather than solely with the state-oriented interest of preserving its cultural wealth.⁶⁵

⁶³ ECHR case law has traditionally granted states significant discretion in determining how to protect cultural goods. When the Court has found violations of Art. 1 of Protocol No. 1, the reason has not been an illegitimate aim but rather an unsuitable method employed in pursuing this aim. Michl (n 13) 126.

⁶⁴ Jakubowski (n 12) 160.

⁶⁵ Jakubowski (n 12) 164.

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