https://doi.org/10.12697/JI.2023.32.00

Dear reader,

This year's *Juridica International* compendium offers articles on a wide variety of topics. From an initial glance, the problems tackled in those articles might not seem to have so much in common. Yet, even though offering windows to several quite distinct cross-sections of legal scholarship, many of the pieces, upon a closer look, reveal themselves to be very much interrelated. One notices that most of them share a theme of concern arising from crises in society that have recently come to a head, with a leitmotif of concern for the future and of venturing into unknowns – a backdrop so familiar to us these days' that we might not even recognise its peculiarity.

Contemporary times are marked by complex global developments such as the pandemic, the ongoing wars in Ukraine and of Israel/Hamas, a still very much unwritten future of AI influencing all aspects of life, etc. In times such as these, the law assumes a critical role in shaping not only our current doings but the course of human affairs far further down the line as well.

The corresponding concern for our global future can be characterised as underpinning this edition from its very first article, a paper whereby Astrid Stadler calls on the courts to save the climate. The same focus could be ascribed to the examination of sensitive health data's application as presented from research by Maret Kruus and the analysis penned by Kai Härmand examining AI's impact on judicial action. Their scholarship silently invites us to ponder the profound influence that the judiciary and the legislature can have on the future. Furthermore, the need to accommodate in the manner most beneficial for society and for every individual alike seems to give significant impetus for such research. The article by Jānis Neimanis on recent Latvian Constitutional Court case-law reflects concerns of a similar nature, via illustrations from the response to SARS-CoV-2, empowerment of marginalised groups, and protection of democracy.

While the work of Neimanis demonstrates how legal response may manifest a balancing act between individuals' rights and the broader public good, other pandemic-related articles analyse the angle of palliative efforts by national legislators or simply struggles for efficiency within the complicated field of public procurement in crisis-ridden times. The piece by Şimal Efsane Erdoğan and Oana Ştefan and that by Raquel Carvalho, in turn, allow us to compare national reactions in this regard. I am immensely pleased to note that these articles reflect fruitful discussion of public procurement in times of crisis from a highly successful conference held on this topic at the University of Tartu's School of law last January.

Finally but surely not least, I stress that I in no way wish to underestimate articles that, by dealing with somewhat more stability-rooted aspects of jurisprudence, are centred less on crises or struggles. Age Värv writing about the role of foreign sources in Estonian case-law; Aleksei Kelli, Margus Pedaste, and Äli Leijen providing a most interesting empirical view of the so-called education exception to copyright (a subject every academic certainly has come in contact with); the analysis Eneli Laurits provides of protecting privacy in certain criminal investigations; eyewitness identification as revisited comprehensively by Annegrete Palu and Anneli Soo; and, finally, the description of a 'super-judge' safeguarding such realms, by Julia Laffranque, offer plenty of hearty food for legal thought.

I extend my warmest thanks to all of the authors for addressing these difficult topics, thus advancing legal scholarship and, through their contribution, serving the common good.

Mari Ann Simovart
Associate Professor University of Tartu

Contents

https://doi.org/10.12697/JI.2023.32.01

Astrid Stadler

Professor, Dr. Dr.h.c.
University of Konstanz

Can Civil Courts Save the Climate? Strategic Climate-change Litigation Before Civil Courts[*1]

Abstract. Climate change is an urgent global problem, and national legislatures must enhance their efforts to reduce carbon dioxide emissions drastically. Individuals and NGOs have filed public law actions against national legislators before international courts (prominently the ECHR) and several constitutional courts to allege violations of constitutional and human rights. In a more recent development, civil courts too are being seized with climate-change litigation. In 2021, a Dutch court ruling on an action by an NGO against the Royal Dutch Shell Group held that Shell is obliged to reduce its CO_2 emissions considerably. This judgment, based on the Dutch Civil Code's general tort regulations, has triggered a wave of similar actions before German courts. Such cases of individual plaintiffs, supported by NGOs, suing private companies for damages or for an immediate reduction of emissions are examples of 'strategic litigation' aimed at bringing about broad societal changes beyond the scope of the individual case at hand. The article analyses the political implications, tackles the question of whether general tort law is a suitable instrument to address the climate-change problem, and discusses how civil courts may handle these cases. Climate change is a complex, multi-stakeholder issue that requires a difficult process of balancing social, legal, and economic interests – which is the task of democratically legitimised parliaments, not primarily a task of courts.

Keywords: climate-change litigation, tort law, causality of emissions, human rights, political questions doctrine

I. Introduction

As the world's first carbon market and a major one, the EU is a key contributor when it comes to greenhouse gas emissions. After years of unheeded warnings from scientists, people in Europe have finally become aware of the need for an immediate response to the world's most threatening problem. Besides global efforts via recurring climate protection conferences, individuals and NGOs in increasing numbers

[1] The text is based on a presentation given at Tartu University on 10 May 2023 on the occasion of the conferment of an honorary doctorate.

are demonstrating dissatisfaction with national efforts and are becoming active in so-called climate-change litigation. The phenomenon covers all kinds of lawsuits, before various types of courts.

Today, there are hundreds of lawsuits against public entities, all over the world, based on the allegation that they do not actively participate in a global effort for reduction of the carbon impact and thus violate constitutional and human rights.[*2] The European Court of Human Rights and several constitutional courts have dealt with actions to force national legislatures to enhance their efforts.[*3] It is, however, a more recent phenomenon for NGOs and/or individuals to sue private companies. This paper focuses primarily on these private lawsuits, which follow two distinct patterns:

(1) A few cases follow from actually suffered damages or costs, and claimants sue companies for compensation. This is the situation in, for example, a lawsuit initiated by a Peruvian farmer against big German energy supplier RWE (Rheinisch-Westfälische Elektrizitätswerke), with its seat in Essen, Germany. The farmer is asking for compensation for costs because he needed to protect his house against the increasing amount of melt water from the surrounding glaciers in Peru. He holds that the defendant company is responsible for the climate change because RWE is the single largest contributor to greenhouse emissions in Europe. In 2016, the court of first instance dismissed the action, citing lack of causality, but in 2021[*4] the Court of Appeals (Oberlandesgericht Hamm) decided to take evidence and to travel to Peru for an on-site inspection together with several experts. We do not know what the Court of Appeals will decide in the end.

(2) The second group of cases are of a preventive or pro-active nature and are brought against big companies with the objective of obtaining a court order that obliges the defendant companies to reduce carbon dioxide emissions in order to prevent future harm. The most famous judgment in this regard is probably the decision of the Hague District Court of 26 May 2021 against the Royal Dutch Shell Group.[*5] The court considered the action, by Dutch NGO Milieudefensie, to be well-founded. According to the judgment, Shell has the obligation to reduce the carbon dioxide emissions of the Shell group's entire energy portfolio by 45% net by the end of 2030 relative to the 2019 level. The judgment was based on the general tort law regulations of the Dutch Civil Code.

We have seen similar civil proceedings before German courts recently. Since autumn 2021, the managing directors of Greenpeace and Deutsche Umwelthilfe, a very active environmental interest group, have launched five separate actions before German courts against the big car manufacturers BMW, Mercedes, and Volkswagen. In September 2022 and more recently, in February 2023, the district courts in Stuttgart[*6] and Braunschweig[*7] dismissed the actions against Mercedes and Volkswagen in the first instance. The plaintiffs had requested that the defendant be prohibited from selling vehicles with internal combustion engines after 2030 – definitely earlier that the time discussed at EU level (2035). The plaintiffs referred to a significant impact on his personal rights if drastic climate protection measures were not taken immediately. The first instance courts found that the consequences alleged by the plaintiff are still completely uncertain today.

In a similar lawsuit, before the District Court of Detmold, an organic farmer sued Volkswagen and requested an order obliging it to sell considerably fewer vehicles with internal combustion engines until 2029 and to refrain completely from selling gasoline-powered cars from 2030 on. On 24 February 2023, the court held that general tort law does not provide a legal basis for the claim and dismissed the action.[*8] The appeals court where the action is pending now is the same court that decided to take evidence in the Peruvian farmer's action (Oberlandesgericht Hamm). Hence, claimants may hope that the court will act in the same way here.

2 For an overview, see Marc-Philippe Weller and Mai-Lan Tran, 'Klimawandelklagen im Rechtsvergleich – private enforcement als weltweiter Trend?' [2021] ZEuP 573; Bernhard Wegener, 'Menschenrecht auf Klimaschutz? Grenzen grundrechtsgeschützter Klimaklagen gegen Staat und Private' (2022) NJW 425, 426.

3 For example, *Verein Klimaseniorinnen Schweiz v Schweiz*, no 53600/20 (ECHR, 17 March 2021) Communicated Case. Some databases collect data on ongoing litigation: Sabin Center for Climate Change Law, Columbia Law School, 'Global Climate Change Litigation' <http://climatecasechart.com/non-us-climate-change-litigation/> accessed 13 May 2023.

4 The delay in taking evidence was due to the pandemic, which did not allow travelling to Peru.

5 Rechtbank Den Haag ZUR 2021, 632 (*Shell*); see also Rechtbank Den Haag C/09/456689 / HA ZA 13-1396 (*Urgenda I*); Gerechtshof Den Haag, 9 October 2018 (*Urgenda II*) and Hoge Raad, 20 December 2019, 19/00135 (*Urgenda III*).

6 District Court Stuttgart [2022] NVwZ 1663.

7 District Court Braunschweig [2023] KlimR 88.

8 District Court Detmold, 24 February 2023, 1 O 199/21, becklink 2026249.

We can close the list of examples with the island of Pari: In February 2023, four islanders from Indonesia filed a complaint before a local court in Switzerland.*[9] The island, with 1,500 inhabitants, is in danger of sinking under the sea because of climate change. The defendant cement company, one of the world's largest emitters of carbon dioxide, is requested to reduce its emissions more quickly and more effectively.

Despite the dismissal of some of the actions in Germany, scholars have different opinions. Some argue that such cases have some or even good prospects on their merits*[10]; others believe that civil litigation is the wrong remedy as a matter of principle.*[11]

II. Civil courts as a forum for fighting climate change

Are civil courts the appropriate forum in which to fight climate change? The obvious answer seems to be 'no', but it is, of course, not that simple.*[12]

1. Strategic litigation – a misuse of civil courts?

The actions described are often labelled as 'strategic litigation' and are good examples of an increasing politicisation of civil litigation. They also sometimes face the criticism that they misuse or even abuse the civil court system for political or ideological purposes. Actions like the one brought by the Peruvian farmer against the German energy supplier RWE use individual claims to get access to courts while the real objective is to obtain media attention for a highly political topic and to pillory selected defendant companies. But the matter is not only about media attention and fuelling public debate; NGOs and climate activists will argue that successful private actions may indeed contribute – step by step – to a reduction of climate-damaging emissions and the carbon impact. The primary goal, however, still is to draw the public's attention to a problem that must be solved elsewhere. The European Center for Constitutional and Human Rights (ECCHR), which supports the lawsuit against RWE, states on its website:

> Strategic litigation aims to bring about broad societal changes beyond the scope of the individual case at hand. It aims to use legal means to tackle injustices that have not been adequately addressed in law or politics.*[13]

It is a widely accepted concept across Europe that the objective of civil litigation is the protection of individuals' rights, but that does not preclude plaintiffs from pursuing individual-level interests and at the same time a public interest. Anyone who has alleged a claim against the defendant can bring an action before civil courts. Civil courts are not allowed to question the claimant's motivation; they simply have to examine the statement of claim for its admissibility and merits. Let me give a simple example: If a landlord sues his tenant for pending rent payment, the court must not take into account whether the landlord does so because he needs the money or whether he simply wants to annoy his tenant. Therefore, in the case of the Peruvian farmer it is simply irrelevant whether the claimant and the NGOs behind him also have political or ideological motives to sue the German company. Therefore, the action is admissible, in principle.

---

9 'Inselbewohner verklagen Zementkonzern Holcim' <https://www.srf.ch/news/international/wegen-klimaschaeden-inselbewohner-verklagen-zementkonzern-holcim> accessed 15 May 2023.

10 Nils Schmidt-Ahrendts and Viktoria Schneider, 'Gerichtsverfahren zum Klimaschutz' [2022] NJW 3475 (criticising the decision of the Stuttgart District Court); Jan-Erik Schirmer, 'Haftung für künftige Klimaschäden' [2023] NJW 113; to some extent also Meik Thöne, 'Klimaschutz durch Haftungsrecht – vier Problemkreise' [2022] ZUR 323.

11 See, for example, Gerhard Wagner, 'Klimaschutz durch Gerichte' [2021] NJW 2256; Weller and Tran (n 2) 603 (on it not being justifiable with reference to climate change); Gerhard Wagner and Arvid Arntz, 'Liability for Climate Damages under the German Law of Torts' in Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (Nomos 2021) 405. – DOI: https://doi.org/10.5040/9781509948741.ch-020; Lutz Friedrich, 'Gemeinwohl vor Gericht: Chancen und Risiken öffentlich-rechtlicher 'Public Interest Litigation' [2021] DÖV 726; Bernhard W Wegener, 'Urgenda – Weltrettung per Gerichtsbeschluss?' [2019] ZUR 3, 10ff; Wolf Friedrich Spieth and Niclas Hellermann, 'Not kennt nicht nur ein Gebot – Verfassungsrechtliche Gewährleistungen im Zeichen von Corona-Pandemie und Klimawandel' [2020] NVwZ 1405, 1407.

12 Thöne (n 10) emphasises correctly that a distinction between admissibility and unsuitability of the actions is necessary.

13 ECCHR, 'Strategic Litigation' <https://www.ecchr.eu/en/glossary/strategic-litigation/> accessed 15 May 2023.

The situation before constitutional or administrative courts is somewhat different with respect to legal standing. Actions by individuals against agencies or public regulators are only admissible if the claimant is individually and currently affected by a public act or wrongdoing. Popular actions that exclusively pursue a public interest are normally not admissible, and only some associations and other organisations may bring lawsuits in a public interest – in limited cases and situations. Accordingly, constitutional courts across Europe have come to different results with respect to climate-change lawsuits against national legislatures. In 2021, the German Constitutional Court in a landmark decision affirmed the legal standing of a group of juvenile claimants and derived from the German Constitution an obligation of the legislator to limit global warming and climate change in order to protect human rights,[*14] while the court denied legal standing of an environmental protection group for reason of lack of individual-level concern. On the other hand, the Austrian Constitutional Court[*15] and the Swiss Federal Supreme Court[*16] completely dismissed complaints by individuals and NGOs as inadmissible, for lack of legal standing.[*17]

2. The political questions doctrine and judicial self-restraint

One popular argument against climate-change litigation runs as follows: 'One country alone cannot save the climate, let alone a single court decision.' This is, of course, correct, but it seems also to represent surrender to the insolubility of the so-called tragedy of the commons. However, this argument does point to the real heart of the problem. The effects of climate change are a mass example of the tragedy of the commons[*18], describing a situation in which individual users who have open access to a resource without being hampered by shared social structures or formal rules (such as fees or taxes) can act independently and, on the basis of their self-interest only, in a manner contrary to the common good of all users. The earth, being the commons, suffers globally through activities of individuals, companies, and governments. Mitigation of the long-term impacts may require strict controls or other solutions but in any case a joint effort of all countries. Public international treaties such as the Paris Climate Agreement adopted in 2015 at the UN Climate Change Conference provide only general political targets such as the long-term goal to keep the rise in mean global temperature to well below 2 °C above pre-industrial levels, preferably below 1.5 °C.

It is up to the signatory states to decide on action plans for reaching the agreed goals. Climate change is a complex, multi-stakeholder issue that requires a difficult process of balancing social, legal, and economic interests – which is the task of democratically legitimised legislatures and parliaments. Courts can only exercise control; they cannot take the initiative. This is the traditional distribution of tasks and power in the modern constitutional state.

Whether the global and quite complex problems of climate change are best dealt with exclusively by public law or, on the contrary, the non-climate-specific tort law could be invoked also, as exemplified by the Dutch Court in the *Shell* case, is the subject of global discussion. The Hague District Court explicitly denied the defendant's argument that the required decision goes beyond the lawmaking function of the court and that a solution must be provided instead by the legislator and politics.

14 German Constitutional Court (BVerfG) [2021] BeckRS 8946.

15 Austrian Constitutional Court (VfGH) 30.9.2020, G 144-145/2020. A new complaint was filed by children and young people (Fridays for Future) in February 2023, 'Neue Klimaklage: Zwölf Kinder und Jugendliche klagen beim Verfassungsgerichtshof gegen das unzureichende Klimaschutzgesetz' <https://www.ots.at/presseaussendung/OTS_20230221_OTS0008/neue-klimaklage-zwoelf-kinder-und-jugendliche-klagen-beim-verfassungsgerichtshof-gegen-das-unzureichende-klimaschutzgesetz> accessed 15 May 2023.

16 Schweizer Bundesgericht, 5.5.2020 – 1 C 37/2019. The European Court of Justice also denied the individual-level concern of private claimants in March 2021 in the context of actions for annulment against EU legal acts on reducing greenhouse gas emissions. Case C-565/19 P *Armando Carvalho v European Parliament and Council of the European Union* [2021] ECLI:EU:C:2021:252; Case T-330/18 Carvalho *v European Parliament and Council of the European Union* [2019] ECLI:EU:T:2019:342.

17 Although the human rights concept is originally one of individualistic legal protection of a private person against the state power, many authors accept the climate policy use of human rights and do not conclude that these are frivolous lawsuits. Instead, they sometimes talk about a 'human rights turn'; see Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation' [2018] Transnational Environmental Law 37. – DOI: https://doi.org/10.1017/s2047102517000292.

18 Named after an article by Garett Hardin published in *Science* in 1968.

In the US, where environmental groups have fought against global warming before federal courts for quite some time,[*19] courts may rely on the political questions doctrine.[*20] This doctrine is a somewhat shapeless concept. In essence, it can be understood to express the principle that some issues are either entrusted solely to another branch of government or beyond the competence of the judiciary to review. It limits the ability of federal courts to hear constitutional questions even in cases where requirements such as standing etc. are fulfilled. In 2020, the Ninth Circuit Court in *Juliana v. United States*[*21] had to decide on a climate-change action filed against the United States by an NGO and 18 young people claiming a violation of their constitutional rights to life, liberty, and property. The plaintiffs applied for an order compelling the United States 'to prepare and implement an enforceable national remedial plan, a comprehensive scheme, to phase out fossil fuel emissions and [...] stabilize the climate system'.[*22] Defendants argued that the action raised only political questions, and the court reversed on a similar argument. Courts cannot order injunctive relief unless constrained by 'limited and precise' legal standards. A constitutional directive or legal standards must guide the courts' exercise in equitable power.[*23] Prior Supreme Court rulings had also described prudential limitations on judicial discretion and had emphasised that courts must respect the separation of powers.[*24]

Much to the contrary, in 2021 the German Constitutional Court accepted a constitutional complaint by several individuals and environmental groups alleging that the German Climate Protection Act as enacted in 2019 was insufficient and that, thereby, the state had violated its obligation to protect constitutional rights.[*25] The Court identified a violation of fundamental rights in the fact that the legislator had not taken sufficient precautions to meet the emission reduction goals for the time after 2030. On account of the emissions permitted by law up to 2030, one will need very high reductions in later periods. The restrictions to be expected for everyone are in violation of the constitutional rights of the complainants today.

The political question doctrine is, for good reasons, domiciled in the common law world, where the case law system has led to a difficult relationship between courts and legislatures anyhow. It is therefore no surprise that thus far it has been adopted neither by the European Court of Justice[*26] nor by national courts on the Continent, at least not in Germany[*27].[*28] Particularly often, constitutional courts have the function of reviewing legislative acts, which always entail also political aspects.[*29]

One may conclude thus: courts in Germany and probably elsewhere in Europe cannot dismiss climate-change actions by relying on a political question doctrine.

19 Note, 'Juliana v United States, Ninth Circuit Holds That Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court, Comment on 947 F.3d 1159 (9th Cir. 2020)' [2021] Harvard Law Review 1929. There is an estimated number of 700–800 lawsuits, most of them aimed at a review of public regulators' acts, see Weller and Tran (n 2) 578.

20 The doctrine has its roots in the Supreme Court case *Marbury v Madison*, 5 US 137 (1803).

21 *Juliana v United States*, 947 F 3d 1159 (9th Cir 2020).

22 First Amendment Complaint for Declaratory and Injunctive Relief, *Juliana v United States*, F. Supp. 3d 1224 (D Ore), No 15-cv-01517 at 7.

23 Observers in the US pointed out that the outcome in the *Juliana* case did not come as a surprise. 'The question was less whether the [claimants] might win, and more how [they] would lose' wrote Jonathan Adler, 'Is Kids Climate Case Coming to an End?' <https://perma.cc/XN28-AYP2> accessed 15 May 2023; Note (n 19) 1933.

24 *Rizzo v Goode*, 423 US 362, 380 (1976); *O'Shea v Littleton*, 414 US 488, 501 (1974).

25 BVerfG [2021] BeckRS 8946.

26 Graham Butler, 'In Search of the Political Question Doctrine in EU Law' [2018] Legal Issues of Economic Integration 329. – DOI: https://doi.org/10.54648/leie2018020.

27 The German Constitutional Court implicitly rejected applying the doctrine, in a very early decision: BVerfG 8.12.1952, BVerfGE 2, 79, 96; see also Rüdiger Zuck, 'Political-Question-Doctrine, Judicial-self-restraint und das Bundesverfassungsgericht' [1974] JZ 361.

28 In 2010, the Swiss Federal Supreme Court dismissed an action filed by the Republic of China against the International Organization for Standardization (ISO) for the allegedly wrong way the name 'Taiwan' was used by ISO. The Swiss Court held that it was a political question not subject to civil jurisdiction: Federal Supreme Court of Switzerland, 9 September 2010, 5A_329/2009 <https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F09-09-2010-5A_329-2009&lang=fr&type=show_document&zoom=YES&> accessed 15 May 2023.

29 That was already the position of Zuck (n 28) 364.

3. Whether a successful lawsuit based on tort law is useful at all

Without a tool like the political question doctrine, civil courts have to look at the general requirements for admissibility and, if they are met, at the merits of the case. Before we address these issues, however, it is worth pondering for a moment on the question of whether these lawsuits are a strategically useful instrument at all. By contrast to climate protection lawsuits brought against states or public entities, private companies are limited to adapting their own behaviour – unlike the state, they are not in a position to plan and implement co-ordinated climate protection measures. Courts can only decide on the individual cases presented to them. If they impose obligations to reduce greenhouse gas emissions with regard to individual companies, we do not merely face a risk that there is no positive effect for the climate at all; the results may also imbalance the strategy of national legislators and the competition between companies.

The Dutch court imposed obligations arising from international treaties on an individual private company. Competitors may welcome the decision and benefit from it in several ways. The EU emissions-trading system (ETS) is one of the cornerstones of the EU's policy to combat climate change.*[30] It operates on the 'cap and trade' principle for approximately 10,000 entities in the power sector and manufacturing industry (and was expanded a few weeks ago to other sectors). Covering roughly 40% of the EU's greenhouse emissions, there is a cap that gets lowered over time. To cover its emissions fully, a company participating in the trading system must obtain emission allowances, and companies can trade these allowances with one another. If a company has reduced its emissions either voluntarily or in response to a court decision, it can sell them to another participant in the system, one that is short on allowances. National courts probably cannot restrict participation in this trade system on the basis of EU law. In the *Shell* case, the Dutch court did not accept the defendant's argument that the company was acting within the EU emissions-trading system and was therefore not acting illegally.*[31] In consequence of the Dutch decision, Shell's competitors may have considerable advantages as they need only comply with a less strict standard of emissions and they may even be in a position to increase their emissions on account of Shell's reduction, because the ETS looks only at the total amount of emissions in a particular sector. The climate protection effect of pro-active tort actions is therefore highly questionable.*[32]

III. International jurisdiction

Courts will normally not be in a position to dismiss climate-change actions for reason of lack of international jurisdiction. In the examples given, the claimants have selected companies domiciled in the forum state, so jurisdiction follows from Articles 4 and 63 of the Brussels I (Recast) Regulation.*[33] It is even possible to sue not only parent companies with a statutory seat or central administration in a Member State of the EU. Claimants can also add as a defendant EU-based subsidiaries, by appealing to Article 8(1) of the Brussels I Regulation. For wholly owned subsidiaries with a seat **outside** the EU, one may argue that their central administration is nevertheless in the EU, more precisely at the place where the parent company takes the decisions for the subsidiary.*[34] The Dutch judgment, however, demonstrates that it is often sufficient to sue the parent company if it is liable for emissions of the entire group. It is worth mentioning that Shell announced shortly after the judgment in The Hague that they planned to move their headquarters from the Netherlands to the UK (and meanwhile they indeed did so) – allegedly for tax reasons.*[35]

30 In Germany, the system has been implemented in national law by the 'Treibhausgasemissionshandelsgesetz' (TEHG).

31 Rechtbank Den Haag (n 5) n 4.4.1 ff.

32 Alexandros Chatzinerantzis and Markus Appel, 'Haftung für den Klimawandel' [2019] NJW 881, 885 suggest that if an operator or another organisation fulfilled the obligations under public law, including the emissions-trading system, there has been no negligent conduct.

33 And for the action in Switzerland from the corresponding regulations in the Lugano Convention.

34 This question has been raised for wholly owned subsidiaries particularly before English courts, and the answer requires taking a look at where the operational decisions for the subsidiary are actually made. See *Vava & Ors v Anglo American South Africa Ltd*, England and Wales High Court (Queens Bench Division) [2013] EWHC 2131 (QB) as well as *Young v Anglo American South Africa Ltd* [2014] EWCA Civ 1130 (31 July 2014).

35 'Aus Steuergründen: Shell zieht um nach Großbritannien' <https://de.euronews.com/2021/11/15/aus-steuergrunden-shell-zieht-um-nach-gro-britannien> accessed 15 May 2023.

In the cases at hand, however, it is not very important where the defendant's headquarters are. Jurisdiction can also be based on the tort rule of Article 7(2) of the Brussels I Regulation, which allows claimants to sue defendants in the place where the damage occurred or is likely to occur in the future. Thanks to the global effects of carbon dioxide emissions, there is an option for European and almost worldwide forum shopping.

IV. Key issues under national tort law

1. The applicable law

Article 7 of the Rome II Regulation provides a rather victim-friendly conflicts rule for environmental damage: the applicable law is the law of the state in which the damage occurs (per Article 4), 'unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred' (Article 7). Claimants before German courts may therefore opt for German tort law if this is also the place where the fundamental decisions on the defendant company's climate strategy are made. The question of the applicable law is of some importance. Although the difficult questions that arise are to some extent the same in all jurisdictions, a jurisdiction with a general tort rule is more flexible.

If we turn to the merits of climate-change litigation, we can focus on three main issues: the violation of personal rights, causation, and illegality.

2. Violation of personal rights

In all jurisdictions, claimants must demonstrate that the defendant's emissions impair their rights. In Germany, this is a very strict requirement, because the German Civil Code has rejected the French approach of a general tort rule according to which a claimant can ask for compensation for any damage caused by the illegal and culpable conduct of the defendant. German tort law requires a violation of so-called absolute rights: life, health, property, or personal privacy rights. Claimants must demonstrate that the emissions have led or will lead to health problems, destroy property, or impair their personal life. In the *Shell* case, on the other hand, the Dutch court was easily satisfied with the fact that 'interests of current and future Dutch residents' could be bundled into the class action filed by the NGO Milieudefensie. Dutch tort law follows the French tradition and operates on the basis of a broad and general tort provision. Shell's obligation to reduce emissions could, therefore, stem from a general duty of care.

The same principles apply for preventive injunctions. Claimants must normally demonstrate an imminent impairment of their legally protected rights (Sec. 1004 GCC), and it is not sufficient for there to be only a potential or theoretical risk. In many cases, one key question, therefore, consists of whether there is an increasing health risk for individuals if we do not succeed in keeping the rise in mean global temperature to well below 2 °C or 1.5 °C. Moreover, it is a typical feature of global warming that the planet reacts with delay to an increase of climate-damaging emissions. If the persons affected were to wait until the earth has warmed up and impairments are imminent, it would be too late: If Earth is to be prevented from warming to above a certain level in the future, action must be taken now, so the threshold to demonstrate imminent impairments must not be too high. This is exactly what the German Constitutional Court held in its landmark decision of May 2021. Decisions made today on the amount of emissions can have an 'intervention-like preliminary effect' for the future on the claimants' fundamental rights. Consequently, it is easier for claimants in Germany to convince civil courts that a future impairment of their legally protected rights is likely.

3. Causation

The most complex issue in climate-change litigation is, of course, causality.[*36] If we take, for example, the actions brought against German car manufacturers, the key question is the following: Is there a sufficient causal link between the production of combustion-powered vehicles and the future health problems of the claimants? The Peruvian farmer must demonstrate a scientific causal connection between the defendant's behaviour in Europe and the damage occurring in Peru.

The starting point of any causality test is, naturally, the 'conditio sine qua non' (or 'but for') formula. Is the defendant's behaviour an indispensable condition without which the claimant's rights could not have been violated? In this sense, every cause is relevant if it cannot be eliminated without elimination of the tortious effect in its concrete form. However, a cause-and-effect relationship is by no means easy to establish in climate-related liability cases. In view of the complexity of ecological processes, the ubiquity of pollution, and the interaction of a wide variety of causes, already this first step of the causality test is not trivial. Plaintiffs must demonstrate a multi-link causal chain: from emissions to climate change, from climate change to particular weather events or long-term effects, and from these to the personal impairment.[*37] However, there are no linear causalities in climate science. Scientists distinguish between 'slow-onset events' (e.g., the melting of glaciers and rise of the sea level) and 'extreme events' such as hurricanes that occur occasionally. There is a huge amount of scientific research, and there has been progress in recent years in terms of predicting to what extent extreme events become more likely and more often in response to greenhouse gas emissions.[*38] It is still difficult to attribute the consequences individually to the defendant's behaviour, though. Liability is even more complicated to demonstrate if we do not focus only on so-called Scope 1 emissions (those directly caused by the defendant) but also consider Scope 2 and 3 emissions, which are indirectly caused by a company via use of energy and emissions by their suppliers (upstream) or through the use of the products downstream.[*39] It is not clear how German courts will handle the problem. The Dutch court explicitly included in Shell's obligation to reduce emissions those caused by Shell customers and end users – a very far-reaching conclusion.

Under German tort law, a second test is needed, to limit unreasonably broad liability, the so-called adequacy test. The idea here is that the risk of damage must have increased considerably because of the defendant's action and the causal relationship must not present itself as a chain of extraordinary, quite improbable circumstances that an objective observer in the situation of the damaging party could not have recognised *ex ante*. To some extent, statistics may help, but they are not always conclusive. In the case of the Peruvian farmer, it can apparently be demonstrated that the defendant company (and its predecessors) contributed over a span of almost 250 years (1751–2010) to the total amount of carbon dioxide emissions by 0.47%. One can hardly argue that such a contribution has increased the claimant's risk of suffering damage 'considerably'.[*40]

Finally, we have to ask whether the tortious act did lead to the realisation of a risk against which the norm of behaviour violated was intended to protect. For some authors, this is the main argument for denial of liability: they argue that climate change is a general risk of life for everyone and should not be attributed to particular companies.[*41]

Probably the most complicated question in climate liability cases follows from the fact that countless small and large emissions typically lead to individual-level harms over a long time, over a large distance, and only in aggregate. Courts all over the world are, of course, used to handling traditional tort cases where damage is caused by more than one wrongdoer, and we distinguish between cases in which the contribution of each wrongdoer was sufficient for the violation of the claimant's right and those in which the individual contributions caused injury or damage only if aggregated.[*42] Both of the perpetrators are liable

36 For a detailed discussion on the question of causality, see Thöne (n 10) 324ff.

37 Ibid 325.

38 Schirmer (n 10) 115ff.

39 Schirmer makes a case in favour of causality for indirect emissions (ibid 116ff).

40 Chatzinerantzis and Appel (n 33) 883; Schirmer (n 10) 116 is of a different opinion with respect to 'adequacy' in the Volkswagen case decided by the court in Detmold (n 8).

41 Chatzinerantzis and Appel (n 33) 885; Wagner and Arntz (n 11) 405; Moritz Keller and Sunny Kapoor, 'Climate Change Litigation – zivilrechtliche Haftung für Treibhausgasemissionen' [2019] BB 706, 709ff.

42 For details, see German Federal Court of Justice (BGH) [1990] NJW 2282, 2883; [2008] NJW 1309; [1970] VersR 814.

if each contribution is in itself sufficient to produce the particular harm (in so-called 'alternative causality'). Even if the contribution by each of the wrongdoers is not sufficient to cause damages, we consider each of the contributions to be causal in order to prevent none of the wrongdoers becoming liable (in so-called 'cumulative causality'). These cases demonstrate that causality is a matter not only of logic but also of legal assessment.

In the context of climate change, the inevitable result of cumulative causality is that each and every one contributes to global warming and can theoretically be liable.[*43] Although in the pending lawsuits the plaintiffs have picked defendants that are large emitters on a European or even a global scale, our traditional doctrinal approaches in tort law are not suitable for addressing global effects. The decisions of the first instance courts in Germany, dismissing climate liability actions are in line with a decision of the German Federal High Court of the early 1980s wherein the court denied tort liability in a situation similar to what climate change represents[*44]: a forest owner had sued for a state institution to pay damages for forest damage caused by air pollution, on the basis of principles of state liability. Here, too, the focus was on long-term, aggregated, and distance damage. The court held that individual-level impairments cannot be assigned to a particular causer.

All in all, the courts cannot reject causality from the start. They will have to take into account scientific studies, need to consider expert opinion[*45], and must find a solution for an unprecedented global problem. It does not seem very likely that German courts will follow the example of the Dutch court and affirm the merits of the pending claims.

4. Illegality

Let's finally and briefly turn to the question of illegality. In the *Shell* case, the court rejected the argument that Shell and its subsidiaries acted within the European legal framework of emission trading and did not violate the law. Most defendants in private climate-change litigation operate on the basis of effective permits and otherwise comply with all climate-related public law regulatory regimes. Car manufacturers may, for example, rely on the European Regulation on emission performance standards for cars and vans[*46], which specifies a maximum amount of carbon emissions of a manufacturer's vehicle fleet per kilometre. Can defendants be held liable even if they do not violate the applicable public law rules?

Once again, we come up against a difficult and controversial question in tort law: do public regulations have a directly binding effect in private law? The decision of public regulators may be a result of a general balancing of interests, but nevertheless compliance with the public law regime does not automatically exclude the possibility of individuals being impaired or suffering from injury. The prevailing opinion in German tort law is therefore that compliance with the public law regime does not automatically exempt them from tort liability.[*47] A case-by-case analysis and balancing of the interests involved is required. Despite the fact that human rights do not apply directly in private law, courts must take into them into account when balancing these interests.[*48] Where European or national rules set only a minimum standard for the reduction of carbon dioxide emissions, individuals may argue accordingly that only a stricter standard applied to an emitter may protect them from personal harm.[*49]

The district court in Braunschweig[*50] in dismissing the climate-change action against Volkswagen emphasised that compliance with public law requirements does not automatically lead to an obligation

43 Thöne (n 10) 326.

44 BGH [1988] NJW 478.

45 The question of burden and standard of proof are discussed in the article by Thöne (n 10) 323ff.

46 Consolidated text of Regulation (EU) 2019/631 setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles.

47 Gerald Spindler, s 823 BGB n 91 in Beate Gsell and others (eds), *beck-online Großkommentar zum BGB* (BeckOGK/BGB) (CH Beck 2022); Gerhard Wagner, s 823 n 80, 505 in Jürgen Säcker and others (eds), *Münchener Kommentar zum BGB* (MünchKomm/BGB) (8th edn, 2020); Thöne (n 10) 329; Schirmer (n 10) 116 and 117. Permissions granted abroad may be relevant on the basis of the Rome II Regulation, art 7; for details, see Eva-Maria Kieninger, 'Das internationale Privat- und Verfahrensrecht der Klimahaftung' [2022] IPRax 1, 8ff.

48 Chatzinerantzis and Appel (n 33) 885 argue that companies acting within the public law regime for greenhouse emissions do not act illegally or in breach of duty.

49 Schirmer (n 10) 117.

50 See above, n 7.

to tolerate impairments, but it may indicate that adverse impacts are insignificant and acceptable. That court also explained that a private company's obligations cannot go beyond the state's obligation to protect individuals against climate change, and it referred to the decision of the German Constitutional Court of 2021 wherein the court expressed the conclusion that the German legislator has currently fulfilled its duty to protect individuals today against climate change.*[51] A future line of argument by courts may therefore be the following: pro-active climate actions can only be successful if the claimants can demonstrate that their future impairments will exceed the normal concern of the average citizen.*[52]

V. Conclusions

Climate-change actions before civil courts may not be successful on the merits from a legal point of view. Many of them will fall at either the causality or the illegality hurdle. Even if the actions are not successful in the end, though, they have an important complementary function in a political sense and contribute to common awareness. It takes a lot of courage for politicians to state clearly that we all have to accept losses in our standard of living – not on an abstract but on a very personal level. Most of them do not have that courage. Maybe it helps if we are pointed to the problem again and again, from different sides. Civil actions are definitely not the most effective or promising tool to directly and significantly reduce global warming, but they are a legitimate approach to gain attention. The very fact that we discuss judgments like the one in the *Shell* case all over Europe now raises the level of awareness in the public arena. Those actions may increase the pressure on companies to improve their emission strategies on a voluntary basis before they become the next target for climate activists. While civil courts, of course, cannot save the climate, civil litigation may fuel the debate in a positive way.

51 BVerfG [2021] NJW 1723 n 143ff; BVerfG [2022] NJW 844.

52 Also the position held by Schirmer (n 10) 117ff.

https://doi.org/10.12697/JI.2023.32.02

Şimal Efsane Erdoğan
PhD candidate
King's College London

Oana Ştefan
Reader, European Law
King's College London

Emerging Challenges to Public Procurement: COVID-19 and Regulatory Approaches to Public Contracting in the EU, the United Kingdom, and France[*1]

Abstract. In recent years, the use of public procurement as a tool to manage the health crisis and, most recently, the Ukraine crisis, has raised concerns. In their efforts to fight the pandemic, as well as for palliation of the economic effects of lockdowns, Member States have implemented various procurement adjustments, and since 2020 we have seen the European Commission resorting to guidance that, in effect, puts in abeyance public procurement rules related to transparency, equality, and competition. Against this backdrop, the article reflects on the regulatory tensions stemming from the use of public procurement as a crisis management tool. Relying on comparative legal analysis, the article looks at the changes in public procurement spurred by the SARS-CoV-2 crisis in the EU, France, and the UK. The article expresses particular interest in evaluating the discretion left to the contracting authorities and the extent to which allowing such discretion can negatively influence public procurement principles such as transparency, legal certainty, equality, and open competition.

Keywords: public policy, comparative perspective, Europeanisation through law, Brexit, regulation, solidarity, governance, negotiated procedure without prior publication

1. Introduction

Every passing year witnesses a multitude of regional emergency situations and catastrophes that profoundly affect the lives of countless individuals. Recent examples include the devastating earthquakes that struck Türkiye in 2023, resulting in more than 50,000 casualties; severe floods and landslides in Pakistan in 2022, causing widespread destruction and displacement; and the bushfires in California in 2021 that left a trail of destruction in their wake. In the face of such regionally focused sudden-onset disasters, governments have

[1] The authors can be contacted at simal.erdogan@kcl.ac.uk and oana.stefan@kcl.ac.uk, respectively. This article states the law as it stood at the time of writing, June 2023. Authors have verified all online resources to be current as of 30 June 2023.

consistently acted swiftly to address the immediate needs of affected populations by providing fundamental supplies such as clean water, shelter, and food, which serve as crucial temporary relief for those affected by the catastrophes.[*2] Not surprisingly, public procurement has always been one of the first tools to be resorted to by governments for crisis management in such times.[*3]

In 2019, the coronavirus pandemic differentiated itself from any other national crises or regional disasters both in magnitude and in geographic reach, and it was categorised as a global health pandemic by the WHO.[*4] In response to the unfolding crisis, governments all over the world simultaneously took extraordinary steps, including general lockdown measures and large-scale shutdown of economic activities of businesses, also closing their borders to other countries to mitigate the spread of the virus. One of the challenges of the pandemic involved being able to access healthcare products,[*5] with devastating consequences for human lives.[*6] This has disrupted public procurement unprecedentedly, reversing general assumptions that public procurement rules can allow governments to procure essential equipment in a fair manner and exposing massive inequalities between various parts of the world.[*7] A much more long-term challenge of the pandemic is related to the inevitable blow to the economy and the snowball effects of the lockdowns and various restrictions, most recently accentuated by the Ukraine war and the economic sanctions imposed on Russia.

This article shows how the public-procurement-related legal framework is used and evolves as a crisis management tool. In the wake of the pandemic, public procurement rules were bent to facilitate purchasing of vital healthcare products without reliance on some of the essential procurement principles. Secondly, contracts already in place needed to be adapted to the new realities of COVID pandemic. Thirdly, centralised public procurement has been relied on at both the EU and the national level. The European joint procurement initiatives included, for instance, ensuring the supply of personal protective equipment (PPE) and an unprecedented centralised vaccine procurement. Joint initiatives emerged also at the national level, with centralised public procurement playing an important role. In France, the Government requisitioned PPE from the main body responsible for supplying materials for administration and public services (the UGAP), and the Île-de-France region set up a central procurement body to fight COVID-19.[*8] These bodies also responded to private orders.[*9] Fourthly, public procurement has been evolving in the Member States toward becoming an essential tool to stimulation of the economy, create jobs, and repair the damage caused by the pandemic. However, such a task is rendered difficult by the superposition of yet another crisis, the war in Ukraine.

In such circumstances, undertaking a comparative analysis of public procurement rules and their evolution is useful, to trace whether and how this field of law and its general principles may transform. The article explores the general EU framework, showing how contracting authorities[*10] were authorised

2 For a brief on national catastrophes, see Robert Handfield and others, 'Assessing State PPE Procurement during COVID-19: A Research Report' (2021) <https://www.naspo.org/assessing-state-ppe-procurement-during-covid-19-a-research-report/>.

3 See Robert N Katayama, 'Emergency Procurement Powers' (1969) 2 Pub Cont LJ 236.

4 Domenico Cucinotta and Maurizio Vanelli, 'WHO Declares COVID-19 a Pandemic' (2020) 91 Acta Bio Medica : Atenei Parmensis 157.

5 Talha Burki, 'Global Shortage of Personal Protective Equipment' (2020) 20 The Lancet. Infectious Diseases 785. – DOI: https://doi.org/10.1016/s1473-3099(20)30501-6.

6 Ezekiel J Emanuel and others, 'Fair Allocation of Scarce Medical Resources in the Time of Covid-19' (2020) 382 New England Journal of Medicine 2049. – DOI: https://doi.org/10.1056/nejmsb2005114; Edward Livingston, Angel Desai and Michael Berkwits, 'Sourcing Personal Protective Equipment During the COVID-19 Pandemic' (2020) 323 JAMA 1912. – DOI: https://doi.org/10.1001/jama.2020.5317.

7 Laurence Folliot Lallion and Christopher R Yukins, 'COVID-19: Lessons Learned in Public Procurement: Time for a New Normal?' (2020) 3(3) Concurrences 46, 49.

8 Fanette Akoka and François Lichère, 'Central Purchasing Bodies in France' in Carina Risvig Hamer and Mario Comba (eds), *Centralising Public Procurement* (Edward Elgar 2021) 184. – DOI: https://doi.org/10.4337/9781800370418.00019; Île de France Smart Services – see <https://smartidf.services/fr/industrie-solidarite-covid19>.

9 S de La Rosa, 'La crise sanitaire du Covid-19 et la transformation du droit de la commande publique. Une perspective européenne : s'adapter à l'urgence' (29 April 2020) Le Club des juristes, Blog du Coronavirus <https://www.leclubdesjuristes.com/blog-du-coronavirus/que-dit-le-droit/la-crise-sanitaire-du-covid-19-et-la-transformation-du-droitde-la-commande-publique-une-perspective-europeenne-sadapter-a-lurgence>.

10 Throughout this article, we will stick with the legal jargon used in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L094/65 ('the Procurement Directive'). According to Article 1 of the Procurement Directive, 'contracting authority' means 'the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law', whereas 'economic operator' means 'any natural or legal person or public entity

to suspend ordinary procurement procedures and purchase vital healthcare products without relying on fundamental procurement principles. As summarised by Sanchez-Graells, the early days of the pandemic marked the longest span of time since the beginning of the EU where public procurement was left unregulated.[*11] This state of affairs has impacted other areas of EU law too, with public procurement falling short of providing European standards for the various goods such that the Commission and Comité Européen de Normalisation (CEN) allowed access to European standards for countering the shortfall of medical supplies, to facilitate an increase in production.[*12] Centring its discussion at the national level, the article draws on a France–UK comparison. This is because France and the UK both have been severely impacted by COVID-19, with the two registering some of the highest mortality rates in Europe.[*13] In the UK, the COVID-19 crisis was superposed upon Brexit, making for a very interesting case study since it allows us to explore both the changing legal framework and the inevitable influence of EU law at a time of crisis.[*14] The tortuous process of Brexit was reflected also in pandemic-linked procurement, with high-profile court cases being currently decided that involve such major political players in Brexit as Dominic Cummings, former chief advisor to the Prime Minister of the United Kingdom. Similarly, several reports point to several public contracts awarded to economic operators chosen by way of the exceptional procurement rules, beyond public scrutiny, and without advertising and without being subjected to competitive tendering.[*15] The French case study allows us to explore the way in which a legal system grounded in codes and established written law adapts to extraordinary circumstances. Also, France has been rather competitive in the COVId-linked procurement market and had the buyer power necessary to win in the fierce race among governments to secure essential supplies.[*16] For example, with regard to purchasing prices, reports show that at the height of the pandemic, in March–May 2020, French authorities paid 50% less for FFP2 masks than the lowest average price secured by its Italian counterparts.[*17]

Our research is looking mainly at the obvious case of procurement of medical equipment during the pandemic by individual states and the use of the negotiated procedure without prior publication. A brief analysis of the evolution of the procurement framework after the pandemic allows us to reflect on the use of public procurement as a tool to relaunch the economy, showing how the legal procurement framework was altered to achieve this goal. At the European level, such an objective was pushed by the Council in its Conclusions of November 2020,[*18] with France recently taking legislative action in this regard. However, such an objective is currently rendered difficult by the ongoing Ukraine war. This is due, on one hand, to the shortage of certain products coming from that region and, on the other hand, to the economic sanctions imposed on Russia. With Russian businesses barred from benefiting from EU public money and, specifically, from accessing public procurement,[*19] detailed guidance and instruction are being adopted at the national level.[*20]

---

or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market'.

11 Albert Sanchez-Graells, 'Procurement and Commissioning during COVID-19: Reflections and (Early) Lessons' (2020) 71 N Ir Legal Q 523. – DOI: https://doi.org/10.53386/nilq.v71i3.882.

12 European Commission, 'Coronavirus: European standards for medical supplies made freely available to facilitate increase of production' (2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_502>.

13 At the time of writing, more than 228,000 deaths in the UK (according to the data provided by the official UK Government Web site – see <https://coronavirus.data.gov.uk/details/deaths>) and more than 160,000 in France (per data provided by the European Centre for Disease Prevention and Control – see <https://www.ecdc.europa.eu/en/cases-2019-ncov-eueea>) had been recorded.

14 We evaluate only the procurement rules covering England, Wales, and Northern Ireland for the purposes of this article.

15 Gareth Davies, 'Investigation into Government Procurement during the COVID-19 Pandemic - National Audit Office (NAO) Report' *(National Audit Office,* 2020) <https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>.

16 Laurence Folliot Lallion and Christopher R Yukins, 'COVID-19: Lessons Learned in Public Procurement: Time for a New Normal?' (2020) 3(3) Concurrences 46, 49.

17 Gian Luigi Albano and Annamaria La Chimia, 'Emergency Procurement: Italy' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in (a) Crisis? (*Bloomsbury 2022).

18 Council Conclusions: Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy 13352/20 (Brussels, 25 November 2020).

19 Article 1 (23) of Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L111, 8.4.2022.

20 DAJ Fiche Technique 'Mise en œuvre de l'interdiction d'attribuer ou d'exécuter des contrats de la commande publique avec la Russie' <https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/conseil_acheteurs/fiches-techniques/crise/FT-Sanctions-Russie-Commande-publique150422.pdf?v=1651063140>.

We show that the evolution of the legal frameworks reflects a tension between, on the one hand, the necessity of ensuring flexibility and legal certainty in extraordinary circumstances, and, on the other hand, the need to preserve classic public procurement principles such as transparency, equality, and open competition. The latter principles have suffered overall amid the pandemic, pointing to concerns similar to those expressed by literature exploring the promotion of environmental or societal goals through public procurement.[*21] This shows that whenever public procurement is used as a tool for anything other than the efficient allocation of public money, the resulting outcomes are controversial, complex, and fraught with difficulties.

The article proceeds as follows: The next part looks at the general EU framework of public procurement, applicable as a baseline throughout the Union, and the way it adapted during the pandemic. We examine the conditions of the negotiated procedure without prior publication and explain why this procedure is an exception to all procurement rules and principles and should be narrowly interpreted.[*22] The third and fourth parts explore the UK and the French case studies before the article presents our final conclusions.

2. The legal framework for public procurement in the EU: Procurement procedure and standards for ordinary times and times of urgency

a. The role of general principles in EU public procurement law

The public procurement law of the EU regulates the purchasing behaviour of the public authorities within the Member States to some extent. The procurement rules originated from internal market integration as stipulated in the TFEU and from secondary legislation in the form of directives, covering several types of public contracts.[*23] Just as any other liberal procurement system in the world, the body of regulation is primarily designed to protect taxpayers' interests and for the best use of public money, and to support the full functioning of the internal market. To this end, the procurement rules impose certain barriers on contracting authorities' behaviour and restrict their freedom – in other words, discretion – to choose economic operators by way of defining procedures and obligations to be followed before a contract is awarded. The main principles behind restricting contracting authorities' discretion can be found embedded in fundamental principles of the TFEU such as equal treatment and transparency, with de Mars arguing that the aggressive promotion of these principles by the CJEU has constrained the content of the procurement directives.[*24]

The regulation of public procurement is deemed one of the main drivers of competition and a vital instrument for delivering public services in the EU.[*25] Therefore, the cardinal tenet of the European public procurement regime is to help establish competitiveness in the internal market and eliminate all non-tariff barriers stemming from preferential purchasing practices of governments that may favour national undertakings.[*26] In addition to the economic objectives sought through competitive procurement markets

21 Some scholars express the idea that horizontal objectives in public procurement distort the free market and eventually bring additional costs. See Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (Second edition, Hart Publishing 2015). For more on inclusion of social objectives in procurement and a regulatory welfare state, see Miriam Hartlapp, 'Measuring and Comparing the Regulatory Welfare State: Social Objectives in Public Procurement' (2020) 691 The ANNALS of the American Academy of Political and Social Science 68. – DOI: https://doi.org/10.1177/0002716220952060.

22 See *Commission v Greece*, C-250/07, EU:2009:338, paras 34–39.

23 The Procurement Directive and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L094/243; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L094/1. This article focuses on the Procurement Directive, which addresses the acquisition of work, supplies, or services by means of public contracts.

24 Sylvia de Mars, 'General Principles in EU Public Procurement Law' in KS Ziegler, PJ Neuvonen, and V Moreno-Lax (eds), *Research Handbook on the General Principles of EU Law* (Elgar 2022). – DOI: https://doi.org/10.4337/9781784712389.00036.

25 Christopher Bovis, 'The Priorities of EU Public Procurement Regulation' (2020) 21 ERA Forum 283, 283. – DOI: https://doi.org/10.1007/s12027-020-00608-8.

26 Christopher Bovis, *EU Public Procurement* Law (Edward Elgar Publishing 2012) viii. – DOI: https://doi.org/10.4337/9780857938428. 'Undertaking' is the term used by the EU Treaties to refer to a business entity, and therefore it shall be used throughout this text.

as a way to achieve ever deeper integration and support the single market[*27], effective competition is another safeguard of protecting taxpayers' interests. To reach the desired level of competition for the proper functioning of the single market and uphold the principles of the TFEU, the legal principle of transparency and its corollaries, open competition and non-discrimination, need to be observed by the contracting authorities in the Member States.[*28]

b. Procurement procedures in ordinary times

In line with such goals, the Procurement Directive recognises open and restricted procedures as constituting the ordinary procedure of procurement.[*29] The procurement rules for ordinary times are designed to establish accountable governance standards for spending of public money, by enforcing competition and transparency requirements. Under these procedures, contracting authorities are asked to publish their contract opportunities in advance, so that these are transparent and visible to private entities and eventually attract as many economic operators as possible, providing equal opportunities to all players. Time is of the essence here, as the long period from the beginning to the end of procurement should give enough time to accommodate protection of the principles of transparency, equal treatment, and ultimately fair competition.[*30] In the context of a crisis, however, time is a luxury contracting authorities do not have. Acknowledging that some days bring turbulence, the Procurement Directive allows deviations from the above-mentioned principles whereby the discretion of contracting authorities is restricted, and it provides a spectrum of procedural options that can be quicker to administer.

Below we briefly discuss the standards of public procurement procedures and restrictions on contracting authorities' discretion in 'extremely urgent' times.

c. Derogations under the Procurement Directive: Negotiated procedures without prior publication

Although the default procedure is an open and restrictive one, the Procurement Directive enables public authorities to derogate from standard rules in situations wherein this is justifiable, either by accelerating the process of buying to meet public needs or where some special procedures could be rendered more expedient via employment of some additional mechanisms. The Procurement Directive opens the way for permitting contracting authorities to conduct accelerated open, restricted, and negotiated procedures where urgency requires quick actions from governments.[*31] As it can be easily deduced, the spectrum of non-ordinary procedures ranges from shortening the time frame of procurement to direct awarding. In parallel, each mechanism allows public authorities to deactivate some essential features and principles of public procurement and provides more flexibility and discretion in choosing economic operators. Eventually, by the gradual bypassing of rules, public procurement becomes more of a powerful crisis management tool free from restrictions imposed on public buyers.[*32]

The unprecedented pandemic situation required the strictest rules to be put in place. Hence, many governments utilised the 'nuclear option' whereby public authorities need not advertise and were able to award contracts via directly negotiating with suppliers. This is the 'negotiated procedure without prior publication' option given to public authorities by the Procurement Directive under Article 32(2)(c).

---

27 C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR 3605.

28 Kirsi-Maria Halonen and others, 'Transparency in EU Procurements: An Introduction' in Kirsi-Maria Halonen and others (eds*), Transparency in EU Procurements: Disclosure within Public Procurement and during Contract Execut*ion (Edward Elgar Publishing 2019). – DOI: https://doi.org/10.4337/9781788975674.00007.

29 See articles 26, 27, and 28 of the Procurement Directive.

30 Recital 46 of the Procurement Directive. Furthermore, Article 47 (1) of the Procurement Directive requires public authorities to set a certain time limit, irrespective of the minimum legislative requirement; Pedro Telles, 'Extremely Urgent Public Procurement under Directive 2014/24/EU and the COVID-19 Pandemic' [2022] Maastricht Journal of European and Comparative Law 4. – DOI: https://doi.org/10.1177/1023263x221077006.

31 Articles 27(3) and 28(6) of the Procurement Directive.

32 Telles (n 30).

The procedure puts to the side regular standards of transparency and competition, giving public authorities a wide discretion without them being constrained by such principles. In this procedure, public authorities can carry out the whole process nearly in secrecy until they decide to award the contract to an economic operator. Said procedure lacks *ex-ante* transparency, as it does not provide equal tendering opportunity and rules are not shared with the public in advance.[*33] In parallel to the exceptional nature of this procedure, the lack of transparency jeopardises the principle of equal treatment between participants or potential economic operators and bypasses fair competition in the end. *Ex-post* transparency is nevertheless still ensured, with public authorities required to justify their decisions by providing procurement reports.[*34] This is particularly important for auditing purposes in the context of COVID-19-related procurement – for seeing how public money has been spent.

Of course, given such severe restrictions on fundamental principles, the procedure is to be used only 'in very exceptional circumstances',[*35] as also underlined by CJEU case law.[*36] Therefore, the grounds from Article 32 must be narrowly interpreted[*37], and the reasons behind the sharp derogations from the ordinary procedures should be detailed sufficiently by the contracting authorities[*38]; hence, Member States ultimately cannot extend the grounds for the application of this procedure or make the application of said procedure for contracting authorities more relaxed and easily available.[*39]

The test for triggering Article 32 (2) (c) comprises three conditions, which must apply jointly. Firstly, a strict necessity must have arisen for the contracting authorities: the contracting authority must have no feasible solutions other than applying negotiated procedure without prior publication. It has been argued that the strict necessity test casts aside the full application of the proportionality test.[*40] In other words, if a contracting authority would be able to fulfil its needs through accelerated open procedure rather than by directly awarding the contract to a specific economic operator, then that selection of the economic operator would fail the strict necessity test.

Secondly, the situation of 'extreme' urgency must involve events that are unforeseeable for the contracting authorities. Although the notion of 'extreme urgency' is not defined anywhere in the Procurement Directive, the directive sheds some light on the concept by describing the situations wherein an 'immediate action' is needed, and illustrates extreme urgency by citing natural disasters.[*41] The emphasis on required immediate action legitimises derogations from the ordinary mode of procurement, which is lengthier than direct awarding. At the same time, this emphasis may mean that contracting authorities shall use this procedure only to aid with urgent needs that are present and immediate. The notion of unforeseeable events refers to situations that could not have been predicted by the contracting authority given the nature and characteristics of the specific project and good practice in the field in question.[*42] Equally, assessing foreseeability is unclear. As some commentators argue, the foreseeability element of the extreme urgency

33 Article 32(2)(c) of the Procurement Directive.

34 According to Article 84(1)(f) of the Procurement Directive, for every public contract awarded via a negotiated procedure without prior publication, each of the contracting authorities issues a written report that shall cite the circumstances justifying the choice of this procedure. After the conclusion of a contract, contracting authorities should send the notices to the Publications Office. Nevertheless, the data gathered by Transparency International UK attest to an array of compliance performances. For instance, 55% of public contracts in the UK had their materials either not published by the recommended deadline or never published. See Transparency International UK, 'Track and Trace: Identifying Corruption Risks in UK Public Procurement for the Covid-19 Pandemic' (2021) 27 <https://www.transparency.org.uk/sites/default/files/pdf/publications/Track%20and%20Trace%20-%20Transparency%20International%20UK.pdf>.

35 Recital 50 of the Procurement Directive; particulars are outlined in art 32.

36 Case C-292/07 *Commission v Belgium,* EU: C: 2009:246, para 19; *Commission v Germany*, ECLI: EU: C: 1996: 149, para 13.

37 C-275/08 *Commission v Germany* and C-352/12 *Consiglio Nazionale degli Ingegneri.*

38 See also C-57/94 *Commission v Italy*, ECLI: EU: C: 1995: 150, para 23; C-318/94 *Commission v Germany*, ECLI: EU: C: 1996: 149, para 13; C-20/01 and C-28/01 *Commission v Germany*, ECLI: EU: C: 2003: 220, para 58; C-385/02 *Commission v Italy*, ECLI: EU: C: 2007: 445, para 19; C-26/03 *Stadt Halle and RPL Lochau*, ECLI: EU: C: 2005: 5, para 46; C-84/03 *Commission v Spain*, ECLI: EU: C: 2005: 14, para 48; Case C-394/02 *Commission v Greece,* EU:C:2009:338, para 33 and the Advocate General's Opinion in its para 130.

39 *Commission v Spain*, ECLI: EU: C: 2005: 14, para 48.

40 Telles (n 30) 5. ; Bogdanowicz, 'Article 32' in R Caranta and A Sanchez-Graells (eds), *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar 2021), para 32.21. – DOI : https://doi.org/10.4337/9781789900682.00041.

41 Per the Procurement Directive's Recital 80.

42 P Bogdanowicz (n 40) para 32.22.

can be subjected to the diligence test as put forward in the *Fastweb* judgement.*[43] Although the judgement dealt with the application of negotiated procedure without prior publication in circumstances of exclusivity rights, it still provides guidance for understanding the extent of the unpredictability test. In *Fastweb*, the CJEU questioned whether the contracting authority acted diligently. It held that, if a contracting authority acts diligently, then it may use this procedure but only provided that it also clearly discloses the reasons that convinced the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice.*[44] This conclusion of the Court can be translated into practices wherein each contracting authority needs to show evidence explaining why it preferred the negotiated procedure without prior publication over other procedures and clarifying that it acted diligently.

The third and final requirement is that the state of extreme urgency not be attributable to the contracting authorities themselves. This requirement indicates that contracting authorities should assess whether the conditions are attributable to them. The question of how to assess the attributability is a subject of debate among commentators, as the legislation is silent about the conditions.*[45] It has been posited that this requirement can be read together with the second requirement, which imposes an obligation of providing evidence as to the choice of procedure.*[46] In a similar vein, Sanchez-Graells has put forward the idea that 'the objective analysis needs to concern whether a reasonably informed and diligent contracting authority would have been able to avoid the extreme urgency or, in other words, whether the extreme urgency is attributable to the contracting authority actions or omissions, and not to external factors or third parties'.*[47] Yet, in an unprecedented health crisis such as the COVID-19 pandemic, it is rather complicated to identify who is responsible for what, and the question becomes more complex when governments centralise their procurement to meet the ensuing needs. However, we posit that completely overlooking the attribution test solely because of the pandemic ignores the case law of the CJEU court and the legislation specifying that this exceptional procedure needs to remain exceptional and that the conditions need to be interpreted in a restrictive way.

It is evident from the wording of the Procurement Directive that the legislation leaves elbow room for contracting authorities at one point to use their discretion without constraint by transparency and competition in pressing times. However, it does so by foreseeing certain criteria still being met. Reading all the conditions cumulatively means that contracting authorities' discretion is still restricted by certain standards and not every kind of urgency can be used as an excuse by those authorities. Whereas the letter of the law is clear and imposes very robust tests that are to be passed, we argue that soft law guidance failed to reflect the spirit of the law in the early days of the COVID-19 pandemic.

d. The soft law approach: Commission guidance on COVID-19-related procurement

The European Commission resorted to soft law to help uniform application of the procurement rules respond to the COVID-19 pandemic.*[48] By so doing, the Commission aimed to accommodate healthcare product needs arising out of the pandemic within the range of flexibility provided under the Procurement Directive, and also it targeted fulfilling its responsibility to assist the Member States in tackling public health issues under the principle of solidarity.*[49] By way of a preliminary note, it should be pointed out that the Commission enjoys discretion in issuing non-binding instruments to explain and interpret directives or regulations; however, this has to be done within certain limits. The Court has already decided that soft law

43 Case C-19/13 *Fastweb,* EU:C:2014:2194, para 50; Telles (n 30) 7.

44 *Fastweb,* para 48; also see Telles (n 30) 7.

45 See Telles (n 30) and also A Sanchez-Graells, 'More on Covid-19 Procurement in the UK and Implications for Statutory Interpretation' (2020) <https://www.howtocrackanut.com/blog/2020/4/6/more-on-covid-19-procurement-in-the-uk-and-implications-for-statutory-interpretation>.

46 Telles (n 30) 9.

47 Sanchez-Graells (n 45).

48 Communication from the Commission: Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis 2020/C 108 I/01) OJ C108I, 1.4.2020 ('Guidance').

49 Roberto Baratta, 'EU Soft Law Instruments as a Tool to Tackle the COVID-19 Crisis: Looking at the "Guidance" on Public Procurement Through the Prism of Solidarity' (2020) 5 European Papers - A Journal on Law and Integration 365.

cannot add to the obligations written in hard law.[*50] Our argument, in what follows, is that the Commission cannot annihilate, through soft law obligations written in hard law either. Even though soft law has no legally binding force, the fact that the Commission has, in practice, issued a blanket exemption from public procurement rules through its SARS-CoV-2-linked guidance is particularly problematic. This is because the guidelines, in effect, empower national authorities to disregard the strict requirements set out in the hard law framework.

In its guidance, the Commission rejects the idea of evaluating the contracting authorities' choice of Article 32(2)(c) on a case-by-case basis, by stating that 'for a situation such as the current COVID-19 crisis[,] which presents an extreme and unforeseeable urgency, the EU directives do not contain procedural constraints'.[*51] The Commission appears to consider all contracting authorities under the same umbrella, thus eliminating the requirement for passing the attribution test as foreseen under Article 32(2)(c). The Commission reiterates its position throughout the 'Guidance' communication by stating:

> These events and especially their specific development have to be considered **unforeseeable for any contracting authority**. The specific needs for hospitals, and other health institutions to provide treatment, personal protection equipment, ventilators, additional beds, and additional intensive care and hospital infrastructure, including all the technical equipment[,] could, certainly, not be foreseen and planned in advance, and **thus constitute an unforeseeable event for the contracting authorities**.[*52] [emphasis added]

Such a wide, blanket approach to the pandemic is a legal slap in the face to the exception in Article 32(2)(c). The black letter law reality is that the extraordinary nature of the negotiated procedure without publication requires a narrow, case-by-case interpretation,[*53] which would be more respectful to the principles of transparency and open competition. This is true for several reasons. The first is that the blanket approach offered by the Commission diminishes the foreseeability test whereby contracting authorities must show evidence that they acted in a diligent way to minimise the effects of urgency. Since the Guidance accepted the pandemic as presenting extreme and unforeseeable urgency for procurement purposes, it is clear that the Commission legalised the use of negotiated procedures without prior publication and this without emphasising the expectation for diligent behaviour from contracting authorities. Second, the Guidance declared that the pandemic was an unforeseeable event for any contracting authority without assessing the attribution test or evaluating whether or not said authority contributed to the negative impact of the COVID-19 pandemic.[*54] Again, the approach taken by the Commission suggests that contracting authorities do not necessarily have to show evidence of their choice of procedure, as the Guidance does not differentiate contracting authorities from each other in this regard. In other words, the individual responsibilities of contracting authorities, whether they took part in emergency planning or acted diligently on time to take precautions against the pandemic, was completely overlooked in the preparation of the Guidance.[*55]

Whilst the Commission has the discretion to interpret, through its soft law instruments, what is written in hard law, we find the guidance presented above problematic precisely because it puts into abeyance the existing hard law. Indeed, the procurement directives have been issued through the usual decision-making mechanisms at the EU level, respecting the expected legitimacy safeguards. The Guidance was published by the Commission without giving much information with regards to the decision-making process involved in its creation. For instance, there are no indications of whether public consultations were carried out. Such lack of public consultations is a characteristic quite usual for emergency soft law.[*56] Yet, in the defence of this soft law approach, an argument can also be made that the pandemic was unforeseeable for each

50 Case C-325/91 *France v Commission* [1993] ECR I-3283, para 31.

51 Ibid, para 2.

52 Guidance (n 48) 4 at para 2.3.1.

53 Telles (n 30) 11 and Albert Sanchez-Graells, 'Procurement in the Time of COVID-19' (2020) 71(1) N Ir Legal Q 81, 83. – DOI: https://doi.org/10.53386/nilq.v71i1.531.

54 Guidance (n 48) 4 at para 2.3.1.

55 The novel coronavirus was first identified as such in the city of Wuhan, in China's Hubei Province, in December 2019, and the WHO declared the resulting outbreak a public health emergency in December 2020. For a timeline of the pandemic, see <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/novel-coronavirus-2019-ncov>.

56 Mariolina Eliantonio and Oana Ştefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 European Journal of Risk Regulation 159. – DOI: https://doi.org/10.1017/err.2020.119.

contracting authority and government, and that in such context blanket exemptions are proportionate.*[57] Such a blanket approach is perhaps conducive to more legal certainty for public buyers and winners of bids, vital in times of crisis. It is no secret that during the pandemic the market in the public procurement sphere shifted considerably and that, encountering conditions of scarce supply and fierce competition among states worldwide, suppliers would have chosen the most legally certain regime. An expectation that a contract won without publicity or competition will not be challenged successfully might be beneficial both for the contracting authority and for the supplier winning the bid. In other words, the guarantee of a quick and straightforward procedure might have been equally competitive to the proverbial government agent carrying suitcases full of cash.*[58] We observe a certain tension here between, on one hand, the imperative to ensure fair and transparent decision-making and, on the other, the need for effective, fast, and clear regulation in times of crisis. Such tension between key principles can be observed at the national level too, as indeed transpired in the UK and France – which we examine in the two case studies addressed next.

3. The public procurement framework in the UK in the context of the COVID-19 pandemic

The public procurement framework of the only former member of the EU is a verbatim adaptation of the Procurement Directive and is regulated by the Public Contracts Regulations (hereinafter 'the Procurement Regulation').*[59] Following in the footsteps of European legislation, the development of today's procurement framework for the UK was designed to secure fair competition, transparency, and value for money. Public contracts for goods, work, and services valued at more than £10,000 must be publicly advertised, to enhance competition and equal treatment.*[60] Also, in parallel with the Procurement Directive, the Procurement Regulation foresees the use of negotiated procedure without prior publication as an exceptional rule under Article 32(2)(c)-(4).*[61] The conditions that need to be fulfilled such that contracting authorities may appeal to the negotiated procedure without prior publication are the same as the ones in the Procurement Directive.*[62]

a. The soft law approach in the UK: The Cabinet Office's note

Shortly before the release of the Commission's Guidance, the UK's Cabinet Office published its Policy Note on responding to COVID-19*[63] (hereinafter 'the PP01/20 Note'), a soft law instrument to guide contracting authorities in the early days of the pandemic in relation to their purchasing practices. The note explains the grounds for employing the negotiated procedure without prior publications. Compared to the European Commission Guidance, the note is lengthier, and more cautious language is preferred throughout the PP01/20 Note, such as 'in responding to COVID-19, contracting authorities **may** enter into contracts without competing or advertising the requirement'*[64] [emphasis added].

---

57 T Kotsonis, 'EU Procurement Legislation in the Time of COVID-19: Fit for Purpose?' (2020) 4 Public Procurement Law Review 199.

58 Shuki Sadeh, 'In Israel's Race To Get Medical Gear, Suitcases Full of Cash Win the Day' Haaretz (24 April 2020) <https://www.haaretz.com/israel-news/business/2020-04-24/ty-article/.premium/in-israels-race-to-get-medical-gear-cash-in-suitcases-wins-the-day/0000017f-f5cb-ddde-abff-fdef66060000>.

59 Public Contracts Regulation 2015. For the purposes of this article, procurement rules of Scotland will not be examined.

60 Article 26(2) of the Public Contracts Regulation states that 'contracts may be awarded only if a call for competition has been published in accordance with the Public Contracts Directive'.

61 The following language is employed: 'The negotiated procedure without prior publication may be used for public works contracts, public supply contracts, and public service contracts in any of the following cases … insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with', and for said purposes 'the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority'.

62 See section 2.c as cited in n 61 ('insofar…').

63 UK Cabinet Office, 'Policy Note – Responding to COVID-19' (March 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873521/PPN_01-20_-_Responding_to_COVID19.v5__1_.pdf>.

64 PP01/20 Note, 3.

After pointing out the possibility of derogations from competition and transparency requirements, the PP01/20 Note clearly elucidates four conditions for using negotiated procedure without prior publication, by providing short clarifications. A holistic appraisal of the Cabinet Office's approach leads us to both positive and negative conclusions with regard to general principles. Beginning with the extreme and unforeseeable urgency requirement, the PP01/20 Note takes an approach similar to the Commission's and qualifies the COVID-19 pandemic as a case of extreme and unforeseeable urgency for the purposes of utilising negotiated procedure without prior publication.*[65] To illustrate the extreme urgency requirement, the following language was chosen:

> The events that have led to the need for extreme urgency were unforeseeable, eg: the **COVID-19 situation is so novel** that the consequences are not something you should have predicted.*[66] [emphasis added]

The example shows that the Cabinet Office adopted a similarly questionable stance and characterises the coronavirus pandemic as a single instance of extreme and unforeseeable urgency. When it comes to assessing the attribution-test-related requirement under the extreme urgency exemption of the Procurement Regulation, the PP01/20 Note takes a different approach and provides more details. Accordingly, the note details the attribution test thus:

> The situation is not attributable to the contracting authority, e.g.: you have not done anything to cause or **contribute to the need for extreme urgency**. … Contracting authorities should … keep a written justification that satisfies these tests*[67] [emphasis added].

Furthermore, the note takes the emphasis on the attribution test one step further and stresses that

> '[…] a contracting authority's **delay or failure to do something** is likely to mean that the situation is attributable to the contracting authority' (emphasis added).

Translating this suggestion of the PP01/20 Note into practice, we conclude that the emergency preparedness of contracting authorities, the timeliness of their decisions, and so on are recommended for consideration as the attribution test requires. The specific emphasis on the attribution test connected with the negotiated procedure without prior publication and emphasis on separate assessments for each procurement decision are more than welcome for the sake of transparency.

Yet practice proved to be different. Some negative audit reports were followed by a series of litigation challenging the government's first reactions to pandemic-related procurement. At the same time, the post-Brexit change in public procurement rules includes some substantial provisions regarding future crises.

b. Public procurement litigation in the UK

The UK government initially responded to the pandemic by attempting to obtain herd immunity and delaying nationwide lockdown measures until the end of March 2020.*[68] Unsurprisingly, the rapid circulation of the virus caused the number of cases and deaths on the island to soar. Under the shadow of criticism over the government's pandemic policies in the press, the exponential rate of increase in the number of cases eventually required immediate healthcare supplies and, thereby, prompted the government to find innovative and expeditious purchasing mechanisms to regain the lost time by making recourse to direct negotiations with suppliers.*[69] Numerous issues in relation to circumventing the ordinary mode of procurement and using direct solicitation were raised and brought before the judiciary, in several cases,

65 PP01/20 Note, 3–4.

66 PP01/20 Note, 4.

67 Ibid.

68 See Barry Colfer, 'Herd-Immunity across Intangible Borders: Public Policy Responses to COVID-19 in Ireland and the UK' (2020) 6 European Policy Analysis 203. – DOI: https://doi.org/10.1002/epa2.1096.

69 See Holly Ellyatt, 'Lawmakers Slam UK's Covid Response, Say "Herd Immunity" Strategy a Public Health Failure' (CNBC, 12 October 2021) <https://www.cnbc.com/2021/10/12/uks-herd-immunity-covid-strategy-a-public-health-failure-inquiry.html>; Ed Yong, 'The UK's Coronavirus "Herd Immunity" Debacle' *The Atlantic (*16 March 2020) <https://www.theatlantic.com/health/archive/2020/03/coronavirus-pandemic-herd-immunity-uk-boris-johnson/608065/>.

among them *R* (*GDL*) *v Secretary of State for Health and Social Care* and *R (GLP) v Minister for the Cabinet Office*.[*70] These cases are particularly important in that with them the UK judiciary tested the grounds for using public procurement under the rules for extremely urgent procurement.

The *R (GDL) v Secretary of State for Health and Social Care*[*71] case concerned, among others, the Department of Health and Social Care, which applied the 'High Priority Lane' or so-called VIP Lane for quick awarding. The High Priority Lane allowed interested suppliers to be quickly considered for the award of contracts, provided that a referral from government officials, ministers, or members of the parliament existed. Among other things, the interpretation of the authorisation to use negotiated procedure without prior publication on grounds of extreme urgency and its limits were negotiated in that case. Most notably for this article, it seems that the High Court favoured the blanket approach used in the soft law instruments and confirmed that the pandemic was indeed an unforeseeable event for all contracting authorities; therefore, the grounds listed in Article 32(2)(c) were considered met without necessarily having to be met by each contract.

In *R (GLP) v Minister for the Cabinet Office*[*72], the civic organisation the Good Law Project challenged the Cabinet Office's decision to award a contract to a company called Public First, founded and directed by persons having ties to then Chief Adviser to the Prime Minister Dominic Cummings, one of the key names behind the Brexit campaign. The contract was directly awarded, with no advertising or competition procedure in accordance with the Procurement Regulation. The Good Law Project brought judicial review claim over the decision based on arguments, among other things, that there was no extreme urgency, the work having been possible via other procedures, and the contract's length exceeding what was strictly necessary under Article 32(2)(c).[*73] The High Court declared the contract unlawful for reason of the appearance of bias. The Court of Appeal overturned the High Court's decision and held that, since the grounds for using the negotiated procedure without prior publication applied, consideration of other suppliers was not required. Most importantly for the purposes of this article, the Court of Appeal rejected the claimant's strict necessity arguments on the basis of Article 32(2)(c).[*74]

c. Audit reports

The increased flexibility given to the governments in their procurement decisions also attracted media attention to such purchases, with the UK government having spent millions on health equipment. Although the effects of external media pressure are hard to assess, one thing is clear: the early days of CoViD-related procurement ended up subjected to numerous investigations by the National Audit Office (NAO).[*75] The data presented in the NAO report represent that 95% of public spending in this time until July 2020 was carried out through direct contracting without any competition.[*76] This is confirmed by EU data retrieved from the Tenders Electronic Daily database for between 1 February 2020 and 31 December 2020. Whilst in Europe open procedures still prevailed during the pandemic, the UK is a curious case, with 357 negotiated

70 Sue Arrowsmith and Luke Butler, 'Emergency Procurement and Regulatory Responses to COVID-19: The Case of [the] United Kingdom' in Sue Arrowsmith and others (eds*), Public Procurement in (a) Crisis ? Global Lessons from the COVID-19 Pande*mic (Hart 2021) 367. – DOI: https://doi.org/10.5040/9781509943067.ch-015.

71 *R (Good Law Project Limited, Everydoctor) v The Secretary of State for Health and Social Care and Crisp Websites Limited (t/a Pestfix), Clandeboye Agencies Limited, Ayanda Capital Limited* [2022] EWHC 46 (TCC). The Good Law Project's appeal claim was refused on all grounds by Lord Justice Coulson on 29 April 2022.

72 *R (The Good Law Project)) v Minister for the Cabinet Office and Public First Limited* [2021] EWHC 1569 (TCC), later appealed: *R (The Good Law Project) v Minister for the Cabinet Office and Public First Limited* [2022] EWCA Civ 21.

73 Arrowsmith and others (n 71) 367.

74 *R (The Good Law Project) v Minister for the Cabinet Office and Public First Limited* [2022] EWCA Civ 21, para 89.

75 NAO, 'Report by the Comptroller and Auditor General: The Supply of Personal Protective Equipment (PPE) during the COVID-19 Pandemic' HC 961 Session 2019–2021 (25 November 2020); NAO, 'Report by the Comptroller and Auditor General: Investigation into How Government Increased the Number of Ventilators Available to the NHS in Response to COVID-19' HC 731 Session 2019–2021 (30 September 2020); NAO, 'Report by the Comptroller and Auditor General: Investigation into Government Procurement during the COVID-19 Pandemic' HC 959 Session 2019–2021 (26 November 2020); House of Commons Public Accounts Committee, 'COVID-19: Supply of Ventilators – Twenty-Seventh Report of Session 2019–21 Report, Together with Formal Minutes Relating to the Report' HC 685 (16 November 2020).

76 See <https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/> (especially 21). For detailed analysis of the report, see Pedro Telles, 'Fisking the UK Government Response to the NAO Report on COVID Procurement' (Telles EU, 24 November 2020) <http://www.telles.eu/blog/tag/public+procurement>.

procedures without a call for competition and only 33 open procedures organised.[*77] The NAO has repeatedly raised concerns about several controversy-raising issues surrounding the direct and quick awarding of contracts by the Cabinet Office, including contracting authorities neglecting to produce documents and spending excessive amounts of money on equipment that was not fit for purpose.[*78]

d. A new Procurement Bill after Brexit

As stated above, the current legislation, which served in combating the pandemic, is a verbatim adaptation of the Procurement Directive. This will not be the case for much longer, however.[*79] The COVID pandemic coincided with the time in which the UK was parting from the EU. In one part of Brexit, the UK government underwent a complete overhaul and promised 'to move away from the complex EU rules-based approach that was designed first and foremost to facilitate the single market' with the new Procurement Bill (hereinafter 'the Bill').[*80] At the time of writing, the Bill is in its final stages before Royal Assent. This legislative change is extremely noteworthy for this article's argument, as it offers a close look at how emergency procurement procedures may be transformed by the Bill as proposed.

As part of cutting off ties with the EU *acquis*, the Government published its Green Paper 'Transforming Public Procurement' on 15 December 2020 in efforts to modernise procurement rules and to simplify procedures.[*81] One selling point of its new proposal, among others, was the aim to 'cut the red tape' and bring more transparency and competitiveness to procurements during emergencies by bringing 'effective crisis procurement'.[*82] The pandemic was still ongoing when the Green Paper was issued, so the UK government had an opportunity to reflect on some initial lessons learnt from a year's pandemic experience. The Green Paper acknowledged that the pandemic had 'underlined the need for an effective regulatory regime for public procurement', pointing out further structural changes desired for the existing legislation.[*83] With reference to shortcomings of the EU procurement rules in place, the Cabinet Office proposed including crisis as new grounds for application of limited tendering and requiring public authorities to publish 'transparency notices' if they rely on grounds of crisis or extreme urgency.[*84] The current European regime is frequently criticised for giving too much unrestricted discretion to public authorities in emergencies.

Stakeholders were mostly supportive of the new proposal of the Cabinet Office but expressed reservations as to appealing to crisis as grounds for limited tendering.[*85] According to the report published by the Cabinet Office, there were concerns about the process for the declaration of a crisis, the scope of the term 'crisis', and whether these grounds would cause an additional delay to urgent procurements.[*86] Against the Cabinet Office's initial offering, the crisis procurement concept did not receive praise from the

77 Luís Valadares Tavares and Pedro Arruda, 'Public Policies for Procurement under COVID-19' [2021](3) European Journal of Public Procurement Markets, 22–23. – DOI: https://doi.org/10.54611/cuin2767.

78 For discussion of similar problems in the EU, see Staffan Dahllof and Adriana Homolova, 'Billions of Euros, Millions of Faulty Masks, and No Answers' (EUobserver, 4 November 2020) <https://euobserver.com/health-and-society/149898>. Also see UK Department of Health and Social Care, 'Annual Report and Accounts 2020–2021' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052421/dhsc-annual-report-and-accounts-2020-2021-web-accessible.pdf>.

79 Further, the government has announced that the sunset for all EU laws retained will be on 31 December 2023 in accordance with the Retained EU Law (Revocation and Reform) Act 2023. After agreement by both Houses on the text for the Retained EU Law (Revocation and Reform) Act, Bill 2022 received Royal Assent on 29 June 2023. The bill thus became an Act of Parliament (a law).

80 Cabinet Office, 'Transforming Public Procurement: Government Response to Consultation' (December 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038516/Transforming_Public_Procurement-_Government_response_to_consultation.v3_.pdf> ('Response to Green Paper').

81 Cabinet Office, 'Transforming Public Procurement' (December 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943946/Transforming_public_procurement.pdf> ('Green Paper').

82 Cabinet Office, 'New Plans Set Out To Transform Procurement, Providing More Value for Money and Benefitting Small Business' (Cabinet Office News Release of 20 December 2020) <https://www.gov.uk/government/news/new-plans-set-out-to-transform-procurement-providing-more-value-for-money-and-benefitting-small-business>.

83 Green Paper (n 81) para 21.

84 Green Paper (n 81) paras 78–81 and 213–216.

85 Response to Green Paper (n 80) paras 94–97.

86 Response to Green Paper (n 80) para 100.

stakeholders. In its response, the Cabinet Office stated that they would move away from the term 'crisis' and instead would give additional power to a Minister of the Crown to declare when action is necessary to protect life and allow contracting authorities to engage in procurement without having to meet all tests connected with the current 'extreme urgency' grounds.[*87]

Nearly six months later, the Procurement Bill was published, on 26 May 2022, and the text underwent some changes in the process of the Bill moving through the various steps of legislation in Parliament. In the current form of the Bill, published on 14 June 2023, direct awarding without prior publication is rebranded as to be used in special cases and in circumstances that involve protecting life, etc.[*88]

The new proposed rules state:

> (1) If a Minister of the Crown considers it necessary, the Minister may by regulations provide that specified public contracts may be awarded under section 41 as if a direct award justification applies.
>
> (2) In subsection (1), 'necessary' means necessary to— (a) protect human, animal or plant life or health, or (b) protect public order or safety.

In addition, public authorities would have to publish the above-mentioned transparency notices, setting out their intention to award a direct contract, with the content and form of such notices being left to the relevant authorities.[*89]

It is evident that the bulk of the rules and conditions for emergency procurement remained similar to the EU rules while notification is made mandatory and a specific set of grounds for direct awarding is established.[*90] Clearly, the pandemic played a decisive role in the creation of a new category of rules distinct from the body of the Procurement Directive of the EU and the current Procurement Regulation in the UK.[*91]

4. The public procurement framework in France

France implemented Directive 2014/24/EU through a decree in 2016.[*92] Since 2019, the 'Code de la commande publique' (hereinafter 'the Public Procurement Code') has been in force in French law, where it compiles rules on concessions and public procurement, including public/private partnerships. In terms of general ethos, the legislation reaffirms the principle of awarding contracts to the party making the economically most advantageous tender. However, the criteria for awarding contracts are numerous, with environmental and social criteria promoted by French procurement regulation since 2004. The Climate and Resilience Act[*93] requires that by 2026 public procurement contracts include environmental and social clauses.

With regard to situations of urgency, French law provided for a long time that the urgency should be external to the buyer.[*94] Two situations need to be distinguished: simple urgency can lead to a mere simplification of procedures, whilst extreme urgency can lead to a waiver of the publicity requirement. For cases of simple urgency, the French Public Procurement Code provides for a reduction of the period required for consultation. The burden of proof related to urgency rests with the buyer, yet the code does not require this urgency to be **external** to the buyer.[*95] Some transparency / good administration duties are articulated by the legal framework, such as the obligation to state the reasons for urgency in the notice of the tender,[*96]

87 Response to Green Paper (n 80) para 102.

88 Articles 41 and 42 of the Draft Procurement Bill.

89 Draft Procurement Bill, art 44.

90 Chapter 3 of art 40(5)(d), on direct award in special cases.

91 The first reading of the draft bill was held in the House of Lords on 11 May 2022 and proceeded in the House of Commons for further amendments. The draft bill went through its report stage and third reading on Tuesday, 13 June 2023. The House of Commons passed the draft with amendments. At the time of this writing, 30 June 2023, said bill is with the House of Lords, awaiting consideration of Commons amendments.

92 Decree of 25 March 2016.

93 Of 20 July 2021.

94 Per the 'Code de marchés publics', now abrogated.

95 CCP, arts R.2161-3, R.2161-6, R.2161-8, R.2161-12, and R.2161-15.

96 DAJ Fiche Technique : 'MINEFI, « Comment utiliser les formulaires europeens ? », mise à jour le 1er avril 2019'.

to notify of the rejections, and to state reasons for them[*97]; a standstill obligation for judicial protection reasons[*98]; and, finally, the drawing up of a report in accordance with the European rules.[*99]

With respect to extreme urgency, the Public Procurement Code exempts both concessions[*100] and public procurement[*101] from the publicity requirement. The code transposes the European rules regarding the negotiated procedure without publication in Article R.2122-1, noting that this procedure is limited to what the emergency situation necessitates. Accordingly, the buyer may launch a public procurement procedure without publicity **or competitive bidding** in cases of extraordinary urgency resulting from external circumstances that could not have been foreseen by the buyer and that do not allow the buyer to respect the deadlines provided for by the law. The code also supplies a non-exhaustive list of examples, such as the execution in emergency of certain work mentioned in the Public Health Code and the Construction and Housing Code. The Code de commande publique allows more leeway in cases of extreme urgency, in the event of which public buyers may undertake procurement without publicity or competition, whereas the European Directive terms mention only the negotiated **procedure without publication** for such cases. According to articles R.2112-17 and R.2312-13 of the Public Procurement Code, extreme urgency can also justify conclusion of contracts with a provisional price.

The hard law framework in France provided for enough flexibility to weather a pandemic; however, supplementary explanations were needed to bring clarity, especially given the complex set of contractual sanctions that can apply should the contract not be fulfilled. In this light, clarification as to the application of the criteria for *force majeure* was vital. The three conditions for *force majeure* are the unpredictability of the event, the event being external to the parties, and the irresistibility of the event (in other words, this is the 'attribution' test as described above). Whilst it is quite straightforward to determine that the pandemic fulfilled the first two conditions, the third condition needs to be assessed on a case-by-case basis.

a. The soft law approach in France

France had two main 'sanitary emergency' periods, one in March–July 2020, the second from 17 October 2020 to 1 June 2021. The first procurement instrument issued by the authorities was a 'fiche technique' prepared by the legal service of the Finance and Economy Ministry in the wake of the lockdown measures imposed on the 16th of March 2020. The fiche recognised that the pandemic was a *force majeure* event. This was 'without prejudice to future provisions that might be adopted by emergency legislation'.[*102] With regard to the conditions for *force majeure*, the document expressly states that the pandemic was not foreseen and was external to the parties but also points out that it needs to be checked, on a case-by-case basis, whether any failure to fulfil contractual obligations is due to the sanitary crisis and, in particular, to lockdown. The document reiterates the Government recommendation to public buyers to admit that the difficulties encountered by their partners might be due to *force majeure*. However, this does not remove the possibility of a case-specific analysis concluding that the pandemic does not preclude certain obligations being fulfilled, which means that providers needed, at least theoretically, to be vigilant.

Similarly, the fiche also interprets the Public Procurement Code – namely, Article R.2161-8 and Article R.2122-1, allowing for shortened publication periods as well as the engagement of the procedure without publicity and competition requirements. There is also a reminder that orders pursuant to such procedures are only to be made for the prices and the term strictly necessary to satisfy urgent needs.

All this somehow is an attempt to reconcile the need for legal certainty that the pandemic will be recognised as a *force majeure* event with the need to ensure public procurement principles of transparency, legal certainty, and competition, even in situations of crisis. Yet such a 'fiche technique of the Direction Affaires Juridiques' is merely an information document, with no legally binding force, which could eventually fall in the wide category of 'soft law' we identify at the European level. What is more, it is quite difficult

97 CCP, arts R.2181-1 and R.2181-6.

98 'Code de justice administrative', L. 551-1ff.

99 CCP, art R.2184-1.

100 CCP, art R.2122-1 (on 'marches classiques') and art R.2322-4 (on 'marches de defense et securite').

101 CCP, art R.3121-6, 3°.

102 See <https://www.economie.gouv.fr/files/files/directions_services/daj/fiche-passation-marches-situation-crise-sanitaire.pdf>.

to determine how this carefully drafted text adds something or clarifies anything of the legal framework. Hard(er) law was soon authorised, when France passed law 2020-290 of 23 March 2020, allowing the Government to take measures in order to fight the pandemic. Namely, the law calls for ordinances to 'adapt the rules concerning the award, the payment deadlines, the execution and termination, especially those related to penalties, provided in the Public Procurement Code'.

b. Law hardens

Issued on the mandate of Law 2020-290, Ordinance 2020-319, of 25 March 2020[*103], provided that special adjustments can only be introduced if they are necessary for coping with the pandemic and with the restrictions imposed by the pandemic, whereby the **default** applicable provisions remain those of the Public Procurement Code. Interestingly, there is no presumption of *force majeure*, which needs to be qualified on a case-by-case basis (and no reference to 'urgency' is made in the decree on specific COVID-related measures accompanying Law 290).[*104] The burden is on the authorities and on the economic operators to prove that they are encountering difficulties due to the pandemic and that prevent them from following the normal procedures or following the normal manner of execution of contracts. This case-to-case approach appears to defeat the objective of clarity and legal certainty, which the ordinance was supposed to follow.[*105] However, this cautious approach allows the necessary flexibility to protect such principles in times of crisis. For example, public authorities 'can', according to Article 3 of the ordinance, adjust the conditions of competition for public procurement as provided for in the Public Procurement Code in the event that it is impossible to respect such conditions. The public authorities appear to have freedom in this regard, provided that they can justify their choice and that it respects equal treatment.

The ordinance established various adjustments, such as extending the term of contracts already in place, allowing subcontractors, and even providing for aid measures. The ordinance also allows such adjustments to existing procedures as postponing deadlines for application and adapting the selection procedures to the exigencies of the lockdowns. Finally, the ordinance limits the sanctions in cases of non-execution due to *force majeure*, thus adapting public procurement further.[*106] As pointed out in the literature, the smart use of sanctions and enforcement is important, as strict sanctions might deter providers from participating to bids, which could have been catastrophic amid the pandemic's conditions of scarce supply.[*107]

This ordinance does not necessarily deal with new procedures – or indeed with the procedure without competition or publication – thus leaving the explanations of the fiche technique as to the notion of urgency standing and allowing for full application of the Public Procurement Code in this regard. However, a wave of relaxation of public procurement rules has occurred in France since the COVID pandemic. A set of these involves raising the threshold for publicity and competition. Such an increase in thresholds started even before the pandemic, with its first increase being from 25K euros to 40K euros in January 2020.[*108] This was followed by a COVID-related temporary increase to 75K euros for public works, public supplies, and foodstuffs,[*109] then, finally, by an increase to 100K euros for public works until 31 December 2022.[*110] Pandemic-related adjustments were made by other instruments too, specifically by Ordinance 2020-391, entrusting certain duties related to the organisation of public procurement to executives at the local level (rather than deliberative structures) and thus speeding up the decision-making process. This could, in turn,

103 'Ordonnance n° 2020-319 du 25 mars 2020 portant diverses mesures d'adaptation des règles de passation, de procédure ou d'exécution des contrats soumis au code de la commande publique et des contrats publics qui n'en relèvent pas pendant la crise sanitaire née de l'épidémie de covid-19, JO 26 mars 2020, texte 43', modified by art 20 of Ordinance 2020-460, of 22 April 2020.

104 'Décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire.'

105 Mathias Amilhat, 'La commande publique face au COVID-19 : dans l'attente de mesures réellement efficaces' [2020] *Journal du Droit Administratif* <http://www.journal-du-droit-administratif.fr/la-commande-publique-face-au-covid-19-dans-lattente-de-mesures-reellement-efficaces/>.

106 Ibid.

107 Laurence Folliot Lallion and Christopher R Yukins, 'COVID-19: Lessons Learned in Public Procurement: Time for a New Normal?' (2020) 3(3) Concurrences 46, 49.

108 'Décr. n° 2019-1344 du 12 déc. 2019, JO 13 déc.'

109 'Décr. n° 2020-893 du 22 juill. 2020, JO 23 juill.'

110 'Amdt n° 1106 (rect.)', 24 September 2020.

be problematic from the standpoint of legitimation of these measures and also, certain authors argue, the efficiency of the procedures.

c. Beyond COVID?

French legislation and judicial practice is in a process of ongoing adaptation to the various current crises, not only post-COVID but also during the Ukraine war. For instance, the Conseil d'Etat has clarified, at the request of the Government, the possibility to revisit financial clauses in contracts impacted by the current economic situation if the partner public authority agrees. In writing its opinion, the Conseil d'Etat relies on European legislation on public procurement, as well as on EU case law.[*111]

Further relaxation of procedural rules for public procurement was performed through legislation – namely, the Act on the acceleration and simplification of public action ('ASAP').[*112] Accordingly, construction contracts under 100,000 euros were exempted from publicity and competition requirements (until the end of 2022), yet, as the Constitutional Council reminded, public buyers have to respect the principle of equality and good use of public money as mentioned in Article L3 of the Public Procurement Code.[*113] Article 131 of the Act complements the Public Procurement Code[*114] with a supplementary reason for suspending prior publicity and competition rules, namely if such a procedure would be contrary to the public interest. Yet, assessing this reason is not left to the discretion of the buyers but, rather, it falls within the powers of the regulator. Moreover, the measures taken must be precise and proportionate, in order to respect constitutional requirements, and shall cover only actions falling outside the scope of application of EU law. This measure is in line with the Council Conclusions of November 2020, which elevated public procurement to the status of an essential tool to relaunch the economy, create jobs, and repair the damage caused by the pandemic. Article 132 of the ASAP law generalises the measures provided for in the CoViD ordinance by adding two new books to the Public Procurement Code, with specifications for specific emergency measures, hence increasing preparedness for future crises. These measures shall be activated by decree and only pursuant to specific delegation provided for by a legislative measure. The principles of ensuring fair competition and equality, even in emergency circumstances, are expressly enshrined in Article L 2711-3 and Article L3411-3 of the code.

The ASAP law and its relaxation of public procurement rules were needed in order to save failing undertakings. As noted in the literature, the objectives for public procurement, aimed at protecting the interest of public buyers, are not always in harmony with the objective of saving failing undertakings.[*115] Yet the ASAP law eases the access of such undertakings to public procurement, allowing firms that have a rescue and restructuring plan to proffer bids. This possibility did not exist before the pandemic and was introduced by Ordinance 2020-738 of 17 June 2020. Undertakings subject to a rescue and restructuring plan can be partners in public procurement contracts for a ten year term, which is likely to help companies suffering long-term effects of the COVID-related restrictions and difficulties. However, the devil is in the detail, as the undertakings would still need to satisfy the criteria set for the procurement they apply for and must win the competition with the other tenders (this suggests that the general public procurement principles should not be diverged from). At the same time, the ASAP law extends and better streamlines the rule that a public buyer cannot terminate a contract merely because the partner is an undertaking in difficulty / subject to a judicial reorganisation procedure.

The aim to relaunch the economy seems prioritised over equal treatment and transparency. However, provision is made that the public buyers need to make sure they choose an appropriate offer, make good use of public money, and do not systematically choose the same operator in cases featuring a plurality of offers.[*116] Notions such as 'appropriate offer' or 'good use of public money' are rather fluid, and their precise legal boundaries will probably be left to judicial interpretation. With regard to the obligation not

111 Opinion N 405540 of the Conseil D'Etat, 15 September 2022.

112 'LOI n° 2020-1525 du 7 décembre 2020 d'accélération et de simplification de l'action publique JORF n°0296 du 8 décembre 2020.'

113 'Cons. const., déc. n° 2020-807 DC du 3 décembre 2020', pt 57.

114 Articles L2122-1 and L2322-1.

115 Grégory Kalfleche and Francine Macorig-Venier, 'Loi ASAP, entreprise en difficulté et commande publique'.

116 Article R.2122-8.

to systematically choose the same operator in cases of a plurality of offers, it is not difficult to imagine a certain scenario of collusion between operators to 'take turns' in winning public bids, especially in remote and small communities.

5. Concluding remarks

This article explored regulatory responses of governments in procuring under extreme urgency situations and offered evidence from the EU, the UK, and France. What emerges from the exploration of the regulatory framework is a mix of soft and hard law used to various degrees in the different jurisdictions. Whilst the European Union and the UK decided to resort to soft law to relax public procurement, France used soft guidance only to a limited extent, partly because rules addressing public procurement (including urgency clauses) have been established in hard codes and legislation. Challenges to core general principles such as transparency and equal treatment are present, though, however soft or hard the legal framework is, and they surface in requests for judicial review, as exemplified in some high-profile UK cases.

As we have reiterated throughout this article, we argue that the grounds for the negotiated procedure without prior publication should be interpreted narrowly as the case law suggests and as the nature of the rule requires. In contrast, we observed varying degrees of compliance with the letter of the law in the soft law instruments of the EU, the UK, and France. If we were to accept the approach of the Commission as suitable for the spirit of the times, it can be deduced that Article 32(2)(c) gains a whole new meaning under a health crisis – a meaning that is not found directly written down or implied under either the hard law or case law pertaining to procurement. Our conclusion is supported by the findings from the UK in particular. Although UK case law did endorse the vague approach taken in the soft law instruments, it is evident from recent legislative development of the UK in which the government proposed the 'crisis' / 'procurement to protect human life' concept that the gap between the rules and practice was a huge one to fill with current legal tools. One principle that stands out in the wake of the use of public procurement amid the pandemic is transparency. This can and should be ensured during the crisis but also *ex post*, through publication of relevant information. As the literature argues, such a task is made even easier in a digitalised world, wherein procurement activity can and should be traceable online.[*117]

As for the way forward, public procurement reforms are being put in place in order to accommodate the revival of the economy, which might be conflictual with principles regulating other areas of law, such as bankruptcy. Matters are complicated further by the circumstances of economic sanctions, which, beyond any considerations related to efficacity, raise tricky administrative questions about their implementation at the national level.

[117] Laurence Folliot Lallion and Christopher R Yukins, 'COVID-19: Lessons Learned in Public Procurement: Time for a New Normal?' (2020) 3(3) Concurrences 46, 52.

https://doi.org/10.12697/JI.2023.32.03

Raquel Carvalho

Associate Professor
Universidade Católica Portuguesa

Procurement in Times of Crisis:

The Portuguese Experience

Abstract. Since 2020, Portugal has enacted legislation specific to addressing the SARS-CoV-2 pandemic, with two distinct moments in this process: one dedicated to the pandemic situation in particular and a more recent one, connected with European funding and its implementation, various energy crises, and effects of economic warfare. As regards the complex and intricately entangled COVID-19 legislation, swift public procurement procedures were established to comply with certain requirements to guarantee competition, since the pandemic constituted an abnormal and unforeseeable circumstance that did not fit into the forecast of urgency provided for in the Directives. Legislation was issued on the modification of long-term contracts, yet with presented a highly debatable solution for the changes' implementation and prohibiting the use of pecuniary compensation. While that legislation has since been repealed, transitory rules and exceptions whose scope is still difficult to understand in full took its place – in the main, the current special legislation on public procurement, Law 30/2021, intended for executing the implementation plan for projects financed or co-financed by European funds, which contains several rules that deviate from the regime resulting from the European directives, plus re-establishment of monitoring by the Court of Auditors, creation of an Independent Commission for supervising the implementation of the associated legislation, and the passing of extraordinary price-revision legislation. The paper presents a brief report on this Portuguese legislative context and on the respective monitoring by both jurisdiction-linked and non-jurisdiction-associated bodies. It directs special attention to the difficulties and perplexities raised by the regimes involved.

Keywords: public-procurement rules, crisis legislation, extraordinary price revision

1. Introduction

1.1. The context of public procurement in Portugal

The 2004 Public Procurement Directives were transposed into the Portuguese Public Contract Code (PCC) in 2008. From even before the EU-level work and the associated transposition, the code has undergone revision several times.

As an EU member state, Portugal transposed the 2014 Public Procurement Directives too, yet without much creative effort, even where it was allowed, thus copying European solutions wholesale. Therefore, the country's public-procurement-related legal context reflects said European directives strongly, with one consequence being legislation more or less similar to that of other Member States.

Portugal has established several types of public-procurement procedure, among them direct award. Its rules for direct award are based on criteria of strict necessity and 'reasons of extreme urgency resulting from events unforeseeable by the contracting authority [that] cannot meet the deadlines inherent in the other procedures and provided that the circumstances invoked are in no way directly attributable to the contracting authority'[*1]. Before the pandemic (namely, between 2016 and 2019), urgency was appealed to as a criterion for choosing direct award in the case of 72.8% of all contracts concluded[*2].

1.2. The setting impelling adjustment

On 13 March 2020, the World Health Organization (WHO) declared the disease COVID-19, caused by the worldwide spread of the SARS-CoV-2 virus, to have reached pandemic levels. Faced with this global threat to the health of their citizens, countries took various measures, particularly at the regulatory level. Two public needs were immediately pressing: protecting citizens from the disease and strengthening health systems so as to provide adequate and timely response to the avalanche of patients seeking medical help.

Portugal was no exception in terms of extraordinary legislation to address these two needs, in combination with those arising in the wake of associated administrative measures with their serious impact on the economy. Successive lockdowns/confinements, decreed in the context of the declaration of a state of emergency – a state of constitutional exception – ushered in several norms and instruments for measures restricting rights, freedoms, and guarantees, many of questionable constitutionality.

This social and health context precipitated complex, intricate legislation, often difficult to interpret and apply. In the arena of public procurement, spinning of this web began with Decree-Law 10-A/2020, of 13 March 2020, and Law 1-A/2020, following it on 20 March. Since then, the former has been amended more than 30 times – with its articles 2 to 4 (Chapter II) and its definition of the scope of application (presented in Art. 1) being especially important with regard to public procurement. Legislation subsequent to this addressed the objective amendments of public contracts, prohibiting pecuniary compensation, a solution that raised several persistent doubts as to constitutionality. It was argued that this legislative measure violated the right to property inherent to the practice of pecuniary compensation by way of violation of the contractual equilibrium that evolves with an abnormal and unavoidable change of circumstances. The right to property is a fundamental right, with its nature (similar to that of core rights, freedoms, and guarantees) rendering it subject to special legal and constitutional protection, particularly with regard to special rules on restriction of its content.

In further developments, with justification anchored in the application of European funds for support amid the economic situation emerging from the pandemic, Portugal again enacted specific legislation on the public-procurement mechanisms applicable in that context – namely, Law 30/2021, of 21 May 2021, approving special measures for public procurement, a law very recently amended by Decree-Law 78/2022, of 7 November 2022.

Notwithstanding the many doubts expressed as to their legality, constitutionality, and compliance with EU law, said regimes established supervisory mechanisms that continued to hold sway. In the case of the public-procurement legislation connected with the pandemic, the Court of Auditors (CofA) assumed increased responsibilities; for the special measures' framework and implementation. In addition to supervision by the CofA, the measures included creating an *ad hoc* entity to monitor execution: Independent Commission for the Monitoring and Supervision of Special Public Procurement Measures (ICMSSPPM).

1 Per art 24(1)(c) of the PCC.

2 Institute of Public Markets, Real Estate and Construction, IP (IPMREC, IP), *Annual Report – Public Procurement in Portugal 2019* (November 2020) 42, in its English-language version available via <https://www.impic.pt/impic/pt-pt/relatorios-e-dados-estatisticos/relatorios-de-contratacao-publica> accessed 21 June 2023.

2. The special public-procurement regime responding to the pandemic[*3]

Decree-Law 10-A/2020, whose effects were later codified explicitly by Law 1-A/2020, of 20 March[*4], approved exceptional, temporary measures for public procurement and the authorisation of expenses in response to the epidemiological situation caused by the coronavirus and by the disease COVID-19. In consequence, the public-procurement regime underwent several changes[*5].

2.1. The first iteration of the special regime

The first version of the special public-procurement regime posed some interpretation challenges as to its subjective scope. In particular, Article 1(3) referred entities that 'are part of the corporate public sector, the administrative public sector or, with the necessary adaptations, local authorities'. The inclusion of expressions for a contracting entity that are non-conformant with the concepts otherwise used in Portugal led to debate and to the prompt revision of Article 1(3)[*6].

As for its objective scope, the regime was specified as applying to public-works contracts, contracts for the lease or purchase of movable property, and the acquisition of services, irrespective of the nature of the contracting entity. It was also required that the contract's object be related to the prevention, containment, mitigation, and treatment of epidemiological infection by the SARS-CoV-2 virus and, alongside it, the restoration of normality after any such infection. Contracts under the new regime were not subject to prior review by the CofA, but neither was a concomitant regime of subsequent review ruled out[*7]. Contracts covered by this exceptional public-procurement regime took effect as soon as they were awarded, whether or not they were put in writing, and they were to be submitted to the CofA for information purposes within 30 days of the signing of the agreement.

For the special regime to apply, several requirements associated with the object of the contract had to be met; i.e., the parties had to provide a demonstration of the purposes motivating recourse to special rules and of a meaningful link between the measures and those purposes.

Specific procedural rules addressing direct negotiation, referred to in Article 2(1), established two requirements: said negotiation had to be both 'strictly necessary and for reasons of urgency'[*8] – requirements quite similar to those articulated in the then-current version of Article 24(2), paragraph c of the PCC. Said provision excluded the procedure for prior consultation previously provided for in Article 27A, which was explicitly withdrawn in subsequent revisions to the PCC.

Article 2(2), in turn, encapsulated the regime for so-called simplified direct agreement – a highly streamlined procedure carried out by means of an invoice that could be employed for values of up to 20,000 euros (in contrast, the procedure articulated in the PCC had a threshold of 5,000 euros), provided

3 The special regimes were criticised by the European Union: Communication 2020/C 108 1/01 – 'Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis' <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0401(05)&from=EN> accessed 16 March 2023; PF Sanchez, 'Medidas Excepcionais de Contratação Pública para Resposta à Pandemia Causada pela Covid-19' in *Covid-19 e o Direito* (Edições Universitárias Lusófonas 2020) 45, 54ff. Regarding analysis of the pandemic-related legislation through to April 2020, JD Coimbra, M Caldeira, and T Serrão, *Direito Administrativo da Emergência* (Almedina 2020) 83ff; PM Pereira, 'Procedimentos Fechados no Contexto de Emergência e de Estabilização' [2020](24) Revista de Contratos Públicos ('RCP') 195, 201ff.

4 Law 1-A/2020 had an important influence in its own right, in parallel with the introduction of Law 4-A/2020, of 6 April of the same year, in the area of judicial litigation of public procurement. This adjustment in the legislative domain brought in suspension to various time limits established for procedures and processes. Later, on 1 February 2021, Law 4-B/202, by revoking articles 7A and 6A of the latter law and providing alternative terms (in its Article 6B) to address suspending procedural deadlines, ended the suspension to judicial deadlines and maintained the non-suspended state of public-procurement deadlines. Ultimately, all the rules set forth in Law 1-A/2020 that pertained to suspension of procedural deadlines were repealed by Law 13-B/2021, of 5 April.

5 Compare with R Carvalho, 'The Portuguese Covid-19 Public Procurement Rules' (2021) 16(1) European Procurement & Public Private Partnership Law Review 30. – DOI: https://doi.org/10.21552/epppl/2021/1/6.

6 Pereira (n 3) 202.

7 Coimbra, Caldeira, and Serrão (n 3) 114ff.

8 Ibid 102ff; Pereira (n 3) 202.

that the requirements specified via the regime's framework were met (principally dictating application for acquisition/rental of goods or for obtaining services).

Finally, Article 2(3) made the limits described in Article 113 of the PCC applicable in cases of employing the direct-award procedure, for reason of protecting competition.

The parties to contracts were required to submit the details of any award under this regime to the government officials responsible for the relevant sector and for the finance domain, and these had to be published online via the state public-procurement portal. Still, publication pertaining to the conclusion of a contract following a direct-award process, as provided for in Article 127 of the PCC, was not made a condition for that contract's entry into force. Hence, all effects stipulated in the contract could unfold immediately upon awarding.

Article 3 made special provisions related to expenses[*9]. These took the form of an exceptional regime establishing the formation of tacit authorisation 'in the absence of a decision, as soon as 24 hours [have] elapsed since the request was sent electronically to the respective public entity' with the power to authorise it. In addition, acquisitions under this decree-law were considered justified 'for the purposes of the requests for authorisation referred to in the previous sub-paragraph'. These provisions were intended for expediting the process and covering situations that are genuinely exceptional relative to traditional contexts of administrative-law obligations: inter-organic control (with the formation of a tacit act) and the duty to substantiate (which gained *ope legis* effect).

Finally, Article 4 created an exemption to the usual authorisation requirements in cases of 'decisions to contract for the acquisition of services the object of which is the performance of studies, opinions, projects, and consultancy services, as well as any specialised work'.

2.2. The revised special public-contract regime

On 25 March, Decree-Law 10-E/2020 revised Article 1, on the special regime for public procurement; introduced additional rules regarding the granting of powers to authorise expenses; and made the effects retroactive to the date of issue of the revised Decree-Law instrument.

Thus, the range of subjects to which the regime applied under Decree-Law 10-A/2020, including the special public-procurement system, was amended: the regime was now applicable to those contracting entities and 'bodies governed by public law' listed in Article 2 of the PCC.

Article 2A of Decree-Law 18/2020 of 23 April 2020 established an exceptional regime of simplified direct award, provided for in Article 128 of the PCC, one whose application hinged on the fulfilment of the requirements of strict necessity and reasons of imperative urgency, subject to justification whatever the contract price might be and up to the budgetary limit. Though it was expansive in this regard, the scope of objective application was limited to 'contracts whose purpose [is] the acquisition of equipment, goods, and services necessary for the prevention, containment, mitigation, and treatment of infection by SARS-CoV-2 and the disease COVID-19'.

Shortly after this, Decree-Law 20-A/2020, of 6 May, introduced a new article (Article 6), addressing the requirements applied by contracting authorities in the context of institutional advertising related to COVID-19. The limits were specified as 'to the extent strictly necessary and for reasons of imperative urgency, duly substantiated, regardless of the contractual price, and up to the limit of the budget'.

In the meantime, another piece of legislation had appeared. The Portuguese government issued an exceptional temporary-duration regime for the financial *reequilibrium* of long-term execution contracts, via Decree-Law 19-A/2020 of 30 April[*10].

The regime that it entailed prompted extensive discussion from the start as to its scope of application and the concept of a long-term, or 'lasting', performance contract. Per most doctrine, the regime was deemed intended, in particular, for concession contracts. It imposed suspension of the financial *reequilibrium* mechanisms provided for by law, until the end of the state of emergency. Therefore, in the event of any imbalance caused in the intervening span of time for reasons stemming from the pandemic, room was left only for such 'compensation or replacement [to] be carried out [as was possible] by extending the deadline for performance of the services or the duration of the contract, not giving rise, regardless of legal provision

9 The rules for authorising expenses are, as a norm, those contained in Decree-Law 197/99 of 8 June.

10 ML Brito, 'Impacto da Pandemia Covid-19 na Execução dos Contratos Administrativos' [2020](24) RCP 247, 274ff.

or contractual stipulation, to price revision or assumption, by the contracting party or public partner, of a duty to provide to the counterparty'.

In some scholars' opinion, the law established two regimes, the first of which, applied from 3 April to 20 May 2020, forbade the contracting partners to 'activate the contractual clauses that established the right to restoring the financial balance or compensation'*[11] while the second entailed, past that time window, the possibility of activating compensation or restoration of the financial balance on condition that the events had occurred before 3 April or after 20 May.

In summary, consistently with the understanding of Pedro Fernández Sánchez,

i) Law 1-A/2020 of 19 March dealt with exemptions from the prior requirement for CofA approval and ratified the regime approved via Decree-Law 10-A/2020;
ii) on its heels, Decree-Law 10-E/2020 clarified the subjective scope of application of the exceptional regime (to extend it to all contracting entities encompassed by Article 2 of the CCP);
iii) preceding these pieces of legislation, April's Law 4-A/2020 permitted the exceptions to the terms dictating the presentation of qualification documents and to the requirement of a bond;
iv) Decree-Law 18/2020 of 23 April authorised 'direct' and 'simplified direct' adjustment up to the limit of the budgetary allocation in cases of certain acquisitions of goods and equipment for the health field; and
v) finally, Decree-Law 20-A/2020 of 6 May authorised groups of contracting entities to use direct adjustment procedures, again only to the extent strictly necessary and for reasons of compelling urgency, with due foundations, regardless of the contract price and within the limits of the budget's allocation, in aims of establishing a space where institutional publicity of the State and other public entities actions could diffuse and flourish, through measures implemented a short while later by means of Resolution of the Council of Ministers 38-B/2020 of 19 May*[12].

2.3. The withdrawal of the special regime for public procurement

Decree-Law 66-A/2022 of 30 September extinguished some of the legislation's provisions for pandemic-linked situations. Addressing this purpose, the preamble articulated that 'in this context, through this decree-law, clarification is being made [with regard to] the decree-laws that are still in force, as well as regarding the elimination of measures that are no longer necessary, through the express resolution of termination of the validity of decree-laws that are already obsolete, anachronistic, [or now] outdated by the evolution of the pandemic'; still, the introductory context-setting continues, it is 'important to guarantee that the alterations made to legislation prior to the pandemic by the decree-laws now revoked are not affected' and, therefore, 'is clarified that the revocation promoted by this decree-law has its effects limited to the decree-laws provided for herein, thus not affecting changes to other diplomas [legislative instruments] introduced by these decree-laws that are now revoked'.

Article 2.1 (a) withdrew the special public-procurement regime while maintaining the amendments introduced by means of said 'diplomas' (now revoked) within other regimes (per paragraph 2). This provision could have posed many difficulties for efforts to identify said alterations and their respective delimitation; however, it did not affect the public-procurement regime in the dimension we have been grappling with in this paper.

At present, the country has no special rules in force that pertain to public-procurement procedures specific to the context of COVID-19 and the pandemic.

11 Ibid, 277.

12 Sanchez (n 3) 44–45.

3. Special procurement measures linked to post-pandemic economic recovery

In 2021[*13], while the complex regime of the 'COVID-19 Regulations' held sway, the legislature passed into law special measures related to public procurement, with Law 30/2021 of 21 May. Yet the grounds for these were anchored not in the pandemic but in implementation of the Recovery and Resilience Plan[*14]. Its object, as defined in Article 1(1)(a), was the 'approval of special public procurement measures regarding projects financed or co-financed by European funds, housing and decentralisation, information and knowledge technologies, health and social support, implementation of the Economic and Social Stabilisation Programme and the Recovery and Resilience Plan, fuel management under the Integrated Management System for Rural Fires (SGIFR) and also agri-food goods'.

The commensurate measures developed were elaborated upon via Chapter II of that law, and an initial limit to the term of validity, 31 December 2022, was set in certain areas[*15].

In addition to furnishing special measures related to those sectors, Section II established simplified procedures. In tuning implemented since passage of the law's first version, simplification brought electronic procedures, exemptions from the duty to supply reasons for not contracting in lots and for setting a certain base price, special rules for selecting invited entities in accordance with the value of the contract, special terms addressing impediments, shortening of the time before deadlines for completion of hearings and administrative impugnation, and rules on not providing a guarantee.

Also, specific terms were introduced that deal with supervision by the CofA, and an independent commission was set up. Finally, doubling of the fines foreseen enabled the administrative-fine framework to emerge as a protective mechanism accompanying this special-measures regime.

In 2022, Law 30/2021 was amended. The rationale underpinning the special measures, as characterised in the preamble, was to promote the 'deepening and clarification' referred to, where '[a]n example of the first desideratum is the extension of the deadline for application of the special measures to matters related to housing and decentralization, information and knowledge technologies and the health and social support sectors' and '[a]n example of the second is the clarification of the applicable procedures in the case of pre-contractual procedures relating to the implementation of the Recovery and Resilience Plan (RRP)'. The introduction continues thus:

> In relation to these, the law has now firmly clarified what has always been the legislator's option [but that] has left doubts about interpretation in need of intervention. It has now been clarified that the procedures covered by Article 2 of Law 30/2021 of 21 May also relates to contracts for the implementation of projects within the scope of the RRP[*16]. It is therefore clear that, in these cases, it is not necessary to apply the provisions of Article 6 of the above-mentioned law (which, in any case, already exempted the order provided for therein in situations where the interventions in question concern the implementation of projects financed or co-financed by European funds, as is the case for all projects under the RRP)[*17].

The legislative amendment extended to Articles 2–7 and 19. The former pertain to pre-contract procedures related to implementation of projects financed or co-financed by European funds, housing, decentralisation, information and knowledge technologies, programmes for stabilisation of health and economic/social

13 Law 30/2021 of 21 May approved special measures for public procurement and amended the Public Procurement Code.

14 When consulting the explanatory memorandum on Proposed Law 41/XIV/1, presented by the government to Parliament and which served as the basis for Law 30/2021, one can identify 'the purpose of stimulating the relaunch of the economy, intending to modernise, simplify and debureaucratise administrative activity and, in particular[,] render more flexible and simplify the procedures for the formation of public contracts, as well as to promote … more effective, and less prolonged, access to those contracts by economic operators'. See the report titled 'Acompanhamento da Contratação Pública abrangida pelas Medidas Especiais previstas na Lei n.º 30/2021', on monitoring of public procurement covered by the special measures provided for by Law 30/2021 <https://www.tcontas.pt/pt-pt/ProdutosTC/Relatorios/relatorios-oac/Documents/2021/relatorio-oac001-2021-pg.pdf> accessed 22 December 2022 ('2021 Report').

15 Here, cf the original versions of articles 3, 4, and 5 of Law 30/2020. The special-measures regime entailed a time limitation connected with pre-contract procedures in the fields of housing and decentralisation, information and knowledge-related technology, health care, and social support.

16 PC Gonçalves, LL Martins, and PS Azevedo, *As Medidas Especiais de Contratação Pública Anotadas* (Almedina 2023) 33.

17 Decree-Law 78/2022 of 7 November 2022.

conditions, and the Integrated Management System for Rural Fires. All these areas apart from the very final one listed saw the special regime's application extended to December 2026. As jurists in Portugal concluded, it was no longer a special and exceptional regime; it had become a regime existing in parallel to that of the PCC.

3.1. The sectors involved

The provisions made for simplified pre-contract procedures encompassed contracts 'intended for the promotion of public housing or of controlled costs or for intervention in real estate whose ownership and management has been transferred to the municipalities, within the scope of the process of decentralisation' of competencies (per Article 3) where the object is the leasing or purchasing of IT equipment; the purchase, renewal, extension, or maintenance of software licences or services; purchasing of computing or cloud-storage services; purchasing of consulting or advisory services; and the execution of public-works projects associated with digital transformation processes (see Article 4) that are designed for 'the promotion of interventions that, by order of the member of the Government responsible for the respective activity sector, are considered integrated within the scope of the Social and Economic Stabilization Programme' as approved in the annex to Resolution of the Council of Ministers 41/2020, of 6 June (per paragraph 1 of Article 6).

Two further spheres were provided for, without explicit reference to Article 2: (1) elements intended for the promotion of the interventions referenced in the extract quoted above from Article 6 (specifically, paragraph 1) that, as described in the same legislation's Article 474(4), fall below the (case-dependent) threshold of 750,000 euros (see Article 7(1)) and (2) the sphere of 'contracts whose object is the acquisition of agri-food goods, [in which] the contracting entities may initiate simplified direct adjustment procedures under the terms of Article 128 of the PCC' when the value of the contract is at least 10,000 euros, provided that the goods (a) are products of organic production; (b) are supplied by entities identified in the Family Farming Statute, approved by Decree-Law 64/2018, of 7 August; or (c) are supplied by holders of the status Young Rural Entrepreneur, approved by virtue of Decree-Law 9/2019 of 18 January.

The reasons for this choice of sectors are laid out in the preamble to the revision instrument: the establishment of policy priority areas and the promotion of greater, more appropriate incorporation of social, environmental, and sustainability-related considerations into public-procurement procedures.

3.2. The special regime for design-and-build contracts[*18]

The 2022 revision introduced Article 2A, on design–build contracts, and established a bespoke 'design–bid–build' regime[*19]. The concept is still conceived of as public work; however, contracting entities may follow simplified procedures. The so-called special and temporary regime[*20] relaxes procedure at various levels, starting with the content of the specifications and encompassing exemptions to requirements related to grounds for non-division into lots and fixing of a base price. Yet the criterion of the proposal being the most economically advantageous one remained mandatory in the multi-factor method[*21] and applicable to the contracting entities in the special sectors mentioned.

While this new regime is available as an option[*22], any contracting authority that chooses the PCC regime must demonstrate strong grounds for the public work with regard to the design stage[*23], as Article 43's item 3 clearly articulates:

18 Gonçalves, Martins, and Azevedo (n 16) 51–55.

19 MA Raimundo, 'Empreitada de Concepção-Construção no Direito dos Contratos Públicos: Função e Pressupostos da Definição Colaborativa de Obras Públicas' (2021) 153(2) O Direito 327, 332.

20 Extended to December 2026 and, therefore, not as temporary as one might think.

21 Referring to the award criterion and its relation to the two stages in design-and-build, P Linhares, 'O Novo Regime Especial da Empreitada de Conceção-Construção' [2023](31) RCP 75.

22 R Ribeiro, 'Algumas Reflexões em Torno do Regime Aplicável às Empreitadas de Conceção-Construção no Código dos Contratos Públicos' [2021](25) RCP 95, 101; ibid.

23 L Torgal, 'A Empreitada de Obras Públicas no Código dos Contratos Públicos – Breve Nota sobre Algumas das Principais Novidades' [2007](64) Cadernos de Justiça Administrativa 62, 64; ibid, 101.

> In duly substantiated exceptional cases, in which the contractor must assume, under the terms of the specifications, obligations of result related to the use of the work to be done, or in which the technical complexity of the building process of the work to be done requires, [for reason of] the specific technicality of the competitors, the special connection of the competitors to the conception of the work, the adjudicating entity can foresee, as an aspect of the execution of the contract to be concluded, [elaboration on] the execution project, in which case the specifications must be integrated only by a preliminary programme.

Therefore, the burden of motivation imposed is much more demanding: the contracting authority must document facts and reasons sufficing to substantiate 'the exceptional nature of the situation', that the work is technically complex, and that there is a connection between that complexity and the contractor-to-be. Corresponding demands do not exist in the special-measures regime.

The substantive regime of the PCC is to be applied with regard to errors and omissions. This feature is worth mentioning because of the accountability of the public-work project's 'designer'. In the PCC-based regime, if design duties are assigned to a contractor and ensuing omissions and errors go undetected notwithstanding diligence, the accountability resides, in general, with the contracting authority, whereas under the exceptional regime, since the design is the contractor's responsibility, the accountability for omissions and errors rests with the contractor alone[*24].

3.3. The features of the regulation

In brief, the characteristics of the pre-contractual regimes currently encapsulated in Law 30/2021 are the following, in their relevant specifics:

(a) subsidiary application of the CCP to the simplified procedures established (per terms of Article 9)[*25]
(b) mandatory electronic processing of the procedures provided for by Article 9 (Article 10);
(c) elimination of the obligation to provide a statement of reasons with regard to decisions on 1) non-division into lots[*26] and 2) setting of the base price (Article 11);
(d) special rules regulating the invitation of entities to submit proposals in the context of the rule on limits to prior consultation (Article 12);
(e) a special norm (with some interpretive dimension) addressing impediments related to social security contribution or tax situation, requiring the admission of candidates or competitors in two particular sets of circumstances associated with those impediments (articles 13 and 16);
(f) reduction of the period before hearing- and administrative-impugnation-linked deadlines (Article 14);
(g) the possibility of not requiring a guarantee, subject to verification of the impossibility of providing one in light of lack of liquidity/insurance;
(h) raising of the thresholds for the use of simplified direct agreement, direct agreement, or prior consultation as regulated via the CCP, applicable only in the context of Article 7;
(i) doubling of the minimum and maximum limits to the fines for administrative infractions falling within the scope of these special measures.

The foregoing language expresses the original regime, based in its essence on the celerity of procedures.

In this regard, it should be emphasised that the reduction of time spans before deadlines is of little significance for the procuring entity but may constitute an obstacle to the exercise of relevant procedural rights by the other participants. On the other hand, celerity is afforded to the detriment of transparency of administrative decisions, in that the procedure dispenses with the obligation – mandatory under the regime of the PCC – to provide a statement of reasons. Finally, it is important to reiterate that these procedures are not mandatory but, rather, offered as a possibility.

---

24 Linhares (n 21).

25 Gonçalves, Martins, and Azevedo maintain that the substantive regime of administrative contracts is also directly applicable to those contracts signed under the special-measures regime (see n 16) 78.

26 For Gonçalves, Martins, and Azevedo, this provision would be expected to have the effect of reducing the number of contracts that are divided into lots, subject to the instrument designed to help small and medium-sized enterprises enter the public-procurement market (see n 16) 85.

3.4. Supervision of the regime

3.4.1. The Court of Account (CofA)

With its Article 17(1), the legislator 'reinstated' the CofA's full supervisory powers: 'Contracts entered into [where the processes follows] simplified public tender or restricted tender procedures by prior qualification adopted under the provisions of section i of this chapter with a value equal to or greater than the value laid down in Article 48 of Law 98/97 of 26 August shall be subject to prior supervision by the Court of Auditors.' In December 2021, the CofA issued a report titled 'Monitoring Public Procurement Covered by the Special Measures Provided For in Law 30/2021 – No 1/2021 – OAC/PG'[*27]. This strengthening of oversight translated into (1) the submission of contracts concluded under the special rules to preventive control by the CofA (per Article 17(1)); (2) submission of contracts entered into on the basis of any procedures adopted under the special procurement measures provided for in said law with a value less than 750,000 euros to concomitant supervision (see Article 17(2)); (3) submission to concurrent oversight under the provisions of Article 17(2), regulated by Resolution 5/2021-PG of 28 June 2021 and establishment of a digital platform, known as eContas-MECP; and (4) submission/documentation of those contracts provided for in Article 17(2) as a condition for their entry into legal effect.

Considering the context of the monitoring that the CofA had been performing, a second Report document was released in October 2022. This offered a set of recommendations to the government in power, Parliament, contracting authorities, the Institute of Public Markets, Real Estate and Construction, IP (IPMREC, IP), and the independent commission.[*28]

Among the many recommendations, the following stand out: (1) that the government and Latvia's parliament '[r]ethink the justification and usefulness of the special public procurement measures regime, given its negligible expression and the prejudice to the use of open competitive procedures'; (2) that they '[c]onsider eliminating the exemptions from justification inherent to the discipline of special public procurement measures, since they are contrary to the public interest, [to] transparency and scrutiny of public procurement and, in the case of paragraph d) of art 2 of Law 30/2021, to applicable European legislation'; (3) to '[p]roceed with the application of art 2 and 6 of Law 30/2021 for the execution of projects or interventions with European funding only in situations where such funding is confirmed', a suggestion aimed at contracting authorities; (4) that entities involved in contracts '[j]ustify all decisions taken in the public procurement procedures, explaining the respective reasons for decision, namely those that decide to contract, that identify the needs to be met, that determine the training procedure to be used, that proceed to the choice of entities to be invited in non-competitive procedures, that reduce [the time before] deadlines for the submission of applications or proposals, that justify the price and that proceed to the award'; (5) for contracting authorities to '[i]ntroduce guarantees of integrity and impartiality in public procurement procedures and adopt internal control practices that reduce opportunities for fraud, corruption or favouritism'; (6) that they also '[r]efrain from giving any effectiveness to MECP contracts [i.e., contracts concluded within special measures regime] before they are communicated to the CofA, in particular for the purpose of payments'; and (7) for the independent commission to '[c]onsider carrying out concrete actions to audit the MECP procedures adopted, as well as the conclusion and implementation of the respective contracts'.

3.4.2. Independent Commission

It was Law 30/2021 that created the Independent Commission as a further supervisory entity. Its composition is set out in Article 18, requiring respect for independence and impartiality, and its mission and powers are rooted in the provisions of Article 19. They encompass (1) monitoring; (2) drawing up recommendations to the contracting parties; and (3) preparing six-monthly evaluation reports on the procedures, which shall be made public.

27 '2021 Report' (n 14).

28 See <https://www.tcontas.pt/pt-pt/ProdutosTC/Relatorios/relatorios-oac/Documents/2022/rel-oac004-2022-2s.pdf> accessed 22 December 2022. https://www.tcontas.pt/pt-pt/MenuSecundario/Pesquisa/Pages/resultadospesquisa.aspx?k=medidas%20especiais.

The Independent Commission issued a Recommendation document on the mandatory submission of all contracts concluded under the special measures to the CofA, Recommendation 1/2022/CIMEC*[29]. It produced two more sets of recommendations too. One dealt with the 'requirement that pre-contractual procedures adopted under the special public procurement measures, as provided for in Article 2 of Law No 30/2021, may only be initiated after the respective financing or the respective financing or co-financing has been ensured beforehand' relative to European funding*[30]. The Commission concluded that 'intention to submit or the presentation of an application for Community funds' is insufficient for application of the special-measures procedures. The most recent Recommendation document is related to the scope and legal regime of the processes conducted and contracts concluded: the latter extends only to contracts addressed in Articles 2 to 8, and following the procedures detailed in those articles is not mandatory*[31].

By means of its first biannual report, produced in May 2022*[32] after a lengthy process of compiling and aggregating data, the Independent Commission identified both good practices and warning signs. It found that the following best practice, among other elements, should be incorporated into proceedings: to (1) evaluate the risks and benefits of choosing simplified procedures, prior to the start of the procedure; (2) identify the public interest as the primary criterion for choices of necessary and indispensable special measures, with referring to it accordingly; (3) make prudent use of simplification measures such as deviating from the established rationale; (4) implement measures that mitigate the risks associated with less expression of competition; (5) and ensure strengthening of publicity measures. Regarding the warning signs, the Commission pinpointed (1) prior consultation with companies that do not respond to invitations, (2) invitations to newly created companies, (3) signs of fragmentation, and (4) reliance on multiple companies with the same beneficial owner.

By 26 December, the Independent Commission had prepared its second report, which stated that 'a clear increase in the use of the Special Measures for Public Procurement' relative to the figures for the previous six-month term was evident, coming to approximately 78.7% in the number of contracts signed*[33].

4. Exceptional temporary revision to public-procurement prices

In its response to the energy crisis associated with the armed conflict in Ukraine that, alongside pandemic-linked developments, had led to economic instability and rising inflation, the Portuguese government issued Decree-Law 36/2022 in May 2022. This articulated an exceptional temporary regime of price revision for some public contracts – namely, public-works contracts*[34]. The substantive regime foresaw mandatory price revision to accommodate the cost increases that are a matter of course in the context of a contract of some length*[35]. 'The scope of application is quite broad, since it covers contracts that were already in their execution stage as of 21 May 2022 and extends to contracts that were yet to be concluded but for which the

29 CIMEC, 'Envio obrigatório de todos os contratos celebrados ao abrigo das medidas especiais de contratação pública para o Tribunal de Contas' <https://www.base.gov.pt/Base4/media/rmweo1ty/recomenda%C3%A7%C3%A3o-n-%C2%BA1-cimec.pdf> accessed 22 December 2022.

30 CIMEC, 'Exigência de os procedimentos pré-contratuais adotados ao abrigo das medidas especiais de contratação pública, nostermos previstos no artigo 2º da Lei n.º 30/2021, só poderem ser iniciados após ter sido, previamente, assegurado o respetivo financiamentoou cofinanciamento europeu' <https://www.parlamento.pt/Parlamento/Documents/cimec/Recomendacao2-CIMEC.pdf> accessed 22 December 2022.

31 That is, 'Recomendação N.º 3/2022/CIMEC', titled 'Âmbito e regime jurídico dos procedimentostramitados e contratos celebrados ao abrigo das Medidas Especiais de Contratação Pública, nostermos previstos no CapítuloI da Lei n.º 30/2021' <https://www.parlamento.pt/Parlamento/Documents/cimec/Recomendacao3-CIMEC.pdf> accessed 22 December 2022.

32 CIMEC, 'Relatório Semestral' (May 2022) <https://www.base.gov.pt/Base4/media/mw2fnbjp/relat%C3%B3rio-semestral-cimec-maio-2022.pdf> accessed 22 December 2022.

33 CIMEC, '2.º Relatório Semestral Medidas Especiais de Contratação Pública' (2022) <https://www.base.gov.pt/Base4/media/fnpb01wj/segundo-relat%C3%B3rio-semestral-dezembro-2022.pdf> accessed 22 December 2022.

34 Even though the PCC has other instruments to address 'a brisk rise in prices'. See LV Sousa, 'A Revisão Extraordinária de Preços e Outras Medidas Constantes do Decreto-Lei n.º 36/2022, de 20 de Maio – A Sua Aplicação à Empreitada de Obras Públicas' [2022] (3, special issue) Revista de Direito Administrativo 109.

35 In this regard, cf art 382, item 1 of the PCC and art 1, item 2 of Law 6/2004, of 6 June 2004.

procedure was under way before that date, along with even contracts still to be concluded whose procedures were to be initiated after that date[*36].

The intention was to establish a temporary regime – initially running until 31 December 2022 but later extended by six months[*37]. Thereby, the contractor was permitted to submit a request for extraordinary price revisions during the term of a public contract, provided that the increase in costs reflects that for a product representing at least 3% of the contract price[*38] and where the annual cost variation rate is equal to or greater than 20%. Also, an opportunity was offered for extending contract-performance periods without any penalty for the contractor ensuing if the need for extension was not attributable to failure by the contractor to obtain materials for the timely completion of the contract. Provision was made in addition for the possibility of an exceptional award over and above the base price even though a possibility of this nature was not provided for in the procedure programme.

The law established the procedure for extraordinary price revision thus: 'If the public contractor says nothing about the proposal submitted by the contractor, it is tacitly accepted, provided that it complies with the eligibility criteria.' If the proposal presented by the contractor does not, however, mesh with the cost structure of the work, 'the public contracting party must, within 20 days from the date of receipt of the request, present a counterproposal, which will become the price revision of [i.e., constitute the new price structure for] the contract'[*39]. Should the contracting authority dispute the proposal and consider the provisions of Article 4(3)(b) of Decree-Law 36/2022 – related to revision in line with a formula established in the contract, with the Ct coefficients multiplied by the compensation factor 1.1 – to apply or disagree with the proposal and conclude that 'the provisions of paragraph c) of No 3 of Article 4 of Decree-Law 36/2022 should be applied, i.e., identifying the materials or labour that are revised by the cost guarantee method, with the formula established in the contract being applied to the rest without any increase', it may act accordingly. The new legislation stated: 'The extraordinary price revision applies to the whole period of execution of the contract and does not hinder the possibility of financial rebalancing, since the causes of the request are different from the legal point of view.'[*40]

This extraordinary regime also addressed the possibility of extension of the contract term during its term of execution 'when the co-contractor demonstrates' that, for reason of conditions for which said co-contractor is not at fault, 'he cannot obtain the materials necessary for the execution of the contract, as per Article 4(1)'. For example, the proof may be demonstrated with a declaration by a distributor of a certain material (one not subject to substitution under the contract) indicating that there is disruption to supply. That said, the contracting authority is not required to accept the request for an extension.

This exceptional regime is extended to the acquisition of services under 'the categories of contracts determined by administrative ruling of the Government members responsible for the area of finance and for the sector of activity' (per item 2 in Article 2). The corresponding administrative ruling (with Portaria ID 74-A/2023 and issued on 7 March[*41]) lists the categories in question thus: '(a) Health and safety coordination in the scope of works contracts; (b) Canteen operation[s]; (c) Supervision of building works; (d) Energy supply; (e) Food supply; (f) Management of waste, mud and other by-products; (g) Collection of waste water; (h) Collection and treatment of urban waste and hazardous waste; (i) Waste water, waste, cleaning and environmental services; (j) Transport of water by tanker; (k) Transport of persons and goods.'[*42]

36 See the item on the exceptional, temporary-duration revision of public-procurement prices found in the IPMREC, IP frequently asked questions (FAQ) document at <https://www.impic.pt/impic/pt-pt/perguntas-frequentes/revisao-extraordinaria-de-precos> accessed 17 March 2023.

37 Recently extended to run until the end of December 2023.

38 There is some uncertainty with regard to the scope of the concept of price: whether the initial price set *versus* the 'corrected contract price, minus the value of any work suppressed and the sum of any additional work' is the relevant notion; see Sousa (n 34) 114.

39 Per the IPMREC, IP frequently asked questions the exceptional temporary revision to public-procurement prices (n 36).

40 The request for financial rebalance may exist against the backdrop foreseen in art 282 of the PCC and may be issued especially in those cases foreseen by the law or, exceptionally, in the contract itself, with the caveat that the repositioning of the financial balance shall never be based on variations in the costs of materials, equipment, or labour, however, since these are already encompassed by the price revision; ibid.

41 Available at <https://dre.pt/dre/detalhe/portaria/74-a-2023-208269534> (JavaScript required) accessed on 28 July 2023.

42 Afterward, more regulations were issued to assist contractors in the fundamentals of exercising the opportunity for revised prices in works and services contracts.

5. Conclusions

The conjunction between the two nexuses of Portugal's crisis legislation entailed complex negotiation of factors related to, firstly, the pandemic and, secondly, the financial crisis that followed, stemming partly from the war and driven onward by high inflation rates. While legislation arising from the first of these, with its highly complicated and intricate structures (justified in terms of figures attesting to abnormal and unpredictable changes of circumstances), has been repealed in the years since, except for a few changes introduced in particular specifically regulated regimes, organs of the European Union have criticised the establishment of several of the solutions nonetheless. The second set of instruments, perhaps not so transitory, was intended to deal with the application of European Funds for economic recovery. Its effects are no less troubling.

Even though the Commission regarded the relevant Directive instruments as already furnishing adequate procedure-acceleration mechanisms to expedite procurement processes at the time of onset of the pandemic, the legislation that unfolded in Portugal amid these conditions was convoluted, manifested great complexity, and raised many questions of interpretation and application. This state of affairs might have resulted from the hastiness of the legislator, coupled with poor preparation: Faced with a highly demanding public-health situation, administrative entities did not have ready means for a timely response, given their lack of planning for emergency situations. In this troubling environment, the legislator rushed in its passing of legislation, inserting poorly drafted rules into the legal system that were out of step with the usual concepts of legal institutions. These only contributed to the bewilderment.

In my view, any need for legislation specific to emergency situations is directly associated with a lack of strategic planning for facing emergency situations and abnormal circumstances that may influence the public-procurement landscape. In Portugal's case, the absence of a contingency plan and asset stockpiles equipping the country to face the pandemic lie at the root of the complex Portuguese solutions witnessed*[43].

With its legislation connected with the RRP to deal with inflation and associated economic upheaval, the legislation seems to have again become distracted from the bigger picture of the world political and economic situation. When recognising the problematic situation, the legislature once more passed legislation without engaging in much coherent planning. Thereby, essential aspects of the legislation remain to be tuned in the future, through further regulation.

[43] On 4 July, Law 31/2023 terminated the validity of the laws issued in connection with the pandemic; see <https://diariodarepublica.pt/dr/detalhe/lei/31-2023-215097639> (JavaScript required) accessed 4 July 2023.

https://doi.org/10.12697/JI.2023.32.04

Age Värv

Associate Professor
University of Tartu

The Role of Foreign Law in the Courts' Application of Estonian Law

Abstract. It is difficult to overestimate the importance of comparative law in the legal developments of the restored Republic of Estonia. The country's legislative drafting and jurisprudence frequently refer to and study legal solutions adopted in other countries, with private-law practitioners having even cited the comparative method as the main approach to drafting legislation and the best-practice rules for legislative drafting adopted in 2011 directing that the experience of other countries be considered in both the proposal for drafting and the draft law itself. While the comparative approach is followed so often for legal articles and doctoral theses that foreign law has even been referred to as an everyday tool for Estonian lawyers, reference to solutions in other legal orders is a much rarer phenomenon in application of the law, whether in the case law of Estonia or in that of other countries. The article provides an overview, based on legal literature and Estonian case law, of the arguments related to the admissibility of the use of foreign law in court decisions and examines the role of foreign law in the application of Estonian legal provisions. Its discussion focuses not on decisions that refer to the case law of the European Court of Justice or European Court of Human Rights or that cite case law from other countries with regard to applying international conventions but on those situations in which courts have used references to other countries' legal provisions, case law, or legal literature (i.e., comparative arguments) when applying national law.

Keywords: comparative law, administration of justice

It is difficult to overestimate the importance of comparative law for how law has developed in the restored Republic of Estonia. In Estonian legislative drafting and jurisprudence, it is quite commonplace to study and refer to legal solutions adopted in other countries. Thus, in the field of private law, the comparative method has even been identified as the main technique applied in drafting of legislation[*1], and the rules adopted in 2011 for good legislative drafting[*2] direct that the experience of other countries be taken into account in the preparation of both the drafting proposal (per §1(1)(5) and the draft law (§43(1)(6)–(7). In

1 P Varul, 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia' [2000](5) Juridica International 104, 107.

2 Hea õigusloome ja normitehnika eeskiri, RT I, 29.12.2011, 228, English translation available at https://www.riigiteataja.ee/en/eli/508012015003/consolide (25.08.2023).

fact, the comparative approach is applied so often for legal articles and doctoral theses that foreign law has been referred to as an everyday tool for Estonian lawyers.[*3]

In the application of the law, on the other hand, reference to solutions in other legal orders is a much rarer phenomenon, both in the case law of Estonia[*4] and in other countries' application[*5]. While prior Estonian legal literature has expressed a need for more thoroughly analysing the meaning of foreign law as a source of law[*6], no fuller discussions of the topic in the Estonian milieu have emerged. This article provides an overview, based on legal literature and Estonian case law, of the arguments related to admissibility of reference to foreign law in court decisions and the role of foreign law in the application of Estonian legal provisions.

The article focuses on those situations in which courts have used references to other countries' legal provisions, case law, or legal literature – in other words, comparative arguments – when applying national law; accordingly, the discussion below does not cover court decisions that refer to the case law of the European Court of Justice or the European Court of Human Rights, and neither does it consider the use of case law of other countries in the course of applying international conventions.

1. Legitimacy of reference to foreign law

1.1. The meaning of legitimacy

There has been a debate in the legal literature as to whether comparison – i.e., recourse to foreign law as a reference in applying national law – is permissible or even legitimate at all. It has been noted that especially the US Supreme Court has been the forum for one of the sharpest discussions on the utility and legitimacy of comparative law.[*7] This may be explained by the fact that the legal system in the United States is often perceived as something unique and truly non-replicable, in a marked contrast against the experience of European lawyers who are used to seeing similarities between distinct legal systems arising from the common Roman legal heritage of European legal orders.[*8] Probably the most oft-quoted ardent opponent of the comparative approach has been US Supreme Court Justice Antonin Scalia. For example, he was decidedly not in favour of referring in a court's reasoning to foreign law as a model for the creation of a legal provision, often declaring such 'legislative drafting history' to be accidental. 'All it takes is a single committee report drafted by a staffer who spent his junior year abroad, or even a single floor statement by an out-of-control Italophile, to the effect that 'our understanding of this bill is that it will produce the desirable state of affairs achieved by the decisions of the Corte Costituzionale' and – *eccolo*! - Italian law becomes relevant to the meaning of the U.S. Code', Scalia has ironically remarked.[*9]

---

3 I Kull, 'Legal Integration and Reforms – Innovation and Traditions' [2000](5) Juridica International 119, 119.

4 N Laas, 'Välisriigi õiguse kohaldamine võrdlev-õigusliku argumendina Eesti kohtupraktikas [The Application of Foreign Law As a Comparative Law Argument in Estonian Case Law]' (master's thesis, University of Tartu 2022); J Laffranque, 'Judicial Borrowing: International and Comparative Law As Nonbinding Tools of Domestic Legal Adjudication with Particular Reference to Estonia' (2018) 2(4) The International Lawyer 1287, 1299.

5 S D'Andrea and others, 'Asymmetric Cross-Citations in Private Law: An Empirical Study of 28 Supreme Courts in the EU (2021) 8(4) Maastricht Journal of European and Comparative Law 498. – DOI: https://doi.org/10.1177/1023263x211014693; B Markesinis and J Fedke, *Engaging with Foreign Law* (Hart 2009).

6 I Kull, 'Eesti tsiviilõiguse allikate tugev ja nõrk kohustuslikkus [Strong and Weak Mandatory Character of Estonian Civil Law Sources]' [2010](7) Juridica 463, 469.

7 M Andenas, D Fairgrieve (eds), 'Courts and Comparative law' (Oxford University Press 2015) 3. – DOI: https://doi.org/10.1093/acprof:oso/9780198735335.001.0001; see also J Resnik, 'Constructing the 'Foreign'. American Law's Relationship to Non-Domestic Sources' in M Andenas, D Fairgrieve (eds), 'Courts and Comparative law' (Oxford University Press 2015) 437–471. – DOI: https://doi.org/10.1093/acprof:oso/9780198735335.003.0023. At the same time, Julia Laffranque, too is among those to have identified the legitimacy of the use of examples from foreign law as one of the main problems with this practice, see Laffranque (n 4) 1295. For a comprehensive overview of the main arguments of the 'legitimacy debate' see T Kadner Graziano, 'Is It Legitimate and Beneficial for Judges To Use Comparative law?' (2013) 21(3) European Review of Private Law 687, 690. – DOI: https://doi.org/10.54648/erpl2013039.

8 J Smits, 'Comparative Law and Its Influence on National Legal Systems' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 528. – DOI: https://doi.org/10.1093/oxfordhb/9780199296064.013.0016.

9 A Scalia, 'Keynote Address: Foreign Legal Authority in the Federal Courts' (2004) 98 Proceedings of the Annual Meeting (American Society of International Law) 305. – DOI: https://doi.org/10.1017/s0272503700061504.

The reasoning presented in the literature emphasises that a valid question as to the legitimacy of the comparison can arise only in the case of judgements in which the reference to the foreign law constitutes a 'normative argument' – i.e., when information about the foreign law has influenced the decision of the judge.[*10] The main arguments put forward in relation to admissibility of the use of foreign materials by the courts are connected with democratic legitimacy and to the fact that the legal system, jurisprudence, and legal decisions are national in nature.

1.2. The question of democratic legitimacy

According to the first set of these arguments, those positing a lack of democratic legitimacy, the courts have neither an institutional nor a substantive basis for legitimately dealing in anything foreign.[*11] Institutional legitimacy (or, rather, the lack of it) means that the court as an institution does not engage in external relations – traditionally a task of the executive power. A lack of substantive legitimacy, on the other hand, is expressed via the fact that the judge is bound by the law in the administration of justice – more precisely, bound by the law only of the judge's country. Only the legislator makes the laws; therefore, only the democratically elected legislature of the jurisdiction's country (and not the judge) holds the power to decide what the law is that the judge is to apply. Hence, the judge shall not be bound by the law of any foreign country, nor would said law even be suitable as a source of inspiration for the interpretation of national law.[*12]

In contrast against these views, some scholars have argued that courts long ago ceased to be merely domestic institutions and that nowadays they are involved in several activities related to the 'outside world', such as taking part in international co-operation in judicial matters and acting as members of international organisations.[*13] With regard to the lack of substantive legitimacy of the courts in this sphere, it has been stated that, furthermore, if looking at the legislator's actions, one must recognise that in many cases the interpretation of a rule can no longer be based purely on the will of the national legislator, because the range of authoritative sources suitable or necessary for interpretation purposes has widened.[*14]

The question of the admissibility of comparison of law from the standpoint of democratic legitimacy has occasionally arisen in Estonian case law. For example, in 2009, the Constitutional Review Chamber of the Supreme Court of Estonia, in connection with a party's request to take into account the Constitution of the Federal Republic of Germany and the German case law based on it, stated that 'the Supreme Court of the Republic of Estonia can be guided in its decisions by the Constitution of the Republic of Estonia. The arguments of comparative law may have weight also in the interpretation of the provisions of the Estonian Constitution, but from them binding codes of conduct cannot be derived for the Estonian courts'.[*15]

In 2018, however, the Criminal Chamber of the Supreme Court dealt with the question, raised in an *obiter dictum*[*16] appeal by a prosecutor, of whether an Estonian court may rely on another country's laws, case law, and legal literature when making a decision thus: the Supreme Court stated that '[p]ursuant to §1 of the Constitution of the Republic of Estonia, Estonia is an independent and sovereign democratic republic

10 Smits (n 8) 526. The opposite of the normative argument involves a situation wherein the court's reference to foreign law is rather superfluous and does not add anything substantive to the reasoning behind the decision. An example from Estonian case law is a decision in which the court found that 'as a comparative digression, a brief reference can be made to how the problem in question has been solved in German law', from TrtRnKo 1-14-9728, 30.9.2015, para 83.

11 M Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013) 237. – DOI: https://doi.org/10.1093/acprof:oso/9780199680382.001.0001.

12 Antonin Scalia, for example, has pointed out that judges (of the United States) are the servants of the people, individuals who have sworn to apply the laws that they, rather than others, see as suitable; see A Scalia, 'Commentary' (2006) 40(4) Saint Louis University Law Journal 1119, 1122.

13 Bobek (n 11) 238. For example, the Estonian Supreme Court participates in the activities of the Association of the Presidents of the Supreme Courts of the European Union, the Association of the Supreme Administrative Jurisdictions of the European Union, the European Conference of Constitutional Courts, the Venice Commission, and the European Judicial Training Network; see the Supreme Court page on international co-operation 'Rahvusvaheline koostöö' <https://www.riigikohus.ee/et/riigikohus/rahvusvaheline-koostoo> accessed 10 May 2023.

14 Bobek (n 11) 239.

15 RKPJKm 3-4-1-16-09, 22.12.2009, para 42.

16 RKKKm 1-17-11509, 13.6.2018, paras 11–11.5.

in which, pursuant to §3, state power, including, without doubt, judicial power, is exercised solely on the basis of the Constitution and the laws in conformity therewith' (para 11.1). The ruling continued: 'It is true that the level of 'sophistication' of the various problems in German jurisprudence is unsurpassed, at least in the European context. However, neither from this nor from the fact, mentioned above, that Estonian contemporary law largely copies German law, does it follow that there is a legitimate possibility to refute the view expressed in paragraph 11.1 above: state power, including judicial power, is exercised in Estonia only on the basis of the Constitution of the Republic of Estonia and Estonian laws that are in conformity with it' (para 11.5). It should be stated for clarification's sake that the position quoted here stemmed from the style of the contested judgement, which in the opinion of the chamber rather resembled an academic article's and hence was castigated for excessive referencing and quoting of foreign law.[*17] This clarification is important because in my view the Criminal Chamber's position does not imply an outright prohibition of comparing sources of law so much as a direction to judges to distinguish more clearly in the text of their judgements between their own arguments and those of the sources used for developing those arguments. The fact that referring to material from other countries is not entirely forbidden in the application of Estonian law can be directly inferred from several other Supreme Court decisions.[*18]

For this reason, it is noteworthy that the judge in a recent decision[*19] of Harju County Court, when deciding on compensation for the costs of the proceedings, found that the costs incurred by the counsel of the accused from consulting German law firms in the preparation of the inquiry were not to be subject to compensation and justified this conclusion by citing the paragraphs of the Supreme Court order excerpted above (paragraphs 11.1 and 11.5).[*20] The county court's decision deserves attention in that the costs of gathering information on foreign law were denied of reimbursement not because there was no need to apply foreign law in the case[*21] but because 'state power, including judicial power, is exercised in Estonia only on the basis of the Constitution of the Republic of Estonia and Estonian laws in conformity with it'. A more subtle but nonetheless recognisable justification for the lack of democratic legitimacy can be found in another decision of Harju County Court, in which the judge refused to take into account the guidelines of the Finnish Road Administration cited by the plaintiff, stating that 'Estonian law applies in the Republic of Estonia and foreign law does not apply in this case'[*22].

1.3. State-centredness of the legal system

The second core argument against the use of comparative law in judicial decisions focuses on the nationality of the legal system and jurisprudence. This reasoning proceeds from the principle that each legal provision (or, in the case of case law, precedent) must be interpreted in a specific context, which is the (legal) system of the particular country concerned. An interpretation that is based on the law of foreign countries could thereby potentially undermine the domestic system.[*23]

The counter-argument is that, since the aim of all legal systems is to create and implement legal provisions that lead to the best and fairest solution to a problem, it is likely that some countries will have

17 Ibid, para 11.2: 'It is highly commendable if an Estonian judge is able to broaden their interpretative thinking on the basis of reading the literature. However, the result of such reading cannot be the referencing or even quoting of foreign law and its interpretation when [one is] interpreting Estonian law. It cannot be, and it does not have to be, because a judicial decision is not a scientific article that has to be written with meticulous precision according to a set of rules.'

18 For instance, see RKTKo 3-2-1-145-04, 21.12.2004; RKTKo 3-2-1-103-08, 9.12.2008; RKTKo 3-2-1-123-11, 7.12.2011.

19 HMKm 1-17-5176, 21.8.2019, para 10.

20 It is worth noting that the *obiter dictum* is not a binding part of the judgement. See E Kergandberg and P Pikamäe (eds), Kriminaalmenetluse seadustik. Kommenteeritud väljaanne [*Code of Criminal Procedure, Commented Edition*] (Juura 2012) ('Criminal Code'), s 363, comment 7; R Narits, 'Kohtupretsedendist [On Judicial Precedent]' [1995](9) Juridica 380, 382.

21 The absence of a need to apply foreign law has been among the grounds cited in the case law on several occasions to justify reimbursement for procedural costs below the amount claimed by the representative. The main argument in this regard is the low complexity of the case. See, for example, TlnRnKm 2-18-7906, 22.3.2021, para 13.2; TMKo 2-19-11142, 16.6.2021, para 20.2; HMKo 2-17-3716, 19.2.2018, para 7; HMKo 2-16-11889, 16.1.2017, para 10; TMKm 2-15-4142, 28.3.2016, para 2.

22 HMKo 2-19-8308, 2.2.2021, para 18.

23 See, for example, Judit Resnik's overview of the 'American Laws for American States' movement in the USA – Resnik (n 7) 458–461.

reached an appropriate solution to a particular problem before others have. Consequently, for finding the best solution, it is useful for the judge to know the experience of other countries.*[24]

Estonian case law features some examples of arguments that point to the inappropriateness of using the law of another country or that even allude to undermining of the domestic legal system. For example, the Constitutional Review Chamber of the Supreme Court found in 2010 that it cannot be considered appropriate to question the constitutionality of an Estonian legal provision on the grounds that similar provisions have not been laid down in the Federal Republic of Germany.*[25] By the same token, in that decision the Criminal Chamber expressed the view also that if a judge or the parties to the proceedings could refer to the reasoning of legal scholars from other countries to refute the arguments of the regional and district courts, such an opening would undermine legal certainty and create great confusion in judicial practice.*[26] The Supreme Court thus articulated the possible damage to the national legal system as lying primarily in undermining of the principle of legal certainty. This involves, in the main, the principle of legal clarity, which is a pillar of legal certainty according to which legal provisions must be sufficiently clear to their addressees and cause as little dispute as possible.*[27] Even from the latter admonition by the Supreme Court, it is still not possible to infer an outright prohibition that precludes a judge consulting materials pertaining to foreign law, though it does contain a warning pointing to the inappropriate consequences of a court decision that does not show 'the judge himself' (i.e., display the judge's own reasoning) sufficiently clearly with regard to applying the rule.

1.4. National context

Thirdly, objections to judges citing the law of another country have been raised on the grounds that multiple, unique circumstances and interests have to be weighed in the rendering of any judgement and that this weighing has to take place in the national context – that is, in light of the specificity of the situation in the given country, its history*[28], and its cultural background.*[29] In this connection, it is customary to return to the words of Scalia, who has held, among other things, that the Supreme Court of the United States of America '…should not impose foreign moods, fads, or fashions on Americans'.*[30]

That view is contradicted by the fact that, in today's globalising world, countries share many of the same principles and values, with one prominent domain in this respect being human rights.*[31] This is why, instead of rejecting comparisons for reason of cultural and historical peculiarities, modern legal literature maintains predominantly that, while these peculiarities must not be ignored, one should simply be careful and attentive when comparing the law across different countries.*[32]

There are no judgements in Estonian jurisprudence that explicitly reject the comparison of law on cultural or historical grounds. On the other hand, a few judgements draw attention to the positive influence

24 Smits (n 8) 529.

25 RKPJKm 5-17-10, 12.12.2017, para 64.

26 RKKKm 1-17-11509, 13.6.2018, para 11.4.

27 Ü Madise and others (eds), *Eesti Vabariigi Põhiseadus - Kommenteeritud Väljaanne* [Constitution of the Republic of Estonia, Commented Edition] (5th, revised and supplemented edn, Iuridicum 2020) ('Estonian Constitution'), s 10, comment 48 (H Kalmo and O Kask), available in excerpt online at <https://pohiseadus.ee/sisu/3481/paragrahv_10> accessed 10 May 2023.

28 GP Fletcher, 'Constitutional Identity' (1993) 14(3–4) Cardozo Law Review 737, 740.

29 F Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (1992) 14(3–4) Cardozo Law Review 865, 867; T Annus, 'Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments' (2004) 14(3) Duke Journal of Comparative and International Law, 328ff; L Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1993) 74(3) Indiana Law Journal 819, 831.

30 *Lawrence et al. v Texas*, 539 US 558 [2003] 598 (Scalia, J., dissenting, citing Thomas, J., concurring in *Foster v.Florida*, 537 U.S. 990, [2002].

31 Smits (n 8) 529.

32 See, for example, M Siems, *Comparative Law* (Cambridge University Press 2014) 21; F Reimer, *Juristische Methodenlehre* (Nomos 2020) 192. – DOI: https://doi.org/10.5771/9783845281926; Laffranque (n 4) 1301; J Husa, *A New Introduction to Comparative Law* (Hart 2015) 23. – DOI: https://doi.org/10.5040/9781849469531; R Wank, 'Rechtsvergleichung als Kulturvergleichung' [2015](4) Recht der Arbeit 294, 295; P Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat — Zugleich zur Rechtsvergleichung als „fünfter" Auslegungsmethode' (1989) 44(20) JuristenZeitung 913, 918; A Stone, 'Comparativism in Constitutional Interpretation' [2009](1) New Zealand Law Review 45, 56; E Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht' (2018) 78(4) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 807, 825.

of foreign law from a cultural point of view. For example, in 2014, Harju County Court found it necessary to cite material compiled from the Supreme Court's research competition[*33] and stated in so doing that 'treating the decisions of the Supreme Court as sources of law does not harm our legal culture, but rather enriches it with some features of Anglo-American law'[*34]. In 2019, Tartu County Court referred to the situation in other countries with an advanced legal culture (specifically, Germany) in its justification of the length of the prison sentence.[*35]

Perusing Estonian case law reveals only a few decisions that have met the use of foreign law with opprobrium. There are considerably more judgements in which the court has referred to foreign law among the sources of rationale in its reasoning even though there was no foreign element in the case. These attest that the comparison of Estonian and foreign law has been considered legitimate. The fact that familiarisation with foreign sources is almost expected in the work of a judge is evident too from the above-mentioned decision of the Criminal Chamber of the Supreme Court, which contains these comments: 'The conviction that, in accordance with the provision and the spirit of the Constitution, the legal reasoning of Estonian courts must be based only on the law in force in Estonia does not in any way imply an undervaluation of jurisprudence or a desire to discourage the interest of judges in reading and interpreting the law of other countries or comparative legal literature. On the contrary: without this kind of reading, and emphatically only looking at domestic law, it would also be difficult to imagine the work of a judge today.'[*36] According to Estonian jurist Julia Laffranque, all that should be avoided is foreign law becoming the judge's main foundation for the reasoning of a decision.[*37] Therefore, it is appropriate to examine the role of foreign law as a source of law in the Estonian legal system.

2. Foreign law's place in the system of sources of law

The need for more thorough analysis of the meaning of foreign law as a source of law was pointed out in Estonian legal literature as early as 2010.[*38] The main characteristic for a source of law is its bindingness.[*39] Accordingly, for solving a legal problem, it is crucial to know which rules are binding when one is making decisions – i.e., where to find the relevant law.[*40] There is no uniform and universal conception of the sources of law: legal systems differ in their understandings of what can be regarded as a source of law, particularly with respect to whether among the sources of law are such sources that do not necessarily have to be taken into account but may be taken into account in the efforts to solve a legal problem.[*41]

According to legal scholar Aulis Aarnio, one can distinguish between sources of law in the broadest sense, in a broad sense, and in a narrow sense.[*42] In the broadest sense, sources of law encompass a wide range of interpretative arguments.[*43] In the broad sense, sources of law, i.e. legal arguments, can be categorised, *inter alia*, according to their degree of binding force in the practical activities of judges and administrative authorities. This categorisation entails three classes:

– strongly binding sources – those the lack of respect for which leads to negative sanctions for the party responsible for enforcement (e.g., nullification of the judgement);

33 J Lahe, 'Kohtunikuõigusest ning Riigikohtu rollist deliktiõigusliku vastutuse eelduste arendamisel. – Riigikohtu lahendid Eesti õiguskorras: tähendus ja kriitika' [On the Law of the Judiciary and the Role of the Supreme Court in the Development of Presumptions of Liability in Tort] in *Supreme Court Decisions in the Estonian Legal Order: Significance and Criticism* (a collection from the Supreme Court's research competition, Tartu 2005) 15.

34 HMKo 2-14-21509, 20.11.2014, para 11.

35 TMKo 1-18-4008, 21.2.2019, para 31.

36 RKKKm 1-17-11509, 13.6.2018, paras 11–11.2.

37 Laffranque (n 4) 1290.

38 Kull (n 6) 469.

39 S Vogenauer, 'Sources of Law and Legal Method in Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 878. – DOI: https://doi.org/10.1093/oxfordhb/9780199296064.013.0028.

40 B Rüthers, C Fischer, and A Birk, *Rechtstheorie mit Juristischer Methodenlehre* (CH Beck 2022) 143.

41 Vogenauer (n 39) 879.

42 A Aarnio, 'Õiguse tõlgendamise teooria' [*Theory of Legal Interpretation*] (Avatud Eesti Fond 1996) 172.

43 Semantic, syntactic, logical, legal, and teleological arguments; related values and judgements; and analogies and *e contrario* arguments (ibid 171).

– the weakly mandatory, for which not being taken into account does not constitute an error and hence is not subject to sanctions but whose absence from the reasoning may lead to the judgement being set aside;
– permitted sources – sources employed with the intent of strengthening the reasoning of the person applying the law.

Among the permitted sources are comparative-law and legal-history arguments, teleological arguments, jurisprudence, values, and value judgements.[*44] In particular, Aarnio stresses, the law of another country is a permissible source for legal decisions if the countries in question share 'common legislation and a similar tradition of interpretation'. In cases wherein the countries have similar legislation, the legal practice of the other country may serve as an interpretative argument. Otherwise, the foreign law has 'indicative value'. The latter means that, while the law of the other country may point to problems of interpretation that might arise and illuminate which interpretations might be possible, the interpretation of the domestic rule must still be rooted in arguments stemming from domestic materials.[*45]

In Aarnio's final category, sources of law in the narrow sense, are the so-called official sources: law, customs, the legislator's aims, and court judgements.[*46]

Estonian authors' approach tends to apply a relatively narrow meaning in defining the sources of law, with historical, teleological, and other arguments belonging to the doctrine of interpretation.[*47] In the associated narrower meaning, if one wishes to find the law, one has to turn first of all to the laws themselves, with the primary set of legal sources being acts that contain legal provisions – i.e., that make binding legal propositions.[*48] Therefore, the Estonian legal order can be regarded as based on statutory law, similarly to other legal orders in continental Europe.[*49]

In addition to the Constitution and the statutes, the body of sources of law in the Estonian legal system is considered to encompass subordinate legal acts, generally accepted principles and provisions of international law, directly applicable legal acts of the European Union, and international treaties.[*50] At the same time, practice of other countries, inclusive of legal practice, may become binding on Estonia if said practice has become customary international law.[*51] In the absence of a norm of treaty or customary law, it is possible to derive a binding rule of international law by analogy, proceeding from the general principles of the national law of other states.[*52] In this case, however, the practice of other countries is still to be regarded as customary international law and not as an independent source of law.

Estonian laws contain references to further sources of law. For example, §2(1) of the Act on the General Part of the Civil Code[*53] names custom as a source of civil law in addition to the statutory law, and §25 of the Law of Obligations Act[*54] obliges parties to contracts concluded in economic and professional activities to follow relevant customs and practices. In §2 of the Code of Criminal Procedure[*55] the criteria under which a decision of the Supreme Court must be regarded as a source of law in criminal proceedings are listed. A judicial decision may serve as a source of criminal procedural law if something is not regulated by the law at all – that is, if a gap exists (and consequently the problem cannot be solved by interpretation).[*56] As for other proceedings, court decisions have not been given the status of precedent, but in practice it is typical

44 Ibid 173–74.

45 Ibid 185.

46 Ibid 172.

47 For example, see R Narits, 'Õiguse entsüklopeedia' [*Encyclopaedia of Law*] (Juura 2007) 68ff, 145ff; Kull (n 6) 463ff; P Varul and others, 'Tsiviilõiguse üldosa' [*General Part of Civil Law*] (Juura 2012) 42ff.

48 Narits (ibid) 69.

49 Ibid 68, 71.

50 'Estonian Constitution' (n 27), s 3, comment 8ff (L Madise and L Mälksoo), available excerpted online at <https://pohiseadus.ee/sisu/3472/paragrahv_3> accessed 10 May 2023 and also s 146, comments 32–33 and comment 37 (M Laaring), online at <https://pohiseadus.ee/sisu/3630> accessed 10 May 2023; Kull (n 6) 463.

51 'Estonian Constitution' (n 27), s 3, comments 9–12 (L Madise and L Mälksoo), online at <https://pohiseadus.ee/sisu/3472/paragrahv_3> accessed 10 May 2023; J Klabbers, *International Law* (Juura 2018) 70.

52 'Estonian Constitution' (n 27), s 3, comment 9 (L Madise and L Mälksoo), online at <https://pohiseadus.ee/sisu/3472/paragrahv_3> accessed 10 May 2023); Kull (n 6) 465.

53 RT I 2002, 35, 216; RT I, 20.6.2022, 1.

54 RT I 2001, 81, 487; RT I, 17.3.2023, 5.

55 RT I 2003, 27, 166; RT I, 11.3.2023, 3.

56 'Criminal Code' (n 20), s 2, comment 18.

and expected that the court, when building its argumentation, refer to those decisions of the Supreme Court in which the applicable legal provisions have been interpreted.*[57]

If the legal relationship involves contact with the law of more than one country, the Estonian court may have to apply the law of another country when resolving the dispute. In accordance with §2(3) of the Private International Law Act*[58], the court's reasoning must be based on, alongside the legal provisions of the foreign country, both the interpretations provided for those provisions and the practice of application in said country. In other cases – i.e., in situations wherein there is no foreign element – foreign laws and court decisions are not a source of law in the Estonian legal system. Hence, for example, the Supreme Court has stated on several occasions that foreign case law cannot be automatically adopted.*[59] The lower courts too have expressed an opinion that it is not the duty of the courts to take foreign law as a starting point*[60] and that foreign states' law and case law shall not be regarded as sources for purposes of criminal proceedings.*[61] Laws and court judgements of other countries are regarded as admissible materials to inform ascertaining the content and meaning of the applicable law*[62], though, and foreign court judgements are cited as secondary sources of interpretation in court practice.*[63]

Therefore, one can state in a nutshell that the law of other countries is not to be considered a binding source for Estonian judges in the course of making a decision.

3. The role of foreign law in interpretation of national legal provisions

3.1. Aims and methods of interpretation

Interpretation is necessary when the content of an existing legal provision is unclear – i.e., when one must employ techniques of analysing the rule, by various means, so as to ascertain its content and meaning. Turning to the law of other countries in the interpretation of national law is seen as a sign of globalisation and simultaneously as proof that the natural development of legal systems takes place on the basis of ideas with external origins just as much as from within the system itself.*[64]

Following the example of Friedrich Carl von Savigny's approach*[65], which has become a classic one, Estonian legal theory identifies the four main methods of interpretation as grammatical (or linguistic), systematic (i.e., systematic-logical), historical (genetic or subjective-teleological), and teleological (more precisely, objective-teleological) interpretation,*[66] where the term 'method' can denote a set of certain techniques, a way of reaching a specified objective. In the case of the interpretation of the law, the objective is to understand the content of the law.

Section 3 of Estonia's Act on the General Part of the Civil Code states that '[a] provision of the law is interpreted together with other provisions of the law, based on the wording, meaning and purpose of

57 V Kõve and others (eds), 'Tsiviilkohtumenetluse seadustik II. Kommenteeritud väljaanne' [*Code of Civil Procedure II, Commented Edition*] (Juura 2017) ('Civil Code II') s 436, comment 3.1.1, para c (E-K Velbri and V Kõve).

58 RT I 2002, 35, 217; RT I, 10.11.2022, 1.

59 RKTKo 3-2-1-145-04, 21.12.2004, para 39; RKTKo 3-2-1-123-11, 7.12.2011, para 15.

60 TlnRnKo 2-18-6678, 18.3.2020, para 44.

61 TrtRnKo 4-17-6479, 22.2.2018, para 6.

62 Kull (n 6) 472; Varul and others (n 46) 90; K Saaremäel-Stoilov, 'Mõtteid Riigikohtu põhiseaduslikkuse järelevalve praktika võimalikest arengusuundadest. Sõnavõtt Eesti põhiseadusliku identiteedi kaitseks [Reflections on Possible Developments in the Constitutional Review Practice of the Supreme Court – a Speech in Defence of Estonian Constitutional Identity]' [2009] (8) Juridica 500, 501.

63 TlnRnKo 2-13-20300, 7.12.2015, para 30. In addition, legal literature written in Estonian (HMKo 2-08-1109, 27.10.2009, para 6; HMKo 2-08-24622, 21.4.2009, para 4) and in foreign languages (TlnRnKo 2-16-6665, 30.6.2020, para 56; TlnRnKo 2-13-45357, 29.10.2014, para 38; TlnRnKo 2-13-8609, 31.10.2013, para 5) has been named as a secondary source of interpretation.

64 J Bell, 'Comparative Law in the Supreme Court 2010–11' [2012](2) Cambridge Journal of International and Comparative Law 20. – DOI: https://doi.org/10.7574/cjicl.01.02.20.

65 FC von Savigny, *System des heutigen Römischen Rechts. Bd. 1* (Berlin, 1840) 213–14, available online at: <https://www.deutschestextarchiv.de/book/view/savigny_system01_1840/?hl=Rechtsquellen;p=269> accessed 10 May 2023. – DOI: https://doi.org/10.1515/9783111692302.

66 Narits (n 47) 152ff; Varul and others (n 47) 43ff.

the law'. The comments accompanying that act of law state that the interpretation methods mentioned in this provision are not presented in a hierarchical manner.[*67] Nor do the procedural codes prescribe to the judge deciding on a case which methods should be used to reach a solution, let alone the priorities in their order of application. However, it is usually stressed that the interpretation of a provision shall begin with linguistic analysis of the text that proceeds from grammatical rules.[*68] The Supreme Court has held that the grammatical interpretation cannot be regarded as sufficient on its own for identifying the content of a legal provision – among other elements, the purpose pursued via the enactment of the provision must be ascertained.[*69] Estonian legal literature has noted also that, generally, historical interpretation is not enough; a teleological method of interpretation too must be applied.[*70] The conception that it is justified to take a complex approach and apply several methods of interpretation at the same time when one interprets the law is prevalent in countries with a civil-law tradition.[*71]

3.2. Comparison as an independent method of legal interpretation?

Both in Estonian and in foreign legal literature, scholars note that the list of methods of interpretation is not limited to the four mentioned above[*72], and one can reach this conclusion likewise from Estonian case law[*73]. This leads to the question of whether comparison can be seen as an independent method of interpretation alongside those four classical methods. If the answer is in the affirmative, this would mean that the courts would be free to use comparative arguments without having to justify their choice of interpretation method. The question has arisen from time to time in legal scholarship ever since 1949, when Konrad Zweigert called comparison a 'universal method of interpretation' on the assumption that if the legislature uses the comparative method, so can a judge.[*74] On the basis of Zweigert's thesis, several authors[*75] have accorded comparison the appellation 'the fifth method'. In contrast, the prevailing view in, for example, German legal theory is that comparison should not be regarded as a customary method of interpretation, with the rationale that it seldom sees use in practice[*76] and that, when it does get employed[*77],

67 P Varul and others (eds), 'Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne' *An Act on the General Part of the Civil Code, Commented Edition*] (Juura 2010) ('Act on the General Part'), s 3, comment 1 (I Kull). It is noted in the German legal literature that all attempts to formulate a hierarchy of methods of interpretation have gone unacknowledged so far – see R Zimmermann, 'Juristische Methodenlehre in Deutschland' (2019) 83(2) Rabels Zeitschrift für ausländisches und internationales Privatrecht 241, 265. – DOI: https://doi.org/10.1628/rabelsz-2019-0021.

68 Narits (n 47) 152; 'Act on the General Part' (n 67), s 3, comment 3.1 (I Kull); 'Civil Code II' (n 57), s 436, comment 3.1.1, para b (E-K Velbri and V Kõve); RKHKo 3-3-1-72-03, 6.11.2003, para 15.

69 RKKKm 1-17-11509, 13.3.2018, para 6.

70 Varul and others (n 47) 44.

71 J Smits, 'The Europeanisation of National Legal Systems' in M Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 240. – DOI: https://doi.org/10.5040/9781472559586.ch-011.

72 'Act on the General Part' (n 67), s 3, comment 1 (I Kull); Zimmermann (n 67) 248; E Feteris, *Fundamentals of Legal Argumentation* (Springer 2017) 9; Reimer (n 32) 143. For example, the rule of economic interpretation applies in tax law; see, for instance, J Jõgi, 'Maksuseaduste tõlgendamine: kas maksumaksja kasuks või kahjuks? [Interpretation of Tax Laws: For the Benefit or Disadvantage of the Taxpayer?]' [2017](4) Juridica 203; V Lopman, 'Majandusliku lähenemise põhimõte Eesti maksuõiguses [The Principle of Economic Convergence in Estonian Tax Law]' [2005](7) Juridica 488. In German legal literature, normative interpretation is mentioned as one of the interpretation methods available – see F-C Schroeder, 'Die normative Auslegung' (2011) 66(4) JuristenZeitung 187. – DOI: https://doi.org/10.1628/002268811794656870.

73 RKHKo 3-3-1-72-03, 6.11.2003, para 15: 'In the further clarification of the determination of the will of the legislator, classical methods of interpretation, such as teleological, systematic, [and] historical, as well as, if necessary, other additional interpretation arguments[,] must also be used.'

74 K Zweigert, 'Rechtsvergleichung als universale Interpretationsmethode' (1949–50) 15(1) Rabels Zeitschrift für ausländisches und internationales Privatrecht 5, 8ff; expressing more doubt are authors such as B Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (Tübingen, Mohr Siebeck 1983).

75 Häberle (n 32); Kadner Graziano (n 7) 693; J Basedow, 'Comparative Law and Its Clients' (2014) 62(4) The American Journal of Comparative Law 821, 822. – DOI: https://doi.org/10.5131/ajcl.2014.0025.; K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford, Clarendon Press 1998) 15, 18.

76 A Janssen, 'Comparative Law in Germany: Yesterday's Hobby or Tomorrow's Science?' (2021) 1(1) Opinio Juris in Comparatione 157, 178.

77 U Drobning has noted that most legal doctrines are silent on the use of comparative law in the courts altogether, and the sources of civil-law methodology doctrine do not mention comparison at all in relation to interpretation. See U Drobning, 'Rechtsvergleichung in der deutschen Rechtsprechung' (1986) 50(3–4) Rabels Zeitschrift für ausländisches und internationales Privatrecht 610, 611. Similarly, see Zimmermann (n 67) 264; Bobek (n 11) 122.

reliance on comparative arguments is referred to as a technique under one of the classical methods of interpretation.*[78].

Also on the basis of approaches in Estonian legal theory, the conclusion may follow that comparison does not hold the status of a separate method of interpretation. For example, in the textbook on the general part of civil law, such a distinct position for comparison is not reflected in the subchapter devoted to methods of interpreting the law (in Section 7.2), but in a separate subchapter (Section 7.3. 'Opinions of legal scholars and practice in other countries') and in the sense of materials used in interpreting the law.*[79] That said, the comments to the Code of Civil Procedure draw a distinction between recognised rules of interpretation and reliance on foreign jurisprudence / legal literature.*[80]

Furthermore, the Supreme Court has striven to develop criteria that limit the use of comparative arguments. Accordingly, in 2004, 2008, and 2011, the Civil Chamber of the Supreme Court of Estonia held that 'the analogous laws and practice of other countries may be taken into account, at least in the case of private-law provisions, as reference material in determining the meaning and purpose of an Estonian law [...] primarily in a situation wherein we do not have a practice implementing the provision, but elsewhere it has developed in the case of a similar provision. This applies in particular to countries with which we share a broadly similar legal system and practice in the application of the law, especially the other Member States of the European Union and, above all, countries belonging to the continental European legal family'*[81]. With regard to situations in which case law addressing the application of the relevant Estonian legal provision exists, the Supreme Court does not consider it necessary to examine the analogous laws and practice of other countries.*[82]

From the foregoing discussion, it can be concluded that Estonian legal theory does not attribute a separate methodological meaning to the examination of foreign law as an activity within the process of ascertaining the content of a legal provision, and there is no evidence of a well-established methodological approach in the case law either. Therefore, analysis of material related to the law of other countries can be considered rather more to be one of the tools used in the process of interpretation.

3.3. The use of comparative arguments in application of interpretation methods

Grammatical interpretation is the examination of a legal provision's text by means of grammatical rules. The interpreter must take into account, among other factors, that the meaning of words can change over time, because language is a constantly evolving phenomenon.*[83] One might think that comparative arguments cannot be applied in the grammatical interpretation of Estonian legal provisions, but this is not quite true. Several judgements from Estonian case law provide evidence of this: on their basis, it can be argued that a glance at the law of other countries has helped the judge to understand, for example, the imprecision of Estonian legal terminology.*[84]

Historical interpretation, as a subjective method of interpretation aimed at ascertaining the intention of the legislator, is at the heart of the attempt to ascertain the intention of the historical legislators, its aims

78 In a comprehensive way; see Zimmermann (n 67), 263–64.

79 Varul and others (n 47), 42–45.

80 'Civil Code II' (n 57), s 436, comment 3.1.1, para b (E-K Velbri and V Kõve).

81 RKTKo 3-2-1-145-04, 21.11.2004, para 39; RKTKo 3-2-1-103-08, 9.12.2008, para 20; RKTKo 3-2-1-123-11, 7.12.2011, para 15. It is true that one should take note that the wording employed is not very categorical ('at least in the case of private law legal provisions', 'in the first place', 'primarily', etc.); therefore, the Supreme Court itself does not always adhere to these criteria (examples: RKTKo 3 -2-1-73-04, 22.2.2005; RKTKo 3-2-1-145-04, 21.12.2004, para 24), and neither do lower courts.

82 RKTKo 3-2-1-90-11, 12.10.2011, para 10. It should be added that if in the course of the practice of the application of an Estonian legal provision an understanding of the content and meaning of the rule has already been established (i.e., if a so-called interpretative precedent has been created), then it is probably not strictly necessary to interpret the rule; see M Luts, 'Lünga vastu tõlgendamise või analoogiaga? (Diskussioonist juriidilises meetodiõpetuses) [Against the Gap by Interpretation or Analogy? (On Discussion in Legal Methodology]' [1996](7) Juridica 348. Relevant at the same time is the position of the General Assembly of the Supreme Court in case 3-2-1-73-04, which states (in its para 25) that the decisive criterion for the interpretation of a provision should be the practice in the application of that provision.

83 Narits (n 47) 152–53.

84 TMKo 1-18-10376, 17.4.2019, para 18; TMKo 1-17-105, 6.11.2018, para 30; TMKo 1-07-12674, 3.9.2018, para 13; TMKo 1-17-1804, 31.5.2018, para 190; TrtRnKo 1-19-4802, 21.01.2021, para 67; TMKo 1-17-6453, 1.3.2018, para 24.

and conceptions of the legal provision at the time of its creation.[*85] This method involves examining the history of a piece of legislation by considering, among other components, the preparatory work carried out in the drafting process (explanatory memoranda, minutes and shorthand notes from parliamentary committees, etc.).

It follows that if the explanatory memorandum accompanying a draft act describes a foreign solution as a model for the creation of a corresponding Estonian legal provision, the interpreter of that provision could, in the event of ambiguity, consult the foreign source. This is how the Civil Chamber of the Supreme Court proceeded in 2004 in a case[*86] in which the method for determining the fair amount of compensation for a share takeover was subject to dispute: firstly, it was established with the aid of the transcript of the Riigikogu (Estonian Parliament) session that the preparation of the relevant provisions of the Commercial Code took German provisions as a model, and then those provisions found in German law and the practice of their application were analysed.[*87] Similar examples can be found in the case law of county and circuit courts.[*88]

Identifying the foreign legal provision that needs to be analysed may be complicated if the explanatory memorandum on the draft provides merely a general list of foreign countries that have been treated as models, without any information on individual rules. Handling the situation is easier when comprehensive information covering the precedents for the legal provision has been supplied either in the explanatory note on the draft or in the comments on the law. The official comments on the Law of Obligations Act[*89], the Code of Civil Procedure[*90], the Law of Property Act[*91], and the Act on the General Part of the Civil Code[*92] are structured in precisely that manner.

Professor R. Narits has pointed out that, even if the Estonian legislator has adopted legal provisions and institutions following the example of another country, it cannot be assumed that the Estonian laws are going to be interpreted in the same way as the corresponding ones in the country of origin.[*93] One might ask, then, why the interpreter of the provision should be interested in the foreign example of the provision in the first place when attempting to ascertain the legislator's intention. In my opinion, this statement must be understood in the sense that even if the model for the drafting of a legal provision is known, it is not always possible to proceed from its foreign interpretation at the time of application of the Estonian law, because the practice of the provision's application in the foreign country and even its wording may have changed since the time when the Estonian legislator used it as a source of inspiration. The Estonian legal provision too may have changed, so it may no longer be relevant to look at what was once a foreign model. It is also possible that an Estonian legal provision has the same wording as a foreign legal provision, but the so-called background systems of the provisions compared remain different. For example, the scope of application of the foreign legal provision may be narrower or broader due to other norms in force in that foreign legal system. Therefore, historical interpretation should not lead to uncritical attribution of 'foreign content' to an Estonian legal provision.

It has been noted in the legal literature that in certain cases – for example, in that of the application of legal provisions harmonised with the law of the European Union – the ascertainment of the 'will of the

85 Narits (n 47) 155. Legal literature has noted that the question of the (national) legislator's intention at the time is becoming of less and less importance in a context of globalisation, as it is more important whether the rule is compatible with, for example, EU law. See Bobek (n 11) 239.

86 RKTKo 3-2-1-145-04, 21.12.2004.

87 Ibid, paras 14 and 23.

88 For example, see TlnRnKo 1-19-6307, 30.11.2020, para 37: Examples from Anglo-American law are analysed in the interpretation of s 288(3)(9) of the Code of Criminal Procedure.

89 P Varul and others (eds), 'Võlaõigusseadus I. Kommenteeritud väljaanne' [*Law of Obligations Act I, Commented Edition*] (Juura 2016); P Varul and others (eds), 'Võlaõigusseadus II. Kommenteeritud väljaanne' [*Law of Obligations Act II, Commented Edition*] (Juura 2019); P Varul and others (eds), 'Võlaõigusseadus III. Kommenteeritud väljaanne' [*Law of Obligations Act III, Commented Edition*] (Juura 2021); P Varul and others (eds), 'Võlaõigusseadus IV. Kommenteeritud väljaanne' [*Law of Obligations Act IV, Commented Edition*] (Juura 2020).

90 V Kõve and others (eds), 'Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne' [*Code of Civil Procedure I, Commented Edition*] (Juura 2017); 'Code of Civil Procedure II. Commented edition' (note 56); V Kõve and others (eds), 'Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne' [*Code of Civil Procedure III, Commented Edition*] (Juura 2018).

91 P Varul and others (eds), 'Asjaõigusseadus I. Kommenteeritud väljaanne' [*Law of Property Act I, Commented Edition*] (Juura 2014); P Varul and others (eds), 'Asjaõigusseadus II. Kommenteeritud väljaanne' [*Law of Property Act II, Commented Edition*] (Juura 2014).

92 'Act on the General Part' (n 67).

93 Narits (n 47) 66.

legislator' consists simply in the presumption that the legislator sought the conformity of the legislative act with internationally accepted obligations.[*94] Therefore, the next step in these cases is to examine how the legal provision fits into the framework of the obligations referred to, which entails a systematic method of interpretation.

In the course of systematic (or systematic-logical) interpretation, the relationships between provisions within a single piece of legislation are examined, and so too are the interrelations with provisions of other pieces of legislation, if examining these is necessary.[*95] The interpretation here consists of finding the place of the provision in the legal system, the relevant branch of law and field of law, and the logic- and functionality-related connections between provisions.[*96] Thus the interpreter examines the structure of the law, its classification, the titles of the various sections and paragraphs, etc., and the process must take account of several clarifying rules of interpretation also (such as the priority of special provisions (*lex specialis derogat legi generali*) or the principle that later law repeals an earlier law (*lex posterior derogat legi priori)*).

Estonian case law offers several examples of how courts have used references to foreign law as benchmarks in the systematic interpretation of domestic legal provisions. In one of these, Harju County Court, in the course of affirming the possibility of expiry of the claim to correct an entry in the Land Register (per §65(1) of the Law of Property Act), pointed out for comparison that German law explicitly excludes the expiry of the corresponding claim.[*97] In another, Tartu County Court, considering a provision (in §201 of the Criminal Code) regulating embezzlement as a general norm or catch-all provision, noted that this is the way embezzlement is understood in Germany as well.[*98]

In the case of teleological (or objective-teleological) interpretation, the interpreter examines the meaning of the legal provision, *ratio legis*. In other words, it asks what is the objective that the provision aims to achieve.[*99] For example, in 2005 the General Assembly of the Supreme Court analysed a provision of the Law of Succession Act in force at the time according to which the right to inheritance of a compulsory portion was vested in the incapacitated relative and spouse of the deceased. Recognising the impossibility of taking a position on the provision simply on the basis of grammatical interpretation (as noted in para 21) or on the basis of the history of the provision's development (addressed in para 22), the General Assembly applied a systematic interpretation method and concluded that, since legal acts differ in the understandings they express of the notion of incapacity, the regulations laid down in the Law of Succession Act must be evaluated in line with the objectives of the institution of compulsory portion (see para 31). In this connection, the General Assembly noted in the same paragraph that '[also] an analysis of the practice of other countries reveals that there is no clear and unified position as to which goals the compulsory portion fulfils or can fulfil'. Accordingly, it was considered possible that the objectives for the institution of the compulsory portion under Estonian law could be clarified by means of the law of other countries.

Examples of references to the law of other countries in the context of the teleological method of interpretation exist also in the case law of Estonia's regional and district courts. For instance, in 2022, Tallinn Circuit Court resolved the issue of compensation in connection with the loss of an owner's building right by taking into account, among other things, the provisions of German law when examining the purpose of §244²(2) of the Law of Property Act.[*100] In another case, Tartu County Court has cited German law among the various arguments put forth in analysis of the purpose of §6(1) of Estonia's Imprisonment Act.[*101]

If, in the course of interpreting a rule, the judge comes to the conclusion that using comparative arguments is justified, the sole objective cannot be to interpret a national rule in conformity with foreign law. Quite the contrary: it is worth reiterating the position of the Supreme Court that '[i]t is also understandable if a judge, on the basis of their reading of professional literature from other countries, is deeply convinced of the lack or even inadequacy of a legal regulation in Estonia. If a judge aware of such a situation has doubts

94 Bobek (n 11) 239.

95 Narits (n 47) 153.

96 Ibid 154.

97 HMKo 2-20-4747, 8.6.2021, para 29.

98 TMKo 1-18-117, 2.5.2018, para 45.

99 Narits (n 47) 157.

100 TlnRnKo 2-19-4952, 18.3.2022, para 9.4.3.

101 TMKo 1-15-6338, 28.8.2015, para 13.

as to whether a given law is in conformity with the Constitution, said judge may initiate a procedure of constitutional review, and it is undoubtedly possible for the judge's own *de lege ferenda* opinion to find its way into a scientific article.'[*102]

4. The role of foreign law in filling legal gaps

Situations may present themselves wherein the interpretation of the law proves insufficient for resolving the real-world case at hand. Although the legal order is constantly evolving, it might not always respond to genuine societal needs; that is, some problems that need to be solved may remain unresolved or new situations may have arisen that the legislator did not foresee when adopting the legal provisions. In these circumstances, we can talk about a gap.

The 'inspirational' function of foreign law in filling gaps in domestic law gets stressed by many authors.[*103] Thus, for example, Basil Markesinis and Jörg Fedke have stated that examples from foreign law can aid in resolving situations wherein a gap exists in domestic law or in which a need for modernisation of the legal system is evident.[*104] Ulrich Drobning differentiates between situations wherein a comparison with foreign law permits solving a problem analogous to ones that have already been solved in other countries and situations wherein the judge, inspired by foreign law, develops domestic law further, finding a solution contrary to the existing provision.[*105] Jan Smits, on the other hand, cites reform to national law as among the functions of comparison.[*106]

Estonian legal literature categorises gaps into genuine, apparent, and value gaps.[*107] A genuine gap is considered to exist where there is no legal regulation of a fact of life that definitely should be regulated, an apparent gap presents itself when the legislator did not intend to regulate certain situations, and a value gap is deemed to exist when the regulation in place is not precise enough (e.g., when the legal provision takes the form of a general clause with overly general wording or when the legislator has employed a vague or imprecise legal concept).[*108] Alternatively, gaps can be grouped into two classes: gaps in the law (which emerge when the existing body of provisions turns out to be incomplete) and gaps in the legislation (from some areas in need of regulation not having been regulated at all).[*109]

Whichever typology one follows, it is possible – except in criminal law[*110] – to fill the gaps by using analogy. This notion (analogy of the law, or individual analogy) involves situations in which a legal provision similar to the one at issue (here, the one that is absent) serves as a basis in the decision-making process. In the case of the analogy of law, the decision is based on a legal principle that can be derived from many provisions that stand on the same legal and political foundations.[*111] Legal scholars have noted that if the law provides for the possibility of using an analogy (as in the case of §4 of the Act on the General Part of the Civil Code), then the judge's actions can be viewed as implementation of the law rather than creation of a new law.[*112] If, however, it is not possible to fill the gap by means of analogy, one can speak of judicial law – i.e., of judges having to 'create' a new law themselves to resolve the situation before them.

In the specialist literature, practitioners note that a judge must be careful when resorting to analogy and further developing the law; it grows all the more dangerous to adopt similar solutions from foreign law without sufficient analysis and reasoning.[*113] The position taken in Estonian case law can be described

102 RKKKm 1-17-11509, 13.6.2018, para 11.3.

103 E.g., T Koopmans, 'Comparative Law and the Courts' (1996) 45(3) International & Comparative Law Quarterly 545. – DOI: https://doi.org/10.1017/s0020589300059352; Zweigert and Kötz (n 75) 18.

104 B Markesinis and J Fedke, Judicial Recourse to Foreign Law: A New Source of Inspiration? (Routledge 2006) 121. – DOI: https://doi.org/10.4324/9780203723357.

105 Drobning (n 77) 628.

106 Smits (n 8) 529.

107 Narits (n 47) 162.

108 Ibid.

109 Luts (n 82).

110 For comments and clarification, see Luts (n 82).

111 Narits (n 47) 163.

112 Luts (n 82).

113 Laffranque (n 4) 1294.

as similarly cautious. Thus it was that, in a decision made in 2014, the Civil Chamber of the Supreme Court identified a gap in company law, consisting in the fact that the holder of a small share in a public limited company could not demand the payment of a dividend, and pointed out that in such a situation it is not permissible to appeal to the mechanisms that protect small shareholders under German law as an example. The decision did state that creation of such protection mechanisms should be considered by the Estonian legislator.*[114] In 2019, the Civil Chamber of the Supreme Court presented a similar argument in a judgment*[115] explaining that there are no special provisions in Estonian law that address the repayment of loans granted to a company by its partners or shareholders in bankruptcy proceedings. The Supreme Court recognised that the gap in question cannot be filled by analogy, because the legislator did not want to regulate the disputed legal relationship (para 24), despite such special provisions existing in several other countries (such as Germany and Sweden), and it stated, therefore, that the Estonian legislator could consider adding the relevant rules to national bankruptcy law (para 25).

Hence, one can argue on the basis of Estonian case law that, although comparative arguments are visible in the interpretation of existing legal provisions, drawing inspiration from the law of other countries when filling gaps in the legal system is not commonplace in this country. Decisions in which courts have opted to use analogy do not seek to draw inspiration from the solutions to analogous legal problems in other countries; rather, the reference to foreign law serves the mere function of demonstrating the existence of a gap.

5. Conclusions

While engaging with foreign experience is favoured and customary in the Estonian legislative process, in court judgements references to the law of other countries play only a supplementary and secondary role. Crucially, comparison cannot reasonably be regarded as an independent method of interpreting the law. Instead of being a method in its own right, it functions as one of the traditional tools of interpretation. Even in the case of pressing gaps in the legal order, information on the law of other countries serves in the role of a means for identifying the gap rather than for filling it.

114 RKTKo 3-2-1-89-14, 29.10.2014, para 27.

115 RKTKo 2-17-17217, 5.6.2019.

https://doi.org/10.12697/JI.2023.32.05

Jānis Neimanis

Judge, JD
Constitutional Court of Latvia

An Overview of the Recent Case Law of the Constitutional Court of the Republic of Latvia

Abstract. The article highlights recent trends in the case law of the Latvian Constitutional Court with regard to the response to COVID-19, empowerment of marginalised groups, and protection of democracy. These developments emphasise the Court's role in upholding the rule of law, promoting equality, and safeguarding democracy in Latvia. During the pandemic, its rulings shaped the legal framework for managing the crisis while balancing public health against individuals' rights. Analysis shows that the decisions on emergency measures, restrictions to fundamental rights, and executive powers ensured government actions' legality and proportionality, with the Court demonstrating commitment to empowering marginalised groups through case law addressing gender equality, LGBTQ+ rights, minority rights, and disability-related rights. The paper shows how, by providing legal protection and promoting inclusivity, the Court advanced the rights of marginalised communities while, additionally, protecting democracy remained a paramount concern for the institution, whereby it safeguarded the Latvian constitutional order, separation of powers, independence of the judiciary, and the rule of law. The discussion illustrates how vigilant scrutiny of legislation and government actions can preserve democratic values, uphold the integrity of institutions, and ensure accountability.

Keywords: COVID-19 pandemic, empowerment of marginalised groups in society, protection of democracy, constitutional court, case law

Introduction

Since the beginning of 2020, the Constitutional Court of the Republic of Latvia (hereinafter 'the Court') has delivered rulings in more than 80 cases which concerned a broad variety of issues, including protection of personal data, the use of the official (Latvian) language in education, the SARS-CoV-2 pandemic, the safety of and access to the Latvian natural-gas pipeline network, and LGBTQ+ rights if we confine ourselves to naming only a few. This paper offers an overview of selected rulings of the Court by categorizing them into three groups which reflect the recent trends in the case law of the Court: the COVID-19 pandemic, empowerment of marginalised groups in society, and protection of democracy.

Cases related to the SARS-CoV-2 pandemic

In March 2020, the World Health Organization announced that the global COVID-19 outbreak caused by a coronavirus had reached the level of a pandemic.[*1] Shortly after that, the Latvian government (through the Cabinet of Ministers) issued an order declaring a state of emergency for approximately a month.[*2] It was later prolonged for a few months and issued again two times over the course of the next two years. This allowed room for swift epidemiological safety measures and related human rights restrictions most of which were established by the government. Several of these measures were contested before the Court resulting in over 100 complaints. Most of the said complaints were related to the obligation to wear medical face masks; limitations on assembly, association, and religious activity, limitations of business hours and commercial activity in shopping centres; the 'downtime allowance' paid by the state to workers; and vaccination. However, only some of these complaints fell within the jurisdiction of the Court or were substantiated enough for a case to be initiated before the Court.

Restrictions on gambling businesses (Case 2020-26-0106)

The first SARS-CoV-2-pandemic-related judgement of the Court concerned temporary prohibition of in-person gambling as well as interactive gambling during the state of emergency.[*3] The case was initiated on the basis of constitutional complaints submitted by five companies who organize gambling; they claimed that such prohibition, amongst other, violates their right to property as enshrined in Article 105 of the Latvian Constitution (the Satversme)[*4]. The Court reiterated that the right to operate a particular type of business under a licence (namely, organising in-person and/or interactive gambling in this case) indeed falls within the scope of Article 105 of the Constitution and, hence, that the applicant's right to property had indeed been restricted. The restriction had been imposed in order to ensure protection of other people's rights regarding public-health concerns and of public welfare.

The Court concluded that the restriction to in-person gambling was both appropriate and necessary as it contributed to limiting the spread of the virus in a timely fashion, since the principal mode of transmission of the virus was through respiratory droplets that are expelled when a person speaks, coughs, or sneezes. Namely, physical contact and meetings had to be limited. However, the restrictions on interactive gambling did not help to limit the spread of COVID-19. Even though they could have contributed to protecting the financial situation of individuals during the pandemic, the Court noted that even during the emergency situation, the legislator must not adopt provisions that are unreasonably broad and also restrict the rights of those individuals to whom the legitimate aim of the regulation does not at all apply. Namely, when adopting a provision aimed at protecting individuals with gambling problems and their families, the legislator had no reason for simultaneously restricting all other people's right to choose where to invest their funds and thereby interfere with how they wished to spend their free time. It was furthermore established that, what could be regarded as alternatives to the means of achieving the legitimate aims are specific restrictions on the course of interactive gambling, for example, limiting the time and money spent on the gambling websites. Thus, the Court found that the restrictions imposed on interactive gambling were not necessary in the context of proportionality test and therefore did not comply with the Constitution.

In this case, the Court elaborated on how proportionality should be applied together with the precautionary principle which grants the legislator a wider margin of appreciation. Namely, if the resort to the precautionary principle as such is reasonably justified, whenever there is a qualified and serious risk to health and welfare whenever there is a qualified and serious risk to health and welfare, the State does not have to wait until the risk becomes reality. However, the restrictions adopted by the legislator, on the basis of such precaution, still have to be in line with the Constitution. Furthermore, it was established that that in

1 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 16 March 2020' <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---16-march-2020> accessed 10 June 2023.

2 Cabinet Order 103, of 12 March 2020: 'Regarding Declaration of the Emergency Situation' [2020](51A) Latvijas Vēstnesis.

3 This was the judgement of 11 December 2020 by the Constitutional Court of the Republic of Latvia in Case 2020-26-0106, 'On Compliance of Section 9 of the Law "On Measures for the Prevention and Suppression of Threat to the State and Its Consequences Due to the Spread of COVID-19" with Article 105 of the Constitution of the Republic of Latvia and Article 49 of the Treaty on the Functioning of the European Union' [2020](242) Latvijas Vēstnesis.

4 Available in English at <https://likumi.lv/ta/en/en/id/57980> accessed on 10 June 2023.

cases wherein the legislator is faced with great uncertainty and believes that the achievement of particular aims requires quick solutions, there is no necessity for the legislature to conduct lengthy, in-depth research into the threat of the respective damage or hold detailed debate on the prevention of the damage as these would significantly delay the adoption and effectiveness of the decision. The Court expressed ideas along similar lines in other cases related to the SARS-CoV-2 pandemic.

Testing for the virus prior to entry to Latvia (Case 2021-10-03)

The case was initiated on the basis of an application submitted by a citizen of Latvia who had been residing in Germany for several years. The applicant had made a habit of travelling to Latvia, had planned to do so in 2021 by passenger air transport in the second half of January or in February; however, the Latvian government had set forth several restrictions on travelling, including the requirement for a negative COVID-19 test result before boarding a passenger air transport that is flying to Latvia. The applicant held that said requirement imposed a disproportional restriction on her as a citizen's right to freely return to Latvia as enshrined in Article 98 of the Constitution.

The Court found that the right of Latvia's citizens to freely return to Latvia was absolute and could not be restricted. However, it was noted that there are various ways in which a citizen of Latvia could return to Latvia, for example, by crossing the land border or entering through a port, airport, railway station, or otherwise. Thus, the Court concluded that a person's right to return to Latvia should be differentiated from a person's wish and possibility to use a particular type of transportation for this purpose.

The Court found that entering the territory of Latvia was not restricted, for example, for the citizens of Latvia who entered Latvia by vehicle that was not providing commercial transportation services and who had tested positive for SARS-CoV-2. Additionally, it was noted that the contested norm could indeed have caused certain inconvenience for the person because it impeded traveling in the manner she desired. However, this could not be regarded as an insurmountable obstacle as Latvia had not prohibited its citizens from traveling and had not closed its borders. Hence, the Court concluded that the applicant's right of freely returning to Latvia had not been restricted, and the proceedings were terminated accordingly.[*5]

Restrictions on operations at shopping centres (Case 2021-24-03)

The case concerned an epidemiological safety provision set forth by the Cabinet of Ministers that stipulated that operation of shops in the shopping centres, the total area dedicated to trade of which exceeded 7000 square meters, was prohibited, except for certain categories of shops. It was initiated on the basis of applications submitted by companies running shops on the premises of these shopping centres that have the possibility to ensure entrance to these shops from the outside, as well as the owners of shopping centres who lease their premises to traders and service providers. The applicants argued the contested regulation creates inequality and is incompatible with the right to property as it provided that only a selection of shops could operate in large shopping centres.

The Court held that the rights of shop owners had been restricted but the said restriction was imposed in order to curb the spread of the virus behind COVID-19 by limiting the gathering and mobility of people in large shopping centres and consequently decreasing the load on public transportation. Thus, the regulation pursued the legitimate aim of protection of other persons' right to health. Additionally, uncontrolled spread of SARS-CoV-2 could have caused an overload for the health sector, thus jeopardising the continuity of accessibility of health care and medical services. Hence, protection of public welfare was also acknowledged as a legitimate aim of the restriction. Furthermore, the Court concluded that the restrictions did contribute to achieving these aims. Nevertheless, the Court found that other measures existed that would restrict the shop owners' fundamental rights to a lesser extent and would ensure the fulfillment of the legitimate aims in the same quality. Namely, there were no significant differences between a shop located in a large shopping centre that had been zoned off from the common use premises and to which an entrance from the outside had been ensured, and a shop set up outside a shopping centre's premises. Thus, regulation permitting such shops in large shopping centres to continue operating would allow to achieve the authorities' legitimate aims in the same quality.

[5] Per the decision of 18 February 2022 by the Constitutional Court of the Republic of Latvia in Case 2021-10-03, on the compliance of para 35^3 of Cabinet of Ministers Regulation 360, of 9 June 2020, 'Epidemiological Safety Measures To Contain the Spread of COVID-19 Infection', with the second sentence of Article 98 of the Constitution of the Republic of Latvia. See 22 February 2022's *Latvijas Vēstnesis* (37).

Therefore, the Court concluded that the contested regulation, insofar as it applied to shop owners, violated their right to property and was incompatible with Article 105 of the Constitution. To this extent, the contested regulation was also deemed incompatible with the principle of equality as enshrined in the Constitution's Article 91, because it prohibited the operation of those shops in large shopping centres irrespectively of whether separate entrance from outside could be ensured for the particular shop. Meanwhile, stand-alone shops set up in other trading venues could continue their operations.

Regarding the owners of shopping centres, the Court recognised that the possibility for them to benefit from leasing their premises was closely connected to the tenants' rights to use these premises for trading. Thus, the contested regulation substantially stripped the owners from exercising their right to lease their premises out and profit from their property respectively. Nevertheless, the entire society benefited from the contested regulation as it protected both people themselves from falling ill and the health care system from becoming overloaded. In view of the spread of the virus and the threats it posed for the health system, the legitimate interests of some commercial companies could not be placed above the interests of the entire society. Thus, the Court recognised that the contested regulation, insofar as it applied to owners of large shopping centres, complied with the right to property as enshrined in Article 105 of the Constitution. However, the Court deemed it incompatible with the principle of equality as enshrined in Article 91 of the Constitution. The contested regulation allowed trading within the premises of a large shop. On the other hand, with certain exceptions, trade was not allowed in large shopping centres during the whole time the contested regulation was in force. Hence, the contested regulation foresaw differential treatment of these groups. The Court did not identify objective arguments allowing to conclude that the differential treatment of owners of large shopping centres and owners of large shops had a legitimate aim.[*6]

Conclusions from the COVID-19-related cases

The Court has also adjudicated a case concerning regulation stipulating that school students shall receive all their primary and general secondary education remotely, due to spread of SARS-CoV-2. The remote learning regulation was deemed to comply with the school student's right to education as enshrined in Article 112 of the Constitution. Furthermore, there are two cases that are still pending before the court. One is related to prohibition to import mink in Latvia during the pandemic, but the other is related to the obligation for members of Parliament to be vaccinated against the coronavirus before being permitted to carry on fulfilling their duties.

An overarching view that the Court has taken in the COVID-19 pandemic related cases is that the proportionality principle should be applied together with the precautionary principle which grants the legislator a wider margin of appreciation. Namely, if the resort to the precautionary principle as such is reasonably justified, whenever there is a qualified and serious risk to health and welfare, the State does not have to wait until this risk becomes reality. However, the restrictions adopted by the legislator, on the basis of such precaution, still have to be in line with the Constitution. Furthermore, it has been established that that in cases when the legislator is faced with great uncertainty and believes that the achievement of particular aims requires quick solutions, there is no necessity for the legislator to conduct lengthy, in-depth research about the threat of the respective damage or hold detailed debate on the prevention of the damage as these would significantly delay the adoption and effectiveness of the decision. These ideas might be followed by the Court in other COVID-19 pandemic related cases.

Cases related to empowerment of society's marginalised groups

Another reoccurring theme in the recent case law of the Court has been the empowerment of marginalized groups of society. These cases showcase the need to protect vulnerable minorities from the uncontrolled and more often than not biased rule of the majority.

6 See the judgement of 10 March 2022 by the Constitutional Court of the Republic of Latvia in Case 2021-24-03, 'On Compliance of Paragraph 2418 of the Cabinet of Ministers Regulation No 360 of 9 June 2020 "Epidemiological Safety Measures for the Containment of the Spread of Covid-19 Infection" (in the Wording That Was in Force from 7 April 2021 until 19 May 2021) with the First Sentence of Article 91, [and] the First and the Third Sentence of Article 105 of the Constitution of the Republic of Latvia' [2022](51) Latvijas Vēstnesis.

Poverty and guaranteed minimum income (Case 2019-24-03)

In summer 2020, the Court passed judgement in a case which concerned the guaranteed minimum income (GMI) level set forth by the government (Cabinet of Ministers).[*7] This indicator was supposed to represent the amount of money a person needs to cover their basic needs. According to Latvian law, it is used to determine the amount of GMI benefit – a material support in monetary terms provided to eligible persons in need for covering their everyday expenses. At the time of adjudication of the case, the contested provision stated that the amount of GMI level for a person shall be 64 euros per month.

The case was initiated on the basis of the Ombudsman's application. The Ombudsman held that this GMI index was incompatible with the core principle of a welfare state and with the principle of the rule of law because it does not assure needy persons of a life compatible with human dignity and does not honour the obligation to ensure that people have an opportunity to exercise their social rights at least to a minimal extent in accordance with the guarantees of Article 109 of the Constitution.

The Court reiterated that the legislator is obliged to create a social-security system that is aimed at the protection of human dignity as the overarching value of a democratic state governed by the rule of law. For everyone to be able to lead a life compatible with human dignity, the minimal social assistance should be such that anybody could provide food, clothes, housing and medical assistance for themselves – everything that is needed to guarantee elementary survival to any person, as well as to ensure to any person the possibility to exercise their right to primary education. Moreover, social assistance should guarantee to a person the possibilities to participate in social, political, and cultural life, thus, ensuring this person the status of a full-fledged member of society.

The Court found that the legislator had introduced measures to create a system of social security, thus ensuring to persons the possibility to exercise their right to social security. One of the elements in the system of social security is social assistance, the purpose of which is to provide assistance to needy persons and which comprises the GMI level, set in the contested norm, and the benefit linked to it. However, the GMI level itself was set by the Cabinet of Ministers, not Parliament, even though it was a parliamentary duty to decide on this essential issue. Furthermore, the Court established that the GMI level of 64 euros was based on a mere agreement between the institutions involved in the payout of the GMI benefit, namely, the Cabinet of Ministers and local governments. There was no method behind it that would ensure that the GMI level actually contributes to ensuring the basic needs of the GMI benefit recipient.

Other measures of the social security system available to needy persons in addition to the benefit for ensuring GMI level were also examined by the Court. It recognised that, within the framework of the social-security system, various measures of social assistance were available to a needy person. However, the state social benefits could not be assessed as benefits to be used to satisfy a person's basic needs since they have other objectives. Moreover, they were granted to persons belonging to certain groups of inhabitants in concrete situations. Thus, the Court found that the GMI level set in the contested norm, in interconnection with other measures of the social-security system, did not ensure that every needy person could lead a life that would be compatible with human dignity. Hence, the contested norm was found incompatible with Article 1 and Article 109 of the Constitution.

Reintegration of ex-convicts into society (Case 2020-36-01)

The Court has adjudicated several cases which were related to permanent bans imposed on ex-convicts even after their criminal record had been cleared. These bans mostly manifest as restrictions on formal recognition of their family ties as well as access to certain jobs.

In March 2021, the Court delivered a judgement in a case concerning a norm which prohibits a person convicted of a violent criminal offence from being employed in contact with children for life.[*8] This case was initiated on the basis of an application submitted by the Supreme Court. It stated that the employer, on the basis of the contested norm, terminated the employment relationship with an employee who worked as a building supervisor and had been convicted of malicious hooliganism.

---

7 The judgement of 25 June 2020 by the Constitutional Court of the Republic of Latvia in Case 2019-24-03, 'On Compliance of Para 2 of the Cabinet Regulation of 18 December 2012 No 913 "Regulation on the Guaranteed Minimum Income Level" with Article 1 and Article 109 of the Constitution of the Republic of Latvia' [2020](121) Latvijas Vēstnesis.

8 Case 2020-36-01, with the judgement titled 'On Compliance of Para 1 of Section 72(5) of [the] Law on the Protection of the Children's Rights with the First Sentence of Article 91 and the First Sentence of Article 106 of the Constitution of the Republic of Latvia' [2021](62) Latvijas Vēstnesis.

Firstly, the Court held that all forms of violence against children must be prevented in the first place by proactive and preventive measures. The contested provision also provided for such measures. It minimised the likelihood of direct and continuous or regular contact with children by a person whose past behaviour has been directed at endangering another person by using or threatening violence. Furthermore, the Court reiterated that in cases where a decision is adopted by weighing various interests involved, including the interests of the child, the best interests of the child have the highest priority. But this does not mean that other interests should not be taken into account. In this case, the best balance must be found between all the interests involved. The right to choose employment is also an important fundamental right, as work is an indispensable source of human dignity and affirmation in a democratic society.

Secondly, the Court emphasised that the legislator is entitled to establish such a prohibition (whereby a convicted person may not be employed in contact with children) only if said person objectively poses a greater risk of danger to a child than someone who has not been convicted of a crime. The mere fact that a person has been convicted of a violent crime is not always sufficient to establish that they pose risk to children in the longterm. The prohibition of a restriction on a fundamental right should not be based on general presumptions, but should, as far as possible, promote the achievement of individual justice. The Court held that the right of a person convicted of a violent criminal offence to be employed in contact with children may be assessed individually by the head of the institution, the employer or the event organiser, if necessary in consultation with the State Inspectorate for Protection of Children's Rights. The State Inspectorate for the Protection of Children's Rights could also be given such additional competence, and such an assessment could also be made by a court of general jurisdiction. Consequently, the legitimate aim of the restriction of fundamental rights could be achieved in the same quality by means which were less restrictive of the rights of persons and which, moreover, did not require a disproportionate contribution from the state and society. Thus, the restriction of fundamental rights contained in the contested provision was not proportionate and the contested provision did not comply with Article 106 of the Constitution.

LGBTQ+ rights (Case 2019-33-01)

The case concerned a legal norm that did not envisage the right to a leave in connection with the birth of a child to the female partner of the child's mother.[*9]

The case was initiated on the basis of a constitutional complaint. It was noted therein that the applicant was in a stable same-sex relationship with her partner. After they began cohabiting, two children were born to the applicant's partner, and the applicant and her partner had jointly planned their birth. Both children lived in a common household with the applicant and her partner. Immediately after the birth of the youngest child, the applicant had wanted to take the leave of 10 calendar days to be together with the new-born child in the first moments of his life and to provide support to her partner. However, the contested legal provision envisages the right to this leave only to the father of the child but does not envisage this right to the female partner of the child's mother, who in fact should be considered as being one of the new-born child's parents. Thus, the legislator had not fulfilled its duty to ensure protection and support to a family with same-sex partners.

Firstly, the Court noted that the state's obligation to protect marriage as a union between a man and woman is set forth in the first sentence of Article 110 of the Constitution. At the same time, this norm establishes an obligation on the state's part to protect and support the family, parents, and children too. The Court underscored that this obligation did not apply only and solely to a family established through marriage. Thus, the first sentence of Article 110 of the Constitution defines a positive obligation of the state to protect and support all families, also, *inter alia*, *de facto* families established through cohabitation. The Court also noted that Article 110 of the Constitution did not specify the concept of family and did not advance gender as a criterion for determining the persons who should be recognised as being a family. In this regard, it recognised that society consisted not only of such persons who, as to their nature, formed close personal and family ties with the representatives of a different sex, but also of persons who, as to their nature, formed such relationships with the representatives of their own sex.

[9] The Constitutional Court ruled on this on its judgement of 12 November 2020 in Case 2019-33-01, 'On Compliance of Section 155(1) of the Labour Law with the First Sentence of Article 110 of the Constitution of the Republic of Latvia' [2020] (222) Latvijas Vēstnesis.

Secondly, the Court recalled that human dignity was the constitutional value of the State of Latvia. The view that the dignity of one human being could be of a lesser value than the dignity of another human being is incompatible with the principle of human dignity. The principle of human dignity does not allow the state to derogate from ensuring fundamental rights to a certain person or a group of persons. The stereotypes prevailing in the society may not serve as constitutionally justifiable grounds for denying or restricting the fundamental rights of a certain person or groups of persons in a democratic state governed by the rule of law.

Lastly, the Court concluded that, in a family of same-sex partners, legal protection and the measures of social and economic protection were accessible only to the mother and her child. Thus, substantially, the protection and support accessible to the family of same-sex partners did not differ from the protection and support that is accessible to the family consisting only of a mother and her child. Thus, the existing legal regulation of family relationships did not ensure protection and support to same-sex partners and to the children born into their families as a united family. The legislator had not established legal regulation of family relationships of same-sex partners, and had not envisaged for families of same-sex partners measures of social and economic protection and support in relation to the birth of a child. Thus, the legislator had not fulfilled its positive obligation deriving from Article 110 of the Constitution to ensure legal, social and economic protection also to families of same-sex partners. Consequently, the Court recognized the contested norm as being incompatible with Article 110 of the Constitution.

Concluding remarks on case law related to empowerment of marginalised groups

The case law related to empowerment of marginalised groups in society reveals human dignity as an overarching value and fundamental right used to determine the constitutional framework within which these cases should be adjudicated. It remains important to this day, as many of the groups mentioned here are still sometimes seen as inherently inferior and less valuable to society.

Cases related to protection of democracy

Another topical issue highlighted in the recent case law of the Court is protection of democracy. The Court has adjudicated cases related to voting rights of prisoners, financing of political parties, as well as militant democracy measures set forth in the Criminal Law.

Voting rights of persons serving a custodial sentence (Case 2021-43-01)

In November 2022, the Court passed a judgement in a case concerning a norm in Latvian law according to which persons who are serving a sentence in places of deprivation of liberty have no right to elect the council of a local government.[*10] The case was initiated on the basis of an application of an individual who was serving a custodial sentence and as such was subjected to the contested norm. This individual claimed that the prohibition established by the contested provision restricts the right of a person to participate in the election of local government by voting as set forth in the first sentence of Article 101 of the Constitution.

The Court recognized that the contested norm unjustly and automatically restricted the fundamental right to elect local government for a group of individuals based solely on the fact that they were serving a custodial sentence in a place of detention. The norm in question, however, failed to take into account whether there was a logical and sufficient connection between the restriction of the right to vote and the specific criminal offense committed by the individual, as well as their unique circumstances. As such, individuals serving a custodial sentence in a place of detention should not be exposed to greater restrictions than what is necessary due to the nature of their offence and the type of punishment imposed on them.

[10] The judgement of 3 November 2022 by the Constitutional Court of the Republic of Latvia in Case 2021-43-01, 'On Compliance of Section 6(2) of the Law on the Election of Local Government Councils with the First Sentence of Para 2 of Article 101 of the Constitution of the Republic of Latvia' [2022](216) Latvijas Vēstnesis.

The Court also emphasized that the restriction of suffrage for individuals serving a sentence at a place of deprivation does not effectively encourage civic engagement or successful reintegration into society upon release. A general restriction on suffrage is also at odds with the goal of criminal punishment, which is to rehabilitate and reintegrate the individual into society. Furthermore, the Court observed that any limitations on the right to vote must be evaluated in relation to the democratic progress of the state. Specifically, it is crucial to regularly reassess the necessity of such limitations, taking into account the level of democratic maturity of the society and the state at the given time.

As a result, the Court found the contested provision to be incompatible with right of a person to participate in the election of local government by voting as set forth in Article 101 of the Constitution.

Democracy capable of protecting itself (Case 2021-34-01)

In May 2022, the Court terminated proceedings in a case concerning a criminal-law provision which criminalized a public call to eliminate national independence of the Republic of Latvia.[*11] The case was initiated on the basis of a constitutional complaint of an individual who had published an appeal on a Web site calling for collecting signatures for the Republic of Latvia to join the United States of America. By a judgement of a court of general jurisdiction, the applicant was found guilty of the criminal offence provided for in the contested norm. The applicant considered that this norm infringed his right to freedom of expression as enshrined in Article 100 of the Constitution.

The Court interpreted the contested norm and concluded that this norm provided for criminal liability only for such a public call to eliminate the national independence of the Republic of Latvia, which poses a real threat to the interests of the state and society and incites to such an action that would actually enable the aim of the call to be achieved. Furthermore, the Court emphasised that the contested norm in the state's criminal law served to protect the state and its democracy. This norm contributed to the implementation of the principle of democracy capable of protecting itself. It was also recognized that the objective purpose of the contested norm of the Criminal Law was to target persons who made such public calls for the elimination of national independence which exceed the limits of freedom of expression and pose a real threat to the national independence and democratic state system of the Republic of Latvia.

The Court recognized that its interpretation of the contested norm of the criminal law ensured protection of the fundamental rights of a person enshrined in Article 100 of the Constitution. In such a way, by interpreting and applying the contested norm in accordance with the Constitution ruled out any grounds for doubting its constitutionality along the way. Thus, the Court recognized the applicant's assumption that the conflict of legal norms with legal norms of higher legal force was caused by the contested norm of the criminal law as unfounded. Whereas assessing the actual circumstances of the criminal case and the qualification of the offence committed by the person did not lie within the competence of the Court, the proceedings connected with the contested criminal-law norm's compliance with Article 100 of the Constitution were terminated.

Concluding remarks on cases related to protection of democracy

The case law related to protection of democracy suggests that the understanding of democracy, rule of law and human rights might still not be sufficient within the society of Latvia and the Parliament, too.

In order to change that, the Court has taken part in several projects to maintain a dialogue with both the society and other state institutions. These include drawing and writing competitions for school students, annual meetings with representatives of state institutions as well as active engagement with the media.

[11] The Constitutional Court of the Republic of Latvia made this ruling in its 27 May 2022 decision on Case 2021-34-01, on the compliance of Section 82(1) of the Criminal Law in the wording that was in force from 1 April 2013 until 10 May 2016 with the first sentence of Article 100 of the Constitution of the Republic of Latvia and on the compliance of the transitional provision of the law of 21 April 2016, 'Amendments to the Criminal Law', with Article 1 and the second sentence of Article 92 of the Constitution of the Republic of Latvia', per *Latvijas Vēstnesis* 103, of 30 May 2022.

https://doi.org/10.12697/JI.2023.32.06

Maret Kruus

Doctoral student, University of Tartu
Attorney-at-Law, Law Office NOVE

The Public Interest Requirement in the Secondary Use of Health Data in Scientific Research:

The Examples of Estonia and Finland

Abstract. The General Data Protection Regulation (GDPR) foresees a flexible data processing regime for conducting scientific research with health data. This regime also enables extensive limitations on data subjects' rights to privacy and self-determination. Concern has been expressed that the notion of 'scientific research' may encompass conducting also profit-oriented commercial research that might not justify such limitations to data subjects' rights. Some authors have suggested a restriction on benefiting from the flexible scientific research regime: public interest should be set as a prerequisite for any scientific research employing health data without the data subject's consent. While the GDPR does not explicitly require that scientific research be in the public interest, it allows Member States to choose their policies. In light of this, the article examines the examples of Estonia and Finland to analyse whether national law should require the processing of health data in scientific research in the absence of the data subject's consent to be in the public interest. The article demonstrates on the basis of the two countries' examples that it is possible to set a public interest standard without explicitly requiring the existence of a public interest via national legislation. Considering the future, the article also shows that, under the proposed European Health Data Space regulation, Member States may retain the public interest standard through the ethics-review requirement in their national law.

Keywords: health data, scientific research, secondary use, public interest, GDPR, European Health Data Space

1. Introduction

There is ongoing discussion about what constitutes 'scientific research' in the meaning of the General Data Protection Regulation[*1] (GDPR), Article 9 (2)(j).[*2] The question is crucial because the associated scientific

1 Regulation (EU) 2016/679 of the European Parliament and 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 (GDPR).

2 Rossana Ducato, 'Data Protection, Scientific Research, and the Role of Information' (2020) 37 Computer Law & Security Review 105412, 2–4. – DOI: https://doi.org/10.1016/j.clsr.2020.105412; Heidi Beate Bentzen, 'In the Name of Scientific Advancement: How To Assess What Constitutes "Scientific Research" in the GDPR To Protect Data Subjects and Democracy'

research regime enables extensive limitations to data subjects' rights to privacy and self-determination. If the activity falls within the scope of scientific research in the meaning applied by the GDPR, the researcher may escape from the need to obtain data subjects' consent and also be exempted from following some basic principles set forth in the GDPR – e.g., those for storage limitations and transparency.[*3] In addition, the European Union (EU) or national law may allow derogations from data subjects' rights, among them the data subject's right to access one's data.[*4] This makes the scientific research regime attractive not only to academic researchers but also to commercial entities conducting profit-oriented research. Concern has been expressed that commercial research might not contribute to the common good to an extent sufficient for justifying such a flexible scientific research regime.[*5]

Some authors have suggested that to avoid stretching the scientific research regime to an overly wide scope, regulators should specify public interest as a prerequisite for conducting scientific research with health data without the data subject's consent.[*6] 'Public interest' is an undetermined legal term and an ambiguous concept.[*7] There are various theories of public interest in the context of scientific research involving health data.[*8] For example, it has been explained as 'improving a better understanding of underlying mechanisms leading to ill-health or to better options for prevention or treatment'[*9] but also as 'substantial expected advancement of the health-related interests of members of a group whose interests are, or should be, of particular concern to the society in question'.[*10]

Some Member States have explicitly stated in their national laws that scientific research conducted with health data in the absence of the data subject's consent must be in the public interest, while others have not.[*11] This is possible in that the GDPR does not – at least explicitly – require that the scientific research be in the public interest yet does allow Member States to choose their policies.[*12]

The article analyses based on the examples of Estonia and Finland whether national law should require the existence of public interest behind any processing of health data in scientific research without the data subject's consent. This discussion shows that, whether public interest is explicitly required by the legislation or not, in Estonia the requirement exists at least to some extent in connection with mandatory ethics review and in Finland in the data permit procedure. The article also shows that in the future, under the proposed European Health Data Space Regulation[*13] (EHDS), Member States may retain the public interest standard through the ethics review requirement in their national law.

The analysis below begins by examining the GDPR, on which the national laws of Estonia and Finland rely (in Section 2), then delves into the national regulations of Estonia and Finland (in Sections 3 and 4, respectively), before reflection on the change that the EHDS holds potential to bring (in Section 5).

in Georgios Terzis and others (eds), *Disinformation and Digital Media as a Challenge for Democracy* (Intersentia 2020) 348–49. – DOI: https://doi.org/10.1017/9781839700422.020.

3 GDPR (n 1), arts 5 (1)(e), 9 (2)(j), 14 (5)(b), and 17 (3)(d); Evert-Ben van Veen, 'Observational Health Research in Europe: Understanding the General Data Protection Regulation and Underlying Debate' (2018) 104 European Journal of Cancer 70, 72. – DOI: https://doi.org/10.1016/j.ejca.2018.09.032.

4 GDPR (n 1), art 89 (2); van Veen (n 3) 73.

5 Janos Meszaros and Chih-hsing Ho, 'AI Research and Data Protection: Can the Same Rules Apply for Commercial and Academic Research under the GDPR?' (2021) 41 Computer Law & Security Review 105532, 7. – DOI: https://doi.org/10.1016/j.clsr.2021.105532.

6 van Veen (n 3) 76; Janos Meszaros and Chih-hsing Ho, 'Big Data and Scientific Research: The Secondary Use of Personal Data under the Research Exemption in the GDPR' (2018) 59 Hungarian Journal of Legal Studies 4, 403–04; ibid 7–10. – DOI: https://doi.org/10.1556/2052.2018.59.4.5.

7 G Owen Schaefer and others, 'Clarifying How Deploy the Public Interest Criterion in Consent Waivers for Health Data and Tissue Research' (2020) 21 BMC Medical Ethics 23, 2. – DOI: https://doi.org/10.1186/s12910-020-00467-5; Kadriann Ikkonen, 'Avalik huvi kui määratlemata õigusmõiste' [2005](3) Juridica 187.

8 Mark J Taylor and Tess Whitton, 'Public Interest, Health Research and Data Protection Law: Establishing a Legitimate Trade-Off between Individual Control and Research Access to Health Data' (2020) 9 Laws 6, 9–17. – DOI: https://doi.org/10.3390/laws9010006.

9 van Veen (n 3) 76.

10 Schaefer and others (n 7) 4.

11 Fruzsina Molnár-Gábor and others, 'Harmonization after the GDPR? Divergences in the Rules for Genetic and Health Data Sharing in Four Member States and Ways to Overcome Them by EU Measures: Insights from Germany, Greece, Latvia and Sweden' (2022) 84 Seminars in Cancer Biology 271, 275. – DOI: https://doi.org/10.1016/j.semcancer.2021.12.001.

12 GDPR (n 1), arts 9 (2)(j) and 9 (4).

13 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Health Data Space' COM (2022) 197 final (EHDS Proposal).

2. The GDPR's public interest requirement

In one option, the processing of health data for scientific research is possible on the basis of the GDPR's Article 6 (1)(f) (processing is necessary for the purposes of legitimate interests) in combination with Article 9 (2) j) (processing is necessary for scientific research). The data subject's consent is not required unless the EU or the Member State's national law requires it. In addition, as the paper's introduction points out, the GDPR does not require the scientific research in question to be in the public interest.[*14] However, Member States may set a public interest requirement in their national laws, according to Article 9 (2)(j) and 9 (4).

Even though the GDPR does not explicitly impose the condition of the relevant scientific research with health data being in the public interest, one should look at whether the concept of scientific research itself entails the requirement of public interest. While the GDPR does not define scientific research, Recital 159 states that the term should be interpreted in a broad manner that encompasses technological development and demonstration, applied research, and privately funded research. This does not hint at a requirement of public interest. On the other hand, Recital 157 stresses registry-based research's importance for obtaining new knowledge about medical conditions that hold great value and that can aid in improving the quality of life for a number of people. According to Recital 53, scientific research with health data should be based on EU or Member State law, which has to meet an objective of public interest. Relying on these recitals, one might argue that what is deemed processing of health data for scientific research must be in the public interest. However, even though the GDPR recitals refer to some extent to public-interest-linked requirements, they are contradictory and do not have binding legal force.[*15] The body of the GDPR meanwhile does not set any requirement of public interest in connection with scientific research, even though it could have done so in a manner analogous to its addressing of archiving purposes, which explicitly need to be in the public interest according to its Article 9 (2)(j).

The EU institutions have made efforts to clarify the concept of scientific research and its relationship with the public interest. The European Data Protection Board (EDPB) has stated that scientific research in the context of the GDPR means a research project set up in accordance with the relevant sector-related methodology and ethics standards, in conformity with good practice.[*16] The European Data Protection Supervisor (EDPS) has stated, similarly to GDPR recitals 53 and 157, that 'flexibility is afforded on the assumption that research occurring within a framework of ethical oversight serves, in principle, the public interest' and that 'the role of research is understood to provide knowledge that can, in turn, improve the quality of life for a number of people and improve the efficiency of social services'.[*17]

Nonetheless, the opinions of the EU institutions are considered soft-law instruments, the legal force of which is not clear,[*18] and authors of legal literature have interpreted the notion of scientific research in several ways. Ducato has understood scientific research in the GDPR's context as any activity aimed at generating new knowledge and advancing the state of the art in a given field.[*19] Verhenneman is of the view that, even though legal uncertainty remains, scientific research does not necessarily have to serve the public interest, while it still must have value to society.[*20] Slokenberga has been critical of the EDPS's opinion, arguing that it does not adequately consider the complex reality in which scientific research takes place and commercialisation as a means to drive scientific advances forward.[*21]

---

14 Ludmila Georgieva and Christopher Kuner, 'Article 9 Processing of Special Categories of Personal Data' in Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (OUP 2020) 381. – DOI: https://doi.org/10.1093/oso/9780198826491.003.0038.

15 Case C-162/97 *Nilsson and others* [1998] ECR I-07477, para 54.

16 European Data Protection Board, 'Guidelines 05/2020 on consent under Regulation 2016/679' (version 1.1, adopted on 4 May 2020), para 153.

17 European Data Protection Supervisor, 'A Preliminary Opinion on Data Protection and Scientific Research' (6 January 2020) 2, 11.

18 Santa Slokenberga, 'Setting the Foundations: Individual Rights, Public Interest, Scientific Research and Biobanking' in Santa Slokenberga, Olga Tzortzatou, and Jane Reichel (eds) in *GDPR and Biobanking: Individual Rights, Public Interest and Research Regulation across Europe* (Cham, Springer 2021) 21. – DOI: https://doi.org/10.1007/978-3-030-49388-2_2; Mart Parind, *Euroopa Liidu õigus. Eesti vaade* (UKU OÜ 2022) 233–38.

19 Ducato (n 2) 3.

20 Griet Verhenneman, *The Patient, Data Protection and Changing Healthcare Models* (Intersentia 2021) 297. – DOI: https://doi.org/10.1017/9781839701252.

21 Slokenberga (n 18) 21.

Therefore, as long as there are no clarifications from the EU legislator or case law of the Court of Justice of the European Union (CJEU), the definition of scientific research remains a grey area.[*22] Bentzen has stated that, by not defining scientific research, the GDPR may extend the privilege it affords to an unintentionally broad range of actors and activities and, unless the term 'scientific research' is clarified, it cannot function as a safeguard against misuse.[*23]

Considering the ambiguity of the concept of scientific research and its relationship with the public interest as articulated in the GDPR, one finds that among the roles of a Member State is to set the standard for 'public interest' in the national law. The following sections illustratively describe how this has been done in Estonia, through mandatory ethics review, and in Finland, via a data permit procedure wherein the criteria for scientific research are assessed. However, as the concept of scientific research should be interpreted autonomously and uniformly throughout the EU,[*24] setting the public interest standard through the national interpretation of scientific research alone is not a solid foundation, in that the future case law of the CJEU may influence national practices.

3. Estonia's requirement for a public interest

3.1. The public interest requirement in Estonian legislation

The processing of health data for scientific research is regulated by Section 6 of the Estonian Data Protection Act[*25] (EDPA), which is the national law in the meaning of the GDPR's Article 9 (2)(j), Article 9 (4), and Article 6 (1)(e). Even though the explanatory memorandum accompanying the EDPA refers to the last of these three only, it is clear that the EDPA also regulates the processing of health data in the meaning of GDPR Article 9 (2)(j) and makes use of the discretion left to Member States on the basis of the GDPR's Article 9 (4). This interpretation is supported by the explanatory memorandum's references to GDPR Article 89 and Recital 159, which regulate or explain the processing of personal data for scientific research.[*26] Processing of health data for scientific research is possible also on grounds of the GDPR's Article 9 (2)(j) in combination with Article 6 (1)(f), which is unlike the combined application of GDPR Article 9 (2)(j) and GDPR Article 6 (1)(e) in that it does not require the existence of a public interest.[*27]

According to the EDPA's Section 6 (1), health data may be processed without the consent of the data subject for scientific research in a pseudonymised form or a form that provides an equivalent level of protection. Under the same act's Section 6 (3)(2), processing of the data in a form that enables identification of the data subject requires overriding public interest. This requirement for an overriding public interest applies also to the processing of pseudonymised data, according to the Data Protection Inspectorate of Estonia.[*28] An alternative interpretation in the legal literature is that the requirements of Section 6 (3)(2), including the one related to an overriding public interest, apply to the processing of directly identifiable personal data only, excluding pseudonymised data.[*29]

The latter interpretation is in line with the systematic interpretation of the EDPA's Section 6 (2 and 3), from which one can conclude that, in the context of that act's Section 6, the concept of data 'enabling identification of the data subject' does not cover pseudonymised data.[*30] Furthermore, had Section 6 (3)

22 Bentzen (n 2) 349.

23 Ibid 344.

24 Case C-245/00 *SENA* [2003] ECR I-1251, para 23; Parind (n 18) 250.

25 Estonian Data Protection Act (*Isikuandmete kaitse seadus*) adopted on 12 December 2018 (RT I, 4.1.2019 11) (EDPA).

26 Explanatory Memorandum of the Draft of the EDPA (*Seletuskiri isikuandmete kaitse seaduse eelnõu juurde*), 14 <www.riigikogu.ee/download/e0cd5571-165f-46ab-963a-bc69ca08a5da> accessed on 9 February 2023.

27 Data Protection Inspectorate of Estonia, 'Isikuandmed uuringutes' (9 March 2023) <www.aki.ee/et/eraelu-kaitse/isikuandmed-uuringutes> accessed 14 June 2023.

28 E-mail from the Data Protection Inspectorate of Estonia to the author (26 January 2023).

29 Kärt Pormeister, 'Uus isikuandmete kaitse seadus ja isikuandmed teaduses: kolm näidet probleemsest õigusloomest' [2019] (4) Juridica 239, 242; Liisa Maria Kuuskmaa, 'Legal Basis for Processing Personal Data and the Protection of Data Subjects' Rights in Use of Data Concerning Health Collected in the Estonian Health Information System for the Development and Use of Clinical Decision Support Systems' 26 <http://dspace.ut.ee/handle/10062/68545?show=full> accessed 9 February 2023.

30 The EDPA (n 25), s 6 (2) states: 'Depseudonymisation or any other method by which the data not enabling identification of persons are changed again into the data which enable identification of persons', and its s 6 (3) uses the language 'in a format which enables identification of the data subject'.

been meant to extend as far as pseudonymised data, there would have been no need to stress that it applies to data in 'a form which enables identification of the data subject', given the EDPA's coverage of personal data only and not anonymised data. Therefore, it is not clear what kind of data processing must serve an overriding public interest: processing of directly identifiable data only or also pseudonymised data. It seems that the law requires only the processing of directly identifiable data to be in an overriding public interest, rather than pseudonymised data, the latter being much more commonly used in scientific research.

3.2. The role of ethics committees in assessing public interest

The EDPA's Section 6 (4) foresees a need for an ethics-committee review in cases of scientific research based on health data. This includes assessing whether there is an overriding public interest in processing health data in a 'form enabling identification of the data subject', however ambiguous the nature of the latter form might be.

Estonia has three widely known active ethics committees in the arena of scientific research that makes secondary use of health data. These are the Estonian Committee on Bioethics and Human Research and two regional committees.*[31] From relying on official communication with the author, it may be concluded that the ethics committees assess the public interest in scientific research or at least its contribution to the common good regardless of the form in which the health data are processed.*[32] At the same time, the ethics committees admit that there is no uniform definition of public interest, and the aims behind each application and the potential results of the proposed efforts need to be assessed on a case-by-case basis.*[33] Among the examples of research in the public interest cited by one of the regional ethics committees is research that enables the enhancement of health policies or more effective treatment, better availability of treatment, or more effective organising of screening.*[34] In contrast, a research project is not in the public interest when the sole object of the activity is to make a profit, with no medically or scientifically new and important knowledge being developed.*[35]

The example of the Estonian Committee on Bioethics and Human Research shows that the ethics review itself includes assessment of public interest in the scientific research context. This is so irrespective of whether there is a requirement of public interest set by law. The tasks of the ethics committee include finding a balance between the protection of fundamental rights and the purposefulness of the research.*[36] No approval will be granted when the research may take pursuing the common good in an irrational direction or when the research does not have scientific value.*[37] Furthermore, the ethics committee relies on the ethics rules that are set for the relevant field(s).*[38] For scientific research involving the secondary use of health data, the WMA Taipei Declaration*[39] is of relevance. One reads under the declaration's point 5 that '[h]ealth research represents a common good that is in the interest of individual patients, as well as the population and the society'. The explication continues with point 8's statement: 'Research and other Health Databases and Biobanks related activities should contribute to the benefit of society, in particular public health objectives.' The tasks and ethics principles described mean that the ethics committee assesses the public interest regardless of whether the law explicitly requires the processing of health data for scientific research to be in the public interest.

---

31 The Research Ethics Committee of the National Institute for Health Development and the Research Ethics Committee of the University of Tartu.

32 Per e-mail messages to the author from the Research Ethics Committee of the National Institute for Health Development (of 2 and 5 January 2023), from the Estonian Committee on Bioethics and Human Research (3 January 2023), and from the Research Ethics Committee of the University of Tartu (9 January 2023).

33 Per e-mail from the Research Ethics Committee of the National Institute for Health Development to the author (2 January 2023), from the Research Ethics Committee of the University of Tartu to the author (4 January 2023), and from the Estonian Committee on Bioethics and Human Research to the author (14 February 2023).

34 E-mail from the Research Ethics Committee of the National Institute for Health Development to the author (2 January 2023).

35 E-mail from the Research Ethics Committee of the National Institute for Health Development to the author (4 January 2023).

36 Health Services Organisation Act (*Tervishoiuteenuste korraldamise seadus*) adopted on 9 May 2001 (RT I, 10.10.2022, 4), s 59^4 (5).

37 Regulations of the Estonian Committee on Bioethics and Human Research (*Eesti bioeetika ja inimuuringute nõukogu kodukord*) adopted on 8 September 2020, para 6.5.3.4 <www.sm.ee/media/2068/download≥ accessed 24 February 2023.

38 Health Services Organisation Act (n 34), s 59^4 (3).

39 WMA Declaration of Taipei on Ethical Considerations Regarding Health Databases and Biobanks, adopted by the 53rd WMA General Assembly in Washington, DC, in October 2002 and revised by the 67th WMA General Assembly in Taipei, Taiwan, in October 2016.

However, the ethics review may function as a tool for assessing public interest only when the following conditions are met: 1) review is mandatory, 2) all ethics committees follow similar standards, and 3) the committees have sufficient human and financial resources for carrying out the assessment.

Even though, under the EDPA's Section 6 (4), an ethics review is always mandatory in Estonia for health data processing in scientific research that lacks a data subject's consent, the explanatory memorandum on the EDPA gives an impression that no ethics committee approval is required in cases of data held in pseudonymised form.[*40] However, this interpretation is in line with neither the wording of the law nor the understanding of the Estonian Data Protection Inspectorate[*41] and, therefore, should not be relied upon. Although the country has no case law specifying when an ethics review is required, divergence from the wording of the law to the detriment of the data subject in the manner suggested by the explanatory memorandum accompanying the EDPA would not be justified.

Problematically, in Estonia, a researcher may escape the requirement to serve a public interest by applying to an ethics committee that follows looser standards. This is possible because the law does not specifically regulate which ethics committee the researcher intending to process health data has to turn to, except in cases of data requested from the national health information system or the Estonian Biobank. Neither does the law regulate the ethics committees' standards or activities, though there are some exceptions.[*42] Therefore, there should be a framework in place that ensures similar standards for assessing public interest.

A further crucial factor is that ethics committees might not be able to analyse and assess the applications, including the meeting of public interest requirements, in much detail when lacking suitable human and financial resources. A heavy workload and insufficient financial resources have also been recognised as an issue in Estonia.[*43]

3.3. Preliminary conclusions from the Estonian setting

The Estonian example shows that assessment of the public interest in scientific research with health data can, in principle, be achieved via mandatory ethics review. This is true notwithstanding whether the law sets a public interest requirement for conducting scientific research with health data. However, this article does not offer any conclusions whether and, if so, to what extent the ethics committees' practice actually encompasses assessing public interest, since in-depth analyses of the committees' decisions are beyond the scope of this paper.

4. The public interest requirement in the case of Finland

4.1. The public interest requirement in Finnish legislation

In Finland, the secondary use of health data for scientific research is regulated by the Act on the Secondary Use of Social and Health Data[*44] (the Secondary Use Act) and the Finnish Data Protection Act[*45] (the FDPA). According to the Secondary Use Act, the researcher needs a data permit before processing health data for scientific research.[*46] When the data needed are controlled by several public data controllers, the private sector, or Kanta Services[*47], the application for this permit must be submitted to Findata[*48], the national data permit authority for the social and health-care sector. In other cases, the application must be

40 Explanatory Memorandum of the Draft of the EDPA (*Seletuskiri isikuandmete kaitse seaduse eelnõu juurde*), 15 <www.riigikogu.ee/download/e0cd5571-165f-46ab-963a-bc69ca08a5da> accessed on 9 February 2023.

41 Data Protection Inspectorate of Estonia (n 27) as accessed on 14 June 2023.

42 Pormeister (n 29) 248.

43 Siim Espenberg and others, 'Teaduseetika järelevalve ja toetamise riikliku süsteemi loomine Eestis. Lõpparuanne' (2020) 23 <www.etag.ee/wp-content/uploads/2020/01/Teaduseetika-uuringu-l%C3%B5pparuanne_20.01.20-1.pdf> accessed 16 February 2023; ibid 247.

44 The Act on the Secondary Use of Social and Health Data (*Laki sosiaali- ja terveystietojen toissijaisesta käytöstä*) 552/2019 (Secondary Use Act).

45 The Finnish Data Protection Act (*Tietosuojalaki*) 1050/2018 (FDPA).

46 See ss 35 and 38 of the Secondary Use Act (n 44).

47 Kanta produces digital services for the social-welfare and health-care sector. See <www.kanta.fi/en/what-are-kanta-services> accessed 25 January 2023.

48 See 'Finnish Social and Health Data Permit Authority Findata' <findata.fi> accessed 9 February 2023.

submitted to the public body controlling the health data directly.*[49] The discussion here focuses on Findata, the most obviously pertinent entity in the situations at issue.

For Finland, the FDPA's Section 6 repeats the principle stated in the GDPR according to which the ban on processing special categories of data does not apply to scientific research (see §6, point 7). Even though at first sight the Finnish law may give the impression that scientific research needs to be in the public interest, as FDPA Section 4 point 3 refers to GDPR Article 6 (1)(e), which in turn refers to 'tasks carried out in the public interest',*[50] this is not the case. Neither the Secondary Use Act nor the FDPA requires that scientific research be in the public interest. Conducting scientific research is also allowed directly on the basis of legitimate interests; this restriction does not require the processing activity to be in the public interest.*[51]

As noted above with regard to Estonia, a public interest requirement may be derived from mandatory ethics review. However, Finland has no mandatory ethics-review terms similar to Estonia's.*[52] Guidelines, not laws, suggest applying for an ethics review in particular cases wherein the risks arising from use of health registries' data are greater.*[53] Findata's data permit procedure does not judge whether the research project should be submitted for an ethics committee's approval.*[54] Therefore, researchers may gain access to health data without ethics approval. In these circumstances, an ethics-review mechanism cannot function as an effective measure for assessing the public interest in the research.

4.2. Interpretation of scientific research in Finnish practice

Despite the lack of public interest or ethics-review requirements in its law, Finland has set a standard for public interest – through the interpretation of 'scientific research' applied in national practice. The criteria that must be met before one obtains access to health data for scientific research purposes have been established in Finnish case law. Dating from 2013, these dictate:

1) an appropriate research plan,
2) sufficient scientific qualifications of the project staff,
3) fulfilling the requirements of autonomy and openness, and
4) the main goals for the study being scientific.*[55]

In the case giving rise to this interpretation, a research company was refused access to health data associated with asthma-related products in the prescription register of the Social Insurance Institution (Kela). The intended research project was funded by a pharmaceutical company, which, problematically, also had the right to comment on the results of the research before publication. In the view of Kela, the entity in the position to decide on granting access to the data, it would not have been possible for such a project to obtain research results that are appropriate in a scientific sense. Kela received the impression that the proposed research was an effort to promote the co-operating pharmaceutical company's sales by publishing a study report that paints a positive picture of that company's products.

The research company's appeal was not successful in court. The court concluded that the possibility of the pharmaceutical company influencing the content of the publications presenting the research had not

49 Secondary Use Act (n 44), s 11.

50 FDPA (n 45), s 4, item 3: 'Personal data may be processed in accordance with point (e) of Article 6(1) of the Data Protection Regulation if: the processing is necessary for scientific or historical research purposes or statistical purposes and it is proportionate to the aim of public interest pursued.'

51 Board presentation HE 9/2018 vp: 'The Government's Proposal to the Parliament as Legislation to Supplement the EU's General Data Protection Regulation', paras 2.3.3 and 2.3.8, per <www.eduskunta.fi/FI/vaski/HallituksenEsitys/Sivut/HE_9+2018.aspx> accessed 9 February 2023; Office of the Data Protection Ombudsman of Finland, 'Scientific Research FAQ', under 'Does scientific research always require consent for the processing of personal data?' <https://tietosuoja.fi/en/faq-scientific-research> accessed 10 January 2023.

52 Iina Kohonen, Arja Kuula-Luumi, and Sanna-Kaisa Spoof (eds), *The Ethical Principles of Research with Human Participants and Ethical Review in the Human Sciences in Finland: Finnish National Board on Research Integrity TENK Guidelines 2019* (2nd edn, TENK 2019) 6 and 19–20.

53 Ibid 6 and 19.

54 E-mail from Findata to the author (17 January 2023).

55 Supreme Administrative Court of Finland Decision KHO:2013:181 22.11.2013/3651; Office of the Data Protection Ombudsman, 'Scientific Research and Data Protection' under 'Characteristics of scientific research' <https://tietosuoja.fi/en/scientific-research-and-data-protection> accessed 10 February 2023; Findata, 'Scientific Research' <https://findata.fi/en/faq/scientific-research/> accessed 11 February 2023; e-mail from Findata to the author (17 January 2023).

been ruled out. The court also found that it could not be concluded with sufficient certainty that the main goals of the research were scientific.*[56]

Therefore, under the notion of 'scientific research', it was not deemed permissible to conduct a study that possibly aimed to promote the commercial interests of one company. Instead, an independent and objective contribution to general scientific knowledge would have been required before access to health data for scientific research could be granted. It can be argued that this condition is a requirement of public interest in the scientific research context.

The above-mentioned case law remains relevant today for both Findata, which considers the scientific research criteria in the course of its data permit procedure, and the data protection authority.*[57] This is true notwithstanding opinions that the GDPR might expand the scope of the Finnish national interpretation of scientific research.*[58]

Finally, it is noteworthy that in Finland innovation and development activities, which often serve commercial interests, are distinguished from 'scientific research', with the former being defined as 'the application and use of technical and business information and existing other information together with personal data when the goal is to develop new or significantly improved products, processes or services'.*[59] For the latter activities, Findata will prepare the relevant datasets and the applicant may obtain access to aggregate-level data only, not to personal data.*[60]

4.3. Preliminary conclusions from the Finnish setting

The Finnish example shows that the notion of 'scientific research' may be substantiated on a national level in a way that incorporates public-interest-related requirements such as the criterion of contributing autonomously and objectively to general scientific knowledge. Accordingly, even though the law does not require 'scientific research' to be in the public interest, the public interest is still assessed to some extent in the data permit procedure, wherein the criteria related to scientific research are assessed. Detailed analysis of Findata data permit decisions extends beyond the scope of this article, so no conclusions are drawn here as to the extent to which Findata practice has continued to assess the criteria for 'scientific research'.

5. The public interest requirement in the European Health Data Space Regulation proposal

5.1. The new framework and the public interest requirement in the EHDS proposal

The proposed EHDS*[61] may change the scope of 'scientific research' and its relationship with the public interest as well as general rules for secondary use of electronic health data. EHDS is meant not to replace the GDPR but to complement it.*[62] Under the instrument as proposed, holders of health data are required to grant access to the health data held to a national central data-access body that coordinates the secondary data use and decides on granting data permits to applicants.*[63] The mechanism resembles the Finnish national Findata system, which was taken as an example in the work to develop the proposal.*[64]

56 Supreme Administrative Court of Finland (n 55).

57 E-mail from Findata to the author (17 January 2023); Office of the Data Protection Ombudsman (n 55).

58 Board presentation HE 9/2018 vp (n 51), para 2.3.8; Tom Southerington, 'Access to Biomedical Research Material and the Right to Data Protection in Finland' in Santa Slokenberga, Olga Tzortzatou, and Jane Reichel (eds) *GDPR and Biobanking: Individual Rights, Public Interest and Research Regulation across Europe* (Cham, Springer 2021) 254. – DOI: https://doi.org/10.1007/978-3-030-49388-2_13.

59 Secondary Use Act (n 44), s 3, para 4.

60 Ibid, s 37.

61 EHDS Proposal (n 13).

62 Ibid, art 1 (4).

63 Ibid, arts 33, 36, and 46.

64 Commission, 'Commission staff working document impact assessment report accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the European Health Data Space' SWD (2022) 131 final, paras 2.2, 2.3, 6.1.1, and 6.1.3.2.

An important change is suggested via Article 34 (1) of the proposal, which extends the list of purposes for which health data may be processed without the data subject's consent*[65] through the inclusion of activities described thus:

(f) development and innovation activities for products or services contributing to public health or social security, or ensuring high levels of quality and safety of health care, of medicinal products or of medical devices;
(g) training, testing and evaluating of algorithms, including in medical devices, AI systems and digital health applications, contributing to the public health or social security, or ensuring high levels of quality and safety of health care, of medicinal products or of medical devices;
(h) providing personalised healthcare consisting in assessing, maintaining or restoring the state of health of natural persons, based on the health data of other natural persons.

In the proposed EHDS, 'scientific research related to health or care sectors' is listed separately from these activities.*[66] The EHDS proposal does not foresee mandatory ethics review for the intended processing activities or assessment of the qualifications of a data permit applicant's staff.*[67] Interestingly, the EHDS proposal assumes that all of the secondary-use activities under it rely on GDPR Article 9 (2)(h)–(j), without specifying which activity is linked with what legal basis.*[68] Under the GDPR, these activities may be carried out without the data subject's consent principally under the scientific research exemption (per Article 9 (2)(j)) or for reasons of public interest in the field of public health (per Article 9 (2)(i)). Relying on the EHDS proposal, the data user conducting these activities need not demonstrate the legal basis under GDPR Article 9 (2) any longer, but the existence of the legal basis is assumed.*[69] Therefore, under the proposed EHDS, the activities would neither have to meet the criteria set for 'scientific research' nor have to be explicitly in the public interest. That situation would be contrary to the general logic of the GDPR according to which a concrete legal basis stemming from Article 9 (2) is always needed for the processing of health data.

Another possible interpretation addressing the legal basis issue would be that what qualifies as scientific research under the GDPR would become, for example, an innovation and development activity under the EHDS.*[70] However, the proposal does not confirm that interpretation; hence, it creates legal uncertainty. Also, in the case described, the extent to which the relevant innovation and development activity should meet the criteria for scientific research remains unclear, because scientific research has been listed separately from innovation and development activities for the EHDS as proposed.*[71] For clarity and full compliance with the GDPR, the proposal should be amended.

According to Recital 41 of the EHDS proposal, access to data for secondary use should contribute to the general interest of society, yet the standard the proposal sets for 'the general interest of society' remains unclear. Similarly to the GDPR, the proposal does not define scientific research or impose a public interest requirement connected with conducting it. As for the new processing activities listed in Article 34 (1)(f–h), the proposal sets requirements such as 'contributing to public health or social security' or 'ensuring high levels of quality and safety of health care', criteria that are very general. It would probably not be difficult for any applicant to demonstrate an intention to meet them. As the EDPS and EDPB have suggested, the EHDS proposal should circumscribe when there is a sufficient connection with public health or social security, to achieve a balance adequately taking into account the objectives pursued by the proposal and the protection of personal data.*[72] Article 35 of the proposal, which prohibits data processing carried out for the development of products or services that may harm individuals and societies at large, clarifies only the

65 The intended legal bases to which consent is not integral have been explained in the EHDS Proposal's Recital 37.

66 EHDS Proposal (n 13), art 34 (1)(e).

67 Santa Slokenberga, 'Scientific Research Regime 2.0? Transformations of the Research Regime and the Protection of the Data Subject That the Proposed EHDS Regulation Promises to Bring Along' [2022] Technology and Regulation 143, 144.

68 EHDS Proposal (n 13), Recital 37.

69 Ibid, Recital 37, arts 45 (4) and 46 (1); Masha Shabani and Sami Yilmaz, 'Lawfulness in Secondary Use of Health Data: Interplay between three Regulatory Frameworks of GDPR, DGA & EHDS' [2022] Technology and Regulation 128, 133; Petros Terzis, 'Compromises and Asymmetries in the European Health Data Space' [2022] European Journal of Health Law 1, 12. – DOI: https://doi.org/10.1163/15718093-bja10099.

70 Santa Slokenberga (n 67) 135, 142.

71 EHDS Proposal (n 13), art 34 (1)(e).

72 EDPB-EDPS, 'Joint Opinion 03/2022 on the Proposal for a Regulation on the European Health Data Space' as adopted on 12 July 2022, para 85.

extreme cases wherein the required standard is not met. Therefore, the proposal does not foresee a clear public or general interest standard for the processing of health data.

5.2. Member States' discretion in the proposed EHDS system

According to the GDPR's Article 9 (4), Member States may foresee further rules on processing health data, including a public interest requirement for processing health data in scientific research. Under the EHDS proposal, it is questionable whether this will be possible in cases covered by the EHDS. According to the explanatory memorandum on the proposal, the regulation is intended 'to prevent the fragmentation that resulted from inconsistent use of the relevant clauses in the GDPR (e.g. Article 9 (4))'.*[73] In Article 63 of the proposal, it is explicitly stated with regard to the context of international access and transfer of health data that Member States may set further conditions in accordance with GDPR Article 9 (4). A similar provision is not present elsewhere. Therefore, the discretion left to Member States is a matter of some doubt.

Nevertheless, there may be a route for setting a public interest requirement through ethics-review requirements expressed in national laws. According to Article 45 (4) of the proposal, the data permit applicant shall provide 'information on the assessment of ethical aspects of the processing, where applicable and in line with national law'. According to Recital 46, the ethics evaluation should be based on its own merits.

It must be stressed that at the national level ethics approval may typically be required for scientific research only and not for other activities covered by the proposal.*[74] In those conditions, for example, those development and innovation activities that are not considered scientific research do not go through an ethics review. It bears reiterating that under the proposed scheme they also need not meet scientific research criteria or clear standards of public or general interest. In consequence, the data subject's health data might easily get processed without there being fair justification. For setting an appropriate standard for accessing health data, one option is to extend the national law's ethics-review requirements to encompass all activities listed in Article 34 (1)(f–h) of the proposal. In the review mandated, a standard of public or general interest can be employed, with the assessment of compliance being conducted accordingly.

6. Conclusion

Analysis shows that, as the GDPR does not assure that the 'scientific research' regime applies in only cases wherein the scientific research is in the public interest, it is up to the Member States to set the relevant public interest standard in their national laws.

The experiences of Estonia and Finland have demonstrated that it is possible to set a public interest standard also without the national legislation explicitly requiring existence of a public interest. The Estonian example illustrates how public interest may be assessed in mandatory ethics review. The Finnish example, in turn, attests that assessing fulfilment of the criteria for 'scientific research' in a national data permit procedure entails evaluating the existence of a public interest to some extent. Therefore, to protect data subjects' right to privacy and self-determination, it is not always necessary to set a requirement of public interest explicitly in legislation. However, with regard to the Finnish case, it must be borne in mind that relying merely on the national interpretation of 'scientific research' which is the autonomous concept of EU law is risky, since future case law of the CJEU might change the way in which Member States have to interpret the notion.

In the future, the proposed EHDS may reduce the discretion of Member States to choose their policies on public interest standards. However, Member States may still retain the public interest standard through an ethics-review requirement imposed by their national law. This should extend equally to scientific research and the other activities listed in Article 34 (1)(f–h) of the proposal, to avoid unintended limitations to the data subject's right to privacy and self-determination.

73 EHDS Proposal (n 13), Explanatory Memorandum, ch 2 ('Choice of the Instrument').

74 Slokenberga (n 67) 144.

https://doi.org/10.12697/JI.2023.32.07

Aleksei Kelli
Professor of Intellectual Property
University of Tartu

Margus Pedaste
Professor of Educational Technology
University of Tartu

Äli Leijen
Professor of Teacher Education
University of Tartu

An Empirical View of the Extent of the Use of the Education Exception to Copyright[*1]

Abstract. The article is based on a study commissioned by the Ministry of Justice entitled 'Extent of Use of Educational Exceptions of Copyright'. The presumed rationale for this is that holders of rights are not compensated for the use of copyright works and subject matter of related rights under the educational exception. In turn, holders of rights would like to be compensated for such use. Therefore, the results of this study, which reveal what is being used and to what extent, can serve as one of the legal policy inputs for addressing the issue.

The study was based on a survey. When drafting the questionnaire, it had to be taken into account that it was not answered by copyright experts, but by the staff of the educational institution. For this reason, a specific use was asked. The definition of an educational institution was based on subsection 3 (2) of the Republic of Estonia Education Act, according to which educational institutions are above all preschool education institutions, basic schools, upper secondary schools, vocational educational institutions, institutions of professional higher education, universities, hobby schools and continuing education institutions, including the research and methodology institutions which provide services to them.

Depending on the specialty, very old works whose copyright has expired (more than 70 years after the death of the author) may also be used. Mapping the use of such works was not the aim of this study, which was also emphasised in the questionnaire.

This study looked at copyright awareness, form and volume of copying, etc. in relation to literary and reference works, photographs, musical works, and audiovisual works. The authors of the study found that the surveyed works are the most widely used in educational institutions.

The results of the study were further verified through focus group interviews. Further input for the interpretation of the results was also obtained from the copyright training provided to the questionnaire respondents.

Keywords: copyright, educational exception, educational institution

[1] This article is based on a report commissioned by the Estonian Ministry of Justice in light of the authors' Estonian-language paper representing the results of a survey of the extent of education-based exceptions' use in relation to copyright and reporting on associated methodology. The paper, published by the University of Tartu in 2022, was available via <https://www.just.ee/uuringud> as of 24 April 2023.

1. Introduction

The issue of the educational exception[*2] arising from Estonia's Copyright Act[*3] has been addressed in *Juridica* on several occasions. In 2020, the journal printed the article 'Students and Copyright'[*4], which opens the system of copyright exceptions for fuller examination from a student perspective. This was followed by a paper whose title translates to 'The Educational Exception in Copyright Law'[*5], presenting in-depth analysis of the legal framework of the educational exception (including the EU directives on which that exception has its foundations). This article is not intended to repeat the analysis published in the previous papers. Neither does it take them as a position of departure. To fulfil its purpose as a stand-alone work that does not require reading the articles referred to above, we must briefly discuss the legal framing of the educational exception, in the next section, to ensure a common basis for understanding. Then, we can directly address the aim for the article: to provide an empirical perspective on the use of the educational exception – i.e., what is actually happening in the field of education in relation to it – and to explain what this could mean in the context of potential amendments to copyright law. Legal analysis of the educational exception is not the main focus of the article.

This paper is anchored in a study commissioned by the Ministry of Justice under the title 'Extent of Use of Educational Exceptions of Copyright'. The presumed rationale for reviewing the matter is that rightholders, who are not compensated for the use of copyrighted works and matter subject to related rights under the educational exception[*6], would like to receive compensation for such use. By revealing what is actually being used and to what extent, the results of this study could serve as one of the inputs for legal policy addressing the issue.

The study was based on a survey.[*7] When drafting the questionnaire, the researchers had to take into account that the respondents would be not copyright experts but staff of educational institutions. For this reason, it probed specific uses. As for sampling, the definition of an educational institution was based on the language of Subsection 3 (2) of the Republic of Estonia's Education Act[*8], according to which educational institutions are, above all else, preschool child care institutions, basic schools, upper secondary schools, vocational educational institutions, institutions of professional higher education, universities, hobby schools and continuing education institutions, including the research and methodology institutions which provide services to them.

This study looked at copyright awareness, the form and volume of copying, etc. in relation to literary and reference works, photographs, musical works, and audiovisual works. At this point, one might ask what considerations led to considering the use of these types of works specifically. Professional experience in the field of education played an important role in the choice of works: the researchers carrying out the study chose to concentrate on the types of material most widely used in educational institutions. It should be noted that some fields of study refer to very old works, whose copyright has expired (with more than 70 years having passed since the death of the author).[*9] As the questionnaire emphasised, mapping the use of such works was not aligned with the aim of this study.

Further supporting the validity of the study's results, the researchers employed focus-group interviews for verification purposes.

---

2 The exceptions furnished by copyright rules that allow the use of copyrighted works (e.g., books, images, and music) and related rights objects (performances, phonograms, etc.) for purposes of education. While speaking of educational exceptions in the plural would be more accurate technically – since copyright law establishes several restrictions supporting use for educational purposes – we have opted for the term 'educational exception' to express an umbrella concept that covers all the limitations (exceptions) made to copyright for education-related purposes.

3 RT I 1992, 49, 615; RT I, 29.6.2022, 2.

4 A Kelli and others, 'Students and Copyright' [2020](5) Juridica 378.

5 K Nemvalts and A Kelli, 'Hariduserand autoriõiguses' [2021](10) Juridica 705. The title, in Estonian, translates to 'The Educational Exception in Copyright Law'.

6 At the same time, remuneration for reprographic reproduction of a work (see s 27^1 of the Copyright Act) extends to the reproduction of a work for educational and scientific purposes in a correspondingly motivated volume within educational and research institutions (see cl 19 (1) 3) of the Copyright Act).

7 The questionnaire used in the survey is annexed to the study report; see A Kelli, Ä Leijen, and M Pedaste (n 1).

8 RT I 1992, 12, 192; RT I, 15.3.2022, 1.

9 According to the general rules of copyright law, copyright is valid for the remainder of the creator's lifetime and for 70 years after the creator's death (see sub-s 38 (1)).

2. The education-based exception to copyright

The questionnaire for the study of the extent of using the education-based exception was prepared in consideration of the specific exceptions made for educational purposes via the Copyright Act. The educational exception to copyright (formed of these limitations) is based on several copyright rules.[*10] Section 19 of the Copyright Act sets out three cases to which that exception applies. Neither the author's consent nor the payment of remuneration is required in any of these cases; however, it is necessary to cite the author and the publication source.

Firstly, the educational exception allows the use of a lawfully published work as illustrative material for educational and scientific purposes, to an extent commensurate with this motivation and provided that said use does not pursue commercial aims. This is known as the educational exception 'for illustration'.[*11] Reliance on it is not directly linked to the activity being situated within an educational institution. According to the explanatory memorandum[*12] on the law transposing the DSM Directive[*13], this exception is formulated in terms of the objective, not the institutional setting: the beneficial use of the exception must be for learning purposes.[*14]

The term 'use' is broader in nature than reproduction (copying). It can refer to not only copying but also processing and making available to the public (e.g., in a conference presentation). There is a certain overlap with the citation exception.[*15] As for differences, the latter is not limited to non-commercial purposes, and the volume of use motivated in connection with the educational exception analysed here is expected to be larger than that following from citation-related motivation. Legal literature has clarified that 'illustration', which denotes use of a part rather than the whole, means giving a specific example and should not involve reproduction of the whole work. That said, in certain cases, the use of the complete work is not excluded. For instance, a complete poem may be used as illustrative material.[*16]

Secondly, a lawfully published work may be reproduced for educational and scientific purposes to a justified extent (in length terms) within educational and research institutions whose activities do not pursue commercial aims. This is the educational exception 'for reproduction' (see clause 19 (1) 3) of the Copyright Act). In the case of this exception, the activity must take place in an educational or research institution. This exception allows copying. Sharing copies with students should still fall under the exception described in the previous paragraph (the educational exception for illustration), however, because the activities permitted are centred on use, not copying.

According to the explanatory memorandum on the act of law transposing the DSM Directive, 'under the current law, the free use of a work for educational purposes (§19 (2) and (3) of the Copyright Act) is structurally one of the cases of free use for which compensation to the rightholder is not explicitly provided. However, it should be noted that in accordance with subsection 27^1 (1) of the Copyright Act, the author and the publisher have the right to receive remuneration for the reprographic reproduction of the work, inter alia, in the case referred to in subsection 19 (3) of the Copyright Act. This means that one of the exceptions already [made] in the current legislation in the field of education is still partly compensated free use'.[*17]

Thirdly, the legal provisions for the educational exception authorise reproduction of a lawfully published work in digital form and communicating it to the public solely for the purpose of illustration to the extent

10 This section of the paper provides a brief overview of the educational-exception issue to aid in making sense of the results of the empirical study of the exception at issue. For more in-depth treatment of the subject, see Nemvalts and Kelli (n 5).

11 See cl 19 (1) 2) of the Copyright Act.

12 Explanatory memorandum to the draft act amending the Copyright Act (transposition of copyright directives) 368 SE, first reading, 2021 <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68> accessed 26 April 2023.

13 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130, 92–125.

14 Ibid, p. 21.

15 Clause 19 (1) 1) of the Copyright Act states: 'The following is permitted without the authorisation of the author and without payment of remuneration if mention is made of the name of the author of the work, if it appears thereon, the name of the work and the source publication: making summaries of and quotations from a work which has already been lawfully made available to the public, provided that its extent does not exceed that justified by the purpose and the idea of the work as a whole which is being summarised or quoted is conveyed correctly.'

16 H Pisuke, Autoriõiguse alused. (2006) 86. The book's title, in Estonian, translates to 'Basics of Copyright'.

17 This is the wording applied by the explanatory memorandum (n 12) p. 21.

justified by the purpose of use and on the condition that the use is made for non-commercial purposes, under the responsibility of the educational establishment, on its premises, at other physical venues, or in a secure electronic environment accessible only by the educational establishment's pupils/students and teaching staff. This specific exemption (the educational exception 'for digital use', per clause 19 (1) 3^2) of the Copyright Act) was recently introduced via the Act amending the Copyright Act[*18] and follows from the DSM Directive. Recital 20 of that directive identifies the beneficiaries of this exception thus: 'While distance learning and cross-border education programmes are mostly developed at higher education level, digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience. The exception or limitation provided for in this Directive should, therefore, benefit all educational establishments recognised by a Member State, including those involved in primary, secondary, vocational and higher education. It should apply only to the extent that the uses are justified by the non-commercial purpose of the particular teaching activity. The organisational structure and the means of funding of an educational establishment should not be the decisive factors in determining whether the activity is non-commercial in nature'.

The Copyright Act is not consistent in its application of terminology. For example, it variously uses the terms 'educational and research institution'[*19], 'educational establishment'[*20], and 'educational institution'.[*21] The Supreme Court has held that the term 'educational institution' in the Copyright Act must be interpreted as having a meaning similar to that in the country's Education Act.[*22] In principle, it can be assumed that the educational exception for digital use is applicable to educational institutions as defined in the Education Act. This is, in fact, stated in the explanatory memorandum accompanying the draft act amending the Copyright Act (for transposition of copyright directives).[*23]

The DSM Directive does not oblige Member States to compensate the rightholder for any damage resulting from the implementation of the educational exception for digital use. Recital 24 of the DSM Directive provides the following explanation: 'Member States should remain free to provide that rightholders receive fair compensation for the digital uses of their works or other subject matter under the exception or limitation provided for in this Directive for illustration for teaching. In setting the level of fair compensation, due account should be taken, inter alia, of Member States' educational objectives and of the harm to rightholders. Member States that decide to provide for fair compensation should encourage the use of systems that do not create an administrative burden for educational establishments.' Accordingly, Member States have the right to provide for compensation to rightholders for use under the educational exception.

Lastly, there is the educational aspect of the public performance of a work. According to Section 22 of the Copyright Act, '[t]he public performance of works[*24] in the direct teaching process in educational institutions by the teaching staff and students without the authorisation of the author and without payment of remuneration is permitted if mention is made of the name of the author or the title of the work used, if it appears thereon, on the condition that the audience consists of the teaching staff and students or other persons (parents, guardians, caregivers, etc.) who are directly connected with the educational institution where the work is performed in public'.

There have been several important court rulings related to the educational exception for public presentation. For example, the Supreme Court has clarified that 'it would be inconsistent with the aim of section 22 of the Copyright Act if the exception could be applied only to performances of works on the territory of a particular educational institution where the performers study or work. There may be a number of reasons for organising a school event elsewhere (e.g. the school's premises are too small, renovation, etc.), which do not affect the justification for applying the exception'.[*25] The Supreme Court stressed in that

18 RT I, 28.12.2021, 1.

19 Clause 19 (1) 3) of the Copyright Act.

20 Clause 19 (1) 3^2) of the Copyright Act.

21 Section 22 of the Copyright Act.

22 RKTKo 2-16-17491, 27.11.2019, para 15.2.

23 Explanatory memorandum (n 12) p. 21.

24 The right to public performance of a work is the property right belonging to the author for 'public performance of the work as a live performance or a technically mediated performance' (cl 13 (1) 7) of the Copyright Act).

25 RKTKo 3-2-1-159-16, 27.2.2017, para 17.

judgement also that delimiting the beneficiaries of the education-linked exception for public presentation such that they consist solely of persons involved in the education process is of central importance.*[26]

In addition, the personal-use exception (addressed by Section 18 of the Copyright Act) may form a basis for the use of material for educational purposes.

Importantly, the effects of these exceptions are not limited to works protected by copyright (books, pictures, and music). They also encompass objects protected by related rights (such as performances and phonograms).*[27]

3. Methodology for conducting the study

3.1. The study design and sample

The study had a discrete quantitative and qualitative phase. In the first, an electronic questionnaire was implemented in the LimeSurvey environment, hosted on a University of Tartu server. The survey process recruited teachers from pre-school institutions (kindergartens), schools providing general education, vocational-education and training institutions, and hobby schools (for hobby education) and lecturers at higher-education institutions. In the qualitative phase, three focus-group interviews were conducted to inform interpretation of the data collected in the quantitative phase. One group consisted of pre-school teachers; another comprised the teachers from general-education, vocational, and hobby institutions; and the third consisted mainly of higher-education teaching personnel. Institutions providing in-service training were not surveyed separately, but many of those surveyed were active in that domain.

Purposive convenience sampling served to ensure broad-based representation of all the groups surveyed, but it might have affected generalisability – only those who voluntarily responded to the invitation participated. Interviews were conducted with respondents who had indicated their willingness to be interviewed in the survey and who had provided a contact e-mail address (otherwise, responding was anonymous). Reducing such factors' impacts on generalisation of the results, the team increased the representativeness of the survey by means of recruitment that did not specifically target a group with a known position on copyright issues. Multiple electronic channels were used to recruit the teachers. For instance, both professional associations of teachers and the educational institutions themselves were requested to disseminate information on the survey, and teacher-training lecturers were recruited through the respective electronic mailing lists of the University of Tartu and Tallinn University. Higher-education lecturers in diverse disciplines were approached through the existing information channels of the higher-education institutions, through the relevant contact points in their human-resources and/or academic departments.

Figure 1, presenting the breakdown of the respondents by teacher category, indicates that 158 teachers in pre-school education, 412 in general education, 88 in vocational education, 89 in higher education, and 85 in hobby education participated in the study. Those respondents who taught at several institutions were asked to focus on the one they considered to be the main educational institution related to their work. The group engaged in hobby education displayed a slightly higher prevalence of working in private institutions as opposed to the national education system, and all of these private institutions charged their learners tuition fees.

[26] The position of the Supreme Court is expressed as follows: 'For the purposes of applying section 22 of the Copyright Act, the decisive factor is how wide the audience could be, taking into account the activities of the educational institution, and whether and how much the school charges for it, i.e. what was the purpose of the school's activities in organising the concert. In the circumstances of the present case, the advertisement for the concert was directed at the general public and everyone (including a large number of people not connected with the school) was able to buy a ticket and attend the concert. … Consequently, not all the conditions for the application of section 22 of the Copyright Act, and thus also of section 17 of the Copyright Act, … were fulfilled.' RKTKo 3-2-1-159-16, 27.2.2017, paras 20–21.

[27] Section 75 of the Copyright Act, 'Limitation of related rights'.

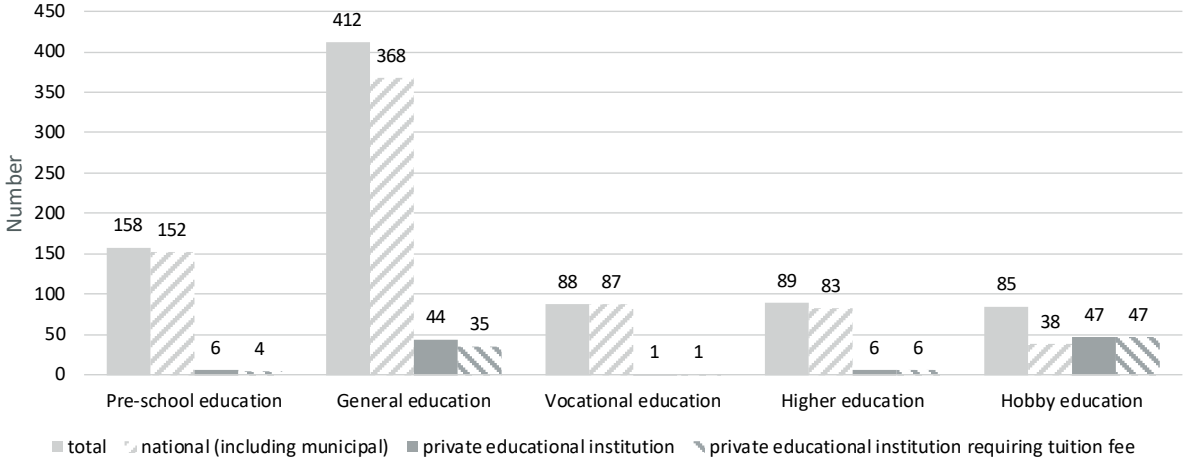


Figure 1. The breakdown of those completing the survey questionnaire between public and private educational establishments and by the main type of educational institution represented, also showing the prevalence of tuition fees in private educational establishments

The teachers were categorised in terms of the fields of study described in national curricula and other regulations. Among the kindergarten ('pre-school') teachers were group teachers, music teachers, movement teachers, and support specialists. General-education schools' teaching staff represented teachers of various specific subjects, year-based or 'homeroom' teachers, and support specialists. The vocational-education teachers covered the arts, business and administration, environment studies, information and communication technology, engineering, manufacturing and construction, agriculture, forestry, fisheries and veterinary medicine, health and well-being, and service-provision fields. Higher-education lecturers surveyed represented the humanities, arts subjects, the social sciences, business, administration and law, the natural sciences, education, mathematics and statistics, information and communication technologies, engineering, manufacturing and construction, agriculture, forestry, fisheries and veterinary medicine, and health and well-being. Participating teachers engaged in hobby education represented the fields of sport, engineering, nature, music, the arts, and general culture. A more detailed picture of the study's sample can be found in the open study report.[*28] In sum, nearly all fields of study were represented at all levels of education, with the exception of the services field, which was not reflected in the set of higher-education personnel taking part.

In the survey, 116 respondents (14%) indicated that they were willing to participate in focus-group interviews. Representatives of each level of teaching were selected, for maximal variety among the informants. As noted above, interviews were conducted in separate groups with 1) teachers in pre-school institutions; 2) teachers at general-education schools, vocational schools, and hobby schools; and 3) university lecturers. In total, 14 teachers were invited to participate in the interview with group 1, of whom eight accepted. From the second group (general-education, vocational, and hobby schools), 18 teachers were invited to be interviewed, of whom seven proved eligible for interviews (three engaged in general education, three from vocational schools, and one from a hobby school). Finally, 13 lecturers providing higher education were invited to join focus groups, of whom six participated.

3.2. The questionnaire

The questionnaire was split into background questions (11 items) and copyright-related questions (33 items). The latter were subdivided into general questions and questions pertaining to specific categories of works (textbooks, workbooks, e-learning materials, and literary and reference works), photographs (a category including both general photographs and photographs of specific works of art), musical works, and audiovisual works. While the survey posed only 44 questions in total, most of them were complex and

[28] Kelli, Leijen, and Pedaste (n 1).

allowed for differentiation in terms of several features. Most items were multiple-choice, but respondents were given the option to add an open response where appropriate.

Prior to the main data collection, the questionnaire underwent pilot testing with three respondents, from different target groups. A separate survey session was held with each of them, during which they also filled in an ancillary questionnaire and, in parallel, took part in a cognitive interview aimed at clarifying any ambiguities in the instrument.

3.3. The focus groups

The focus group interviews followed a protocol drawn up to consist of an introduction, questions corresponding to the topics covered in the questionnaire, and a summary. They applied a semi-structured interview design and were conducted jointly by all authors of this article. One of them functioned in the leading role, as the primary interviewer and the facilitator of the discussion; the second asked various questions; and the third took notes.

3.4. Data analysis

In analysis of the questionnaire responses, the results were compared across groups, with estimation of the confidence intervals for the means. If the 95% confidence intervals for the means of the two groups compared did not overlap, the result was considered statistically significant. All interviews were transcribed, and examination of the data followed the principles of thematic analysis[*29]. In addition to highlighting the main themes and sub-themes, the team compared responses across target groups (i.e., across categories of teachers). The results of the thematic analysis are presented in the next section, in connection with interpretation of the quantitative results.

4. Results of the study

Several patterns were evident in conceptions of general copyright issues and the use specific to individual classes of work in the context of learning activities. With regard to the former, respondents in our survey rated their knowledge of copyright law as average. The interviews and copyright training received after administration of the questionnaire uncovered some uncertainty and a need for further training and guidance materials.

One of the first substantive questions, pertaining to the form of copying (physical or digital copies), revealed that the use of paper materials clearly depends on the educational institution. These were employed most often in pre-school education and nearly as frequently in schools (with no statistically significant difference). Use of paper materials was relatively prominent in hobby education too, though still statistically significantly less prevalent than in pre-schools. Per the responses, they were used less frequently in both vocational schools and higher-education institutions. When material was copied, this was done slightly more often in digital form than via paper, on average, according to respondents' estimates. The difference is particularly marked for higher education, where paper copies proved almost non-existent.

To assess the volume of copying, the researchers asked in the questionnaire how many distinct types of work the respondents would estimate that they had copied digitally in the month preceding the survey. The instrument specified that this covered scanning written material, downloading or uploading a digital file online, sharing a file on a memory stick with a learner, making physical copies, and using other formats for learning purposes.

We found that those providing hobby education made the most copies, although there was extensive variation in the number within each group, rendering the averages for each group statistically insignificant in their differences from the others' (see Figure 2).

[29] V Braun and V Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77. – DOI: https://doi.org/10.1191/1478088706qp063oa.

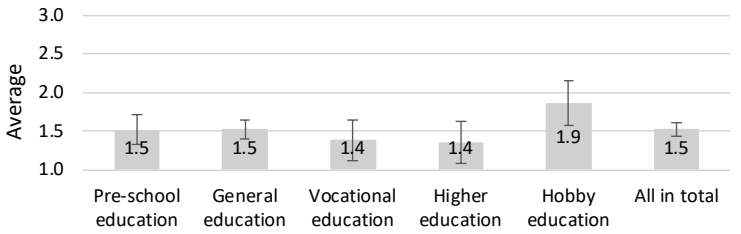


Figure 2. Responses to the item 'How many distinct types of work (e.g., book, textbook, workbook, music and lyrics, film, photograph, game, etc.), in your estimation, have you copied digitally (e.g., by scanning written material, downloading or uploading a digital file from the Internet, or sharing a file on a memory stick with a learner) or on paper for learning purposes in the last month (September 2022)?', where the scale is 0 = 'None', 1 = '1–5', 2 = '6–10', 3 = '11–15', and 4 = '16 or more')

Where material was copied, this very rarely involved complete works (as Figure 3 attests). The figure is slightly higher than average for teachers providing hobby education and relatively high also for kindergarten teachers, whose copying rate does not differ statistically significantly from those reported from hobby education.

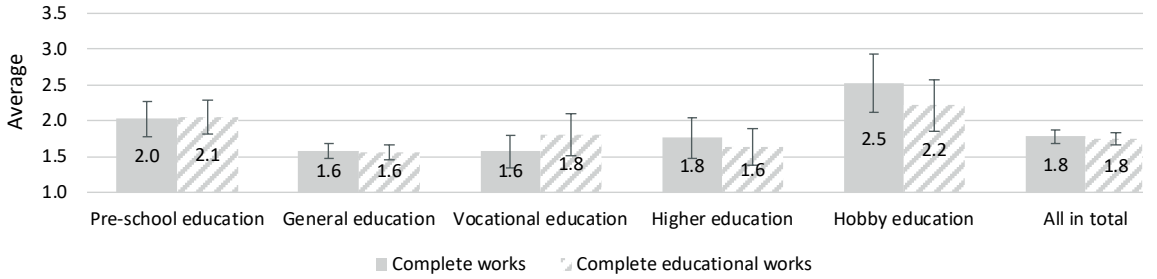


Figure 3. A plot of responses to 'For teaching purposes, I have usually copied a complete work, whether educational or non-educational (e.g., a whole book, workbook, or piece of music) and not limited myself to extracts (such as a chapter or a few pages)' (the response scale used the integers 6 to 1, for 'Strongly agree' to 'Strongly disagree') and 'As a rule, I have copied materials created for educational purposes (textbooks, workbooks, etc.) in their entirety (a whole book, workbook, etc.) and have not limited myself to extracts such as a chapter or a few pages' (on the same scale)

The remarks in interviews were consistent with the questionnaire results indicating that copying of complete works was very rare.

Although the Copyright Act in its current version does not distinguish between works created specifically for educational purposes and 'ordinary works' in the context of educational publishing, the study also examined the use of the former. This is necessary because a need to amend the Copyright Act accordingly in the future cannot be ruled out.

Kindergarten teachers appear the most likely to make copies of materials created for educational purposes that are available to the educational institution but not accessible directly to learners (as Figure 4 shows). We found no statistically significant difference between the usage practices of teachers in general education and those engaged in hobby education, while vocational educators and teachers providing higher education proved less likely than kindergarten and general-education teachers to copy materials created for educational purposes, though only for reasons of personal accessibility. However, kindergarten teachers did not share these copies as often as others and teachers in general education schools were marginally less likely to do so. This trend can be explained by the degree to which learners in the given setting are prepared for independent learning and the extent to which they are given independent-learning tasks.

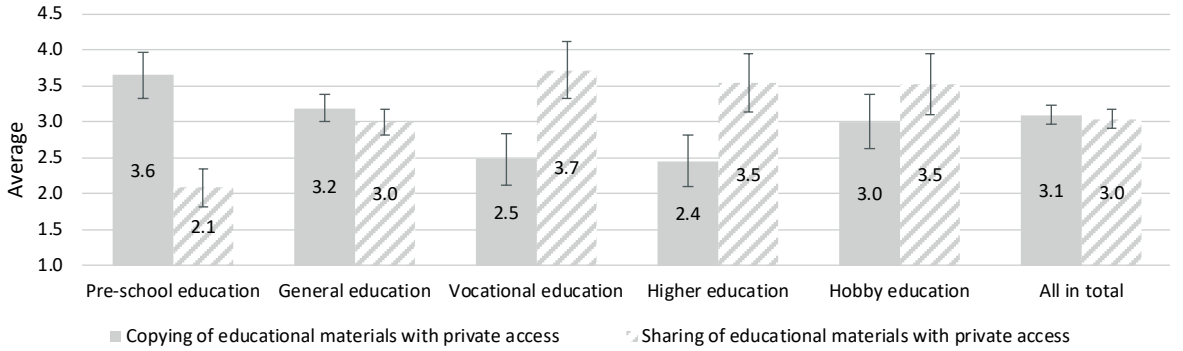


Figure 4. Responses to 'For purposes of teaching, I have copied educational materials (textbooks, workbooks, etc.) to which I have access (e.g., via the institution's methodology office) but to which my learners do not' (on an integer scale of 6, for 'Strongly agree', to 1, for 'Strongly disagree') and to 'I share copies (paper or digital) of educational materials I have created at home, for learners' education' (with the same scale)

Measured by the number of individual works involved, copying of literary and reference works was slightly more common than average in higher education, emerging as statistically significantly more commonplace than in general and hobby schools. Figure 5 reflects these patterns in the responses. We found no statistically significant differences between other groups. It is worthy of note that these works were very rarely copied in their entirety.

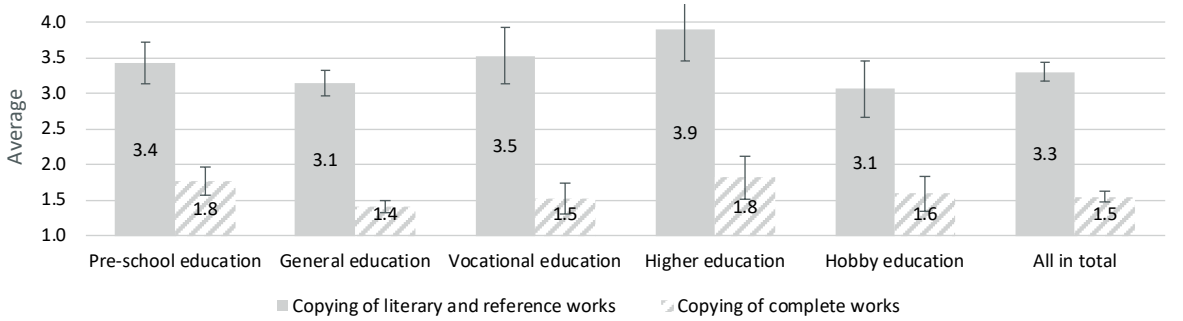


Figure 5. Responses for the items 'I have copied literary and reference works, and other written works (e.g., books, articles, drawings, illustrations, and diagrams), for teaching purposes' and the follow-on item 'When copying literary and reference works, I have copied the whole work and not limited myself to extracts (such as a chapter, a few pages, or some illustrations or diagrams)' (scale for both items: 6 to 1, for 'Strongly agree' to 'Strongly disagree', respectively)

As Figure 6 shows, the copies were relatively rarely shared for learners' home use. When educators did share them in this connection, it was most often in higher education and least often in kindergartens (the latter was the only statistically significant difference between groups in this regard).

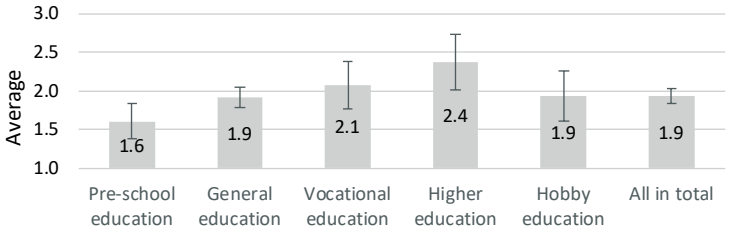


Figure 6. Responses for the questionnaire item 'I have handed out / provided copies of literary and reference works for learners to consult at home' (integer scale: 1 = 'Not at all' to 6 = 'Very often')

When respondents shared literary and reference works with learners, those providing vocational and higher education did so mostly by sharing the name of the work, general education and hobby schools manifested a roughly equal split between sharing the work's name and sharing a copy of either the entire work or a part of it, and the strongest preference in kindergartens was for sharing a copy of the whole work or part of the work. Figure 7 presents these findings graphically.

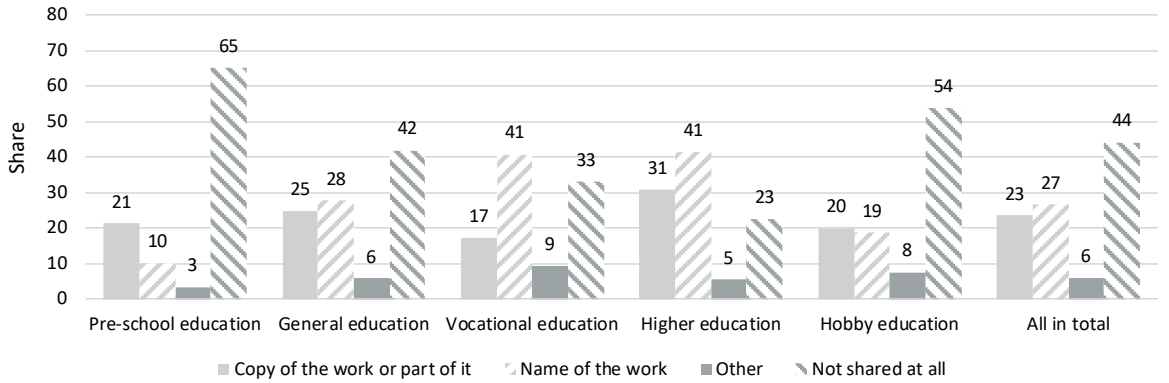


Figure 7. Questionnaire responses to 'When distributing literary and reference works to learners, I have made them available mostly in the form of: 1 = a copy of the work or part of it; 2 = the name of the work, so that learners can consult it independently; 3 = another form; 4 = no sharing at all'

Among educators, copying photographs was somewhat less common than copying literary and reference works, in respondents' estimation (see Figure 8). At the same time, the sharing of photographs differed little in prevalence from the sharing of literary and reference works, so it can be considered a more common activity for photographs in relative terms.

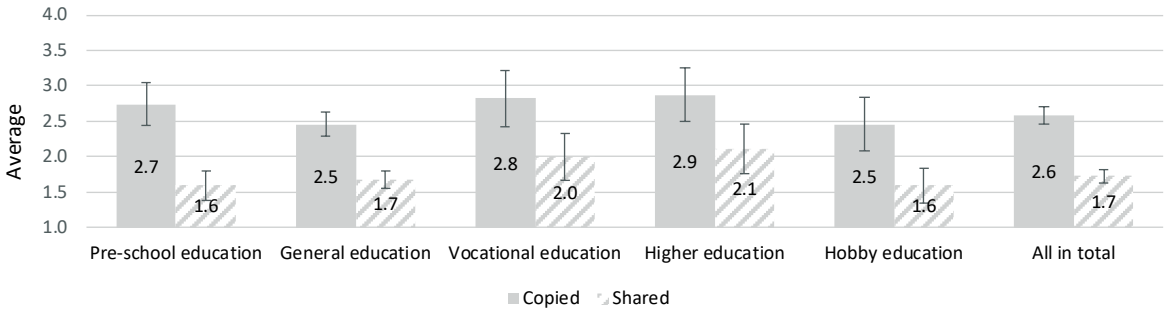


Figure 8. Responses to 'I have copied other people's photographs for teaching purposes, either on paper or digitally (whether as a single photograph or in a presentation)' and 'I have shared copies of photographs with learners and have not limited myself to showing these' (integer scale for both items: 1 = 'Not at all' to 6 = 'Very often')

Musical compositions were used relatively often by teachers in kindergartens and by those working at hobby schools, and their use was more frequent in general education than in vocational schools and higher-education institutions, as Figure 9 clarifies. In most cases, no statistically significant group-specific differences are visible between the use of excerpts and the use of complete works. Only in kindergartens was there a statistically significant difference: complete works were used less, in respondents' estimation.

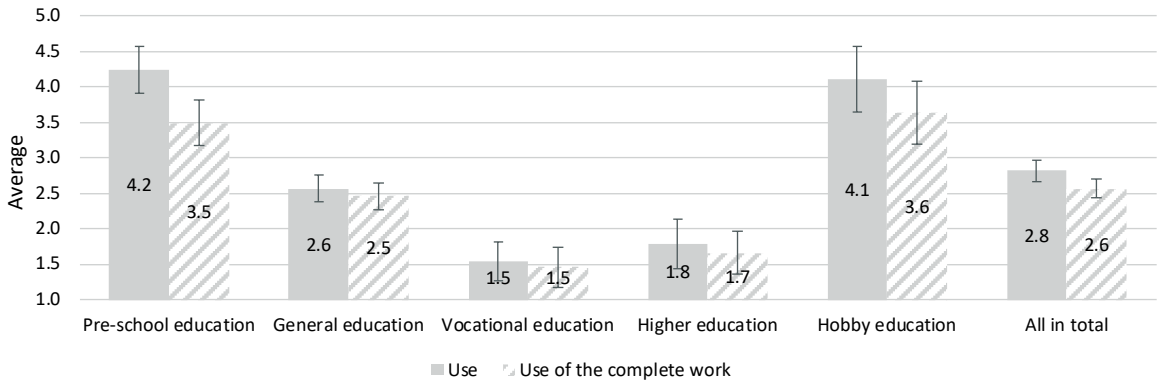


Figure 9. Responses to 'I have used musical compositions (e.g., lyrics, a recording of music with or without lyrics, or a music video) in my teaching' and the follow-up item 'When I have used a piece of music, I have used the complete work and not limited myself to extracts (such as a part of the piece of music)'. The scale is the same as in Figure 8

When musical works were used for teaching purposes, the most typical means of doing so, across all of the various types of educational institution, was to perform a work found online without copying it. Figure 10 visualises this strong pattern and also attests that other uses probed in the questionnaire were very rare, showing only slightly greater prominence in kindergartens and hobby schools and not present at all in vocational schools.

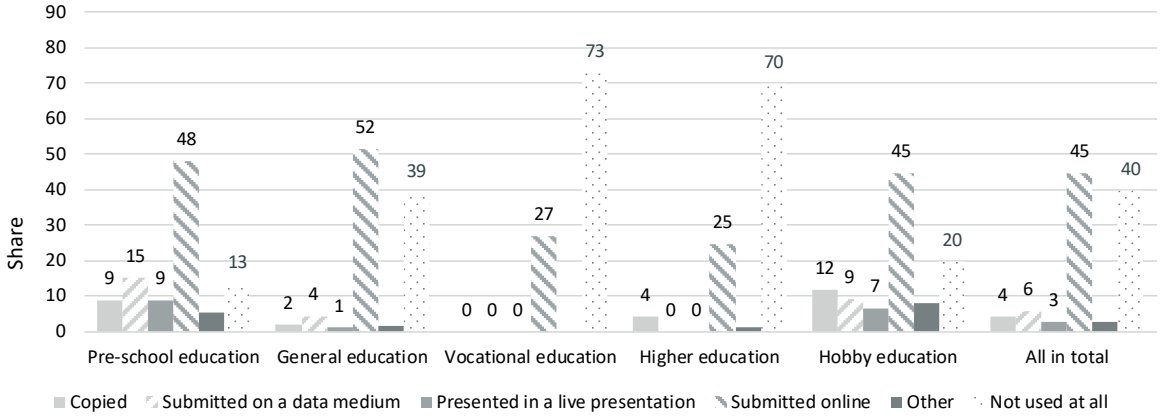


Figure 10. Responses to the survey item 'When I have used a piece of music for teaching, I have mostly: a) copied a piece of music that I perform in the classroom; b) presented a piece of usic via a physical medium (e.g., CD, DVD, or Blu-ray disc) to learners; c) presented a piece of music through a live performance; d) presented a piece of music from the Internet without copying it, such as by playing music via YouTube or Spotify for the class; e) done something else; f) not used it at all'

Audiovisual works were used least in higher education, statistically significantly less than in primary and general education (see Figure 11). Again, in terms of the use of holistic approaches, higher-education teachers display lower average scores than teachers who worked at general schools and vocational schools.

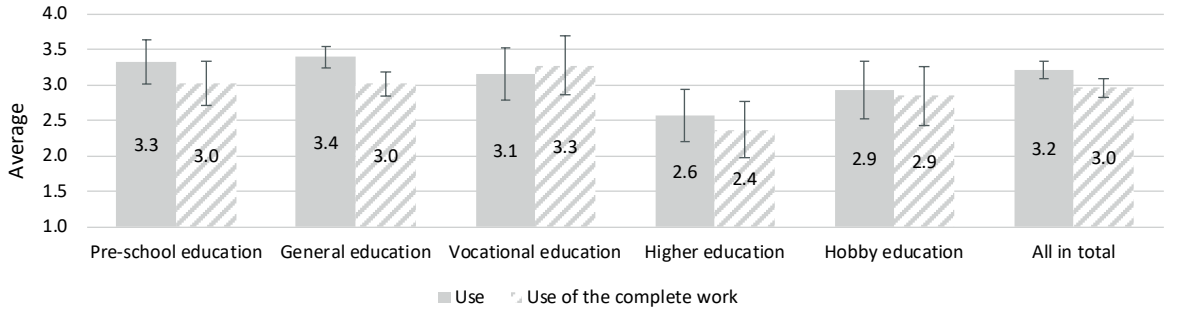


Figure 11. Responses for 'I have used audiovisual works (televisual content or videos, documentaries, etc.) for my teaching' and the follow-on item 'When I have used an audiovisual work, I have used the complete work and not limited myself to extracts (e.g., a. part of the audiovisual work)' (scale for both items: 1, for 'Not at all', to 6, for 'Very often')

5. Conclusions

As noted in our introductory remarks, the aim of the Ministry of Justice in commissioning the study was to obtain information on the extent to which works and objects of related rights (performances, recordings, etc.) are used in educational establishments on the basis of the educational exception and, partly by means of that information, to decide on compensation to rightholders. Prior to the study reported upon in this article, legal practitioners tended to gauge this use through the lens of subjectively assessing non-comparable individual cases. In contrast, an objective grounding requires a systematic survey via uniform instruments, involvement of the full range of educational institutions, and a representative sample. The study's sample size added further value to the contribution: with 832 respondents having taken part in the questionnaire portion of the survey, the researchers behind the study conclude that it utilised a large sample, for an even more objective picture of the extent of use.

The results prove illuminating. Firstly, they shed light on the extent to which information is copied, an important issue for the implementation of the educational exception. The central question is of the extent to which complete works are copied *versus* the copying being limited to parts of a work. As a general rule, the educational exception supports use of portions of works and parts of subjects of related rights, though the use of the whole object is not excluded. This matter depends on the specific object, which is one reason for the study having delved into use object-specifically.

Though the Estonian Copyright Act does not distinguish between works created for educational purposes (such as a workbook for a particular year of study in schools) and 'ordinary' works, this distinction is important in view of possible future regulations. The scope for education-motivated use of material created for explicitly educational purposes should be more limited than that for educational use of other works.

The study suggests that copies of complete works are made very rarely. The figure is slightly higher than average for teachers in the field of hobby education and higher in relative terms among kindergarten teachers too, whose copying rate does not differ statistically significantly from that of teachers providing hobby education and who also emerged as the most likely to make copies of education-aimed materials that are available institutionally but not directly accessible to learners (no statistically significant difference is visible between the usage practices of teachers in general-education schools and those in hobby schools). Vocational and higher-education educators appear less likely than teachers in kindergartens and general-education schools to copy materials created for educational purposes, but they still seem to do so only for personal accessibility. Since complete works are not copied on a large scale, it cannot be said that copying harms the legitimate interests of a work's author significantly.

Education-category-specific patterns in the extent of using the educational exception help to explain also how printed textbooks and workbooks get utilised. Kindergartens and general education are very clearly distinguished by the fact that teachers there make much greater use of printed textbooks and workbooks from publishers. As for the most widely used educational works across the board, the survey revealed various aspects of the copying and sharing of literary and reference works, photographic works, photographs of

works of art, musical works, audiovisual works (principally films), etc. Copying of works in the first category listed seems to be, on average, slightly more prevalent in higher education (it is statistically significantly more commonplace there than in general and recreational schools). Copies are shared with learners relatively infrequently, most often in higher education and least often in kindergartens.

How works in other categories of concern to rightholders get used fills out the picture of the landscape.

Educators' copying of photographs is somewhat less common than copying of literary and reference works. Also, in this respect, there are no statistically significant differences among the groups compared. That said, as noted above, because the figures are similar between sharing of photographs and sharing of literary/reference works, this activity can be considered more common for photographs, in relative terms. It is noteworthy too that the various categories of educational institution differ little in their use of photographs of works of art – they are surprisingly similar. No group is statistically significantly different from the others. However, the sharing of such photos is very rare, notwithstanding relatively extensive variation between respondents working at higher-education institutions and hobby schools.

Musical compositions, on the other hand, see use relatively often in kindergartens and hobby schools, and they get used more often in general education than in vocational and higher education. In most cases, there is no statistically significant difference between the use of extracts and the use of complete works; only in kindergartens was there a statistically significant difference, with full works being used less, according to the survey participants.

Finally, audiovisual works are used least within higher-education institutions – statistically significantly less than in primary and general education. In terms of the use of holistic approaches, the average score is again lower for higher-education teachers, especially in comparison with teachers at general and vocational schools.

From the foundations provided by the survey's questionnaire and interview data, one can conclude that, in general, lecturers' and other teachers' use of works and related rights objects falling under the educational exception is not very extensive. At the same time, it cannot be said that copyright-protected material is not used at all and, therefore, that there is no basis whatsoever for rightholders to enter into a discussion with the state about possible compensation. Therefore, compensating rightholders remains on the table as a matter that may be addressed in the legal-policy domain.

https://doi.org/10.12697/JI.2023.32.08

Annegrete Palu

Junior Lecturer
Institute of Psychology
University of Tartu

Anneli Soo

Associate Professor
School of Law
University of Tartu

From Tradition to Evidence: Rethinking the Law on Eyewitness Identification in Estonia

Abstract. Eyewitness identification is a procedural act that is influenced by various psychological factors. Scientific research has demonstrated that the way identification procedures are conducted and administered affects witnesses' identification decisions and their confidence in those decisions. Research into these variables has also led to best-practice guidelines for conducting eyewitness identification. However, the legal system in Estonia, as have those in many other places, has been slow to adopt the recommendations and has adhered to traditional principles instead, which is reflected in the law on eyewitness identification. This article analyses whether Estonia's law governing eyewitness identification is consistent with evidence-based recommendations. It first presents an overview of variables related to the reliability of identification evidence over which the criminal-justice system has control, and then compares the most important findings from scientific literature (and the resulting best practices) with the current law. Finally, it highlights specific areas of law wherein adjustments could produce better alignment with the findings from scientific research. The authors conclude that the law today, leaving many decisions up to law-enforcement entities, displays a need for additional official guidelines. The article highlights the importance of using scientific research to inform legal practices.

Keywords: eyewitness identification, lineups, evidence-based guidelines, legal safeguards, identification accuracy, eyewitness recommendations

1. Introduction

When a crime is observed, a witness may be asked to identify the culprit or an object[*1] from a lineup[*2], typically composed of a suspect, who may or may not be guilty[*3], and 'fillers', who are known to be innocent. The witness's task is to determine and state, based solely on their memory of the

1 Identification of persons is the focus throughout this article.

2 In this article, we use the term 'lineup' to refer to presentations via all media (photo, video, and live lineups) except where stating otherwise.

3 The guilty suspect is the individual who committed the crime, and 'innocent suspect' denotes an individual whom the police incorrectly suspect of committing the crime.

crime[*4], whether or not the culprit is in the lineup. The witness might identify the suspect (thus producing either a correct or a false identification, depending on whether the suspect is the culprit), identify a filler, or reject the lineup as not featuring the culprit (rejection accuracy naturally depends on whether the suspect is the culprit). The justice system uses these eyewitness decisions as evidence to establish the identity of the culprit.

Irrespective of their significance for the criminal-justice system, eyewitness identifications can be quite unreliable as evidence. Scientific research going back many decades has found that memory is fragile, its contents can be forgotten, or they may be altered at any of several stages – even through procedures intended to collect and preserve eyewitnesses' identification evidence.[*5] Additionally, the identification process involves social interaction, which can affect witnesses' decision-making behaviour and their choices from the lineup.[*6] Although identification decisions are easily influenced, witnesses are not always aware that they have been influenced, let alone of the extent of the influence.[*7]

Inaccurate identification during the identification procedure can dramatically affect the subsequent criminal investigation. Law-enforcement officials are subject to bias, just as witnesses are.[*8] Research has shown that officers' prior beliefs about a suspect's guilt can affect their evaluations of witness evidence,[*9] leading to cumulative bias in the assessments.[*10] Furthermore, when officers strongly believe a suspect is guilty, they may overlook alternative investigations aimed at establishing innocence,[*11] despite those being one of the goals of the criminal investigation.[*12] Erroneous decisions are one potential result. For example, believing a suspect to be guilty can lead officers to evaluate an ambiguous identification decision as consistent with their belief. This can drive them to seek additional incriminating evidence, further reinforcing their initial belief in the suspect's guilt. Thus, eyewitness identification can affect subsequent steps in a criminal investigation, including the trial.

Given that eyewitnesses' identification decisions are easily influenced but can have a significant role in setting the direction of the police investigation, it is essential that criminal-justice system officials (e.g., police officers, attorneys, and judges) know of the various factors that affect eyewitness identification accuracy. These factors can be divided into two main categories: estimator and system variables.[*13] While estimator variables[*14] – among which are factors associated with the witness, crime event, and perpetrator – influence identification decisions, the investigative authorities have no control over them. System variables, on the other hand, are related to conducting and administering an identification

4 Eerik Kergandberg and Meris Sillaots, *Kriminaalmenetlus* (Juura 2006) 176; Gary L Wells, Nancy K Steblay, and Jennifer E Dysart, 'Eyewitness Identification Reforms: Are Suggestiveness-Induced Hits and Guesses True Hits?' (2012) 7 Perspectives on Psychological Science 264. – DOI: https://doi.org/10.1177/1745691612443368.

5 National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (The National Academies Press 2014) 69–70. – DOI: https://doi.org/10.17226/18891.

6 Margaret Bull Kovera and Andrew J Evelo, 'Eyewitness Identification in Its Social Context' (2021) 10 Journal of Applied Research in Memory and Cognition 313. – DOI: https://doi.org/10.1016/j.jarmac.2021.04.003; Brian Cahill, 'Eyewitness Choosing Behavior: The Role of Ecphoric Experience and Non-Memorial Cues' [2015]. – DOI: https://doi.org/10.25148/etd.fidc000163.

7 Steve D Charman and Gary L Wells, 'Can Eyewitnesses Correct for External Influences on Their Lineup Identifications? The Actual/Counterfactual Assessment Paradigm' (2008) 14 Journal of Experimental Psychology: Applied 5. – DOI: https://doi.org/10.1037/1076-898x.14.1.5.

8 Vanessa Meterko and Glinda Cooper, 'Cognitive Biases in Criminal Case Evaluation: A Review of the Research' (2022) 37 Journal of Police and Criminal Psychology 101. – DOI: https://doi.org/10.1007/s11896-020-09425-8.

9 Karl Ask, Anna Rebelius, and Pär Anders Granhag, 'The "Elasticity" of Criminal Evidence: A Moderator of Investigator Bias' (2008) 22 Applied Cognitive Psychology 1245. – DOI: https://doi.org/10.1002/acp.1432; Steve D Charman, Melissa Kavetski, and Dana Hirn Mueller, 'Cognitive Bias in the Legal System: Police Officers Evaluate Ambiguous Evidence in a Belief-Consistent Manner' (2017) 6 Journal of Applied Research in Memory and Cognition 193. – DOI: https://doi.org/10.1016/j.jarmac.2017.02.001; Steve Charman, Amy Bradfield Douglass, and Alexis Mook, 'Cognitive Bias in Legal Decision Making' in Neil Brewer and Amy Bradfield Douglass (eds), *Psychological Science and the Law* (Guilford 2019).

10 Charman, Douglass, and Mook (n 9).

11 Eric Rassin, Anita Eerland, and Ilse Kuijpers, 'Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations' (2010) 7 Journal of Investigative Psychology and Offender Profiling 231. – DOI: https://doi.org/10.1002/jip.126.

12 Kergandberg and Sillaots (n 4) 12–13.

13 Gary L Wells, 'Applied Eyewitness-Testimony Research: System Variables and Estimator Variables' (1978) 36 Journal of Personality and Social Psychology 1546.

14 For an overview of several estimator variables, see Jennifer L Beaudry, Christina L Bullard, and Jennifer R Dolin, 'Estimator Variables and Eyewitness Identification' in Gerben Bruinsma and David Weisburd (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer 2014). – DOI: https://doi.org/10.1007/978-1-4614-5690-2_668.

procedure; these **can** be controlled by the investigative authorities. Although both categories of variables should be considered in evaluating the reliability of identification evidence (i.e., the likelihood that the suspect identified is guilty)[*15], knowledge from research on system variables is especially beneficial, in that it helps law enforcement to implement identification procedures that increase discriminability (the ability to distinguish the guilty party from an innocent suspect)[*16] and thereby increases the reliability of eyewitness evidence.

Research into system variables has informed best practices for obtaining and preserving eyewitness identification evidence, with numerous practices validated by experimental laboratory and field studies. This work has led to several science-based recommendations[*17] and guidelines to practitioners[*18], beginning with a set of guidelines set forth by Gary Wells and colleagues on behalf of the Executive Committee of the American Psychology-Law Society in 1998.[*19] An updated version featuring five additional recommendations and an expanded rationale for all of the suggestions was published in 2020.[*20] Legal psychologists agree that, to guarantee the reliability of eyewitness identification evidence, it is necessary to conduct the identification procedure in accordance with research-based recommendations. However, law-enforcement agencies have been slow to implement these recommendations[*21], on account of both a need to increase suspect-identification rates[*22] and practitioners' limited knowledge of factors that influence eyewitness identification.[*23] This situation has led to discrepancies in many locales between science-based recommendations and actual lineup practices. Estonia is no exception.[*24]

The last decade's immense advances in scientific understanding of eyewitness identification call for more thorough analysis of the guidelines on how to conduct the eyewitness identification procedure. In Estonia, handling of the procedure for eyewitness identification is guided by the Code of Criminal Procedure (CCP), which has not changed since its adoption, in 2004. Therefore, a key aim behind this article was to examine whether the guidelines on eyewitness identification in Estonia's CCP are in accordance with best practices that stem from scientific research and whether they promote reliable eyewitness identification practices. Our discussion begins with an overview of system variables associated with constructing and conducting the identification procedure and how and why these variables affect eyewitness identification. Secondly, we ask to what extent the guidelines presented in the CCP as it stands today are in line with current science-based recommendations and best practices.

15 Laura Mickes and Scott D Gronlund, 'Eyewitness Identification' in John H Byrne (ed), *Learning and Memory: A Comprehensive Reference* (2nd edn, Academic Press 2017) 531. – DOI: https://doi.org/10.1016/c2015-1-01759-8.

16 Ibid. This type of accuracy is informative in deciding which identification procedures are superior.

17 National Research Council (n 5).

18 The International Association of Chiefs of Police, 'Model Policy. Eyewitness Identification' (September 2016) <https://www.theiacp.org/sites/default/files/2018-08/EyewitnessIDPolicy2016.pdf> accessed 27 June 2023; National Institute of Justice, Technical Working Group for Eyewitness Evidence, 'Eyewitness Evidence: A Guide for Law Enforcement' (US Department of Justice 1999) 178240, available via <https://nij.ojp.gov/library/publications/eyewitness-evidence-guide-law-enforcement> accessed 16 June 2023.

19 Gary L Wells and others, 'Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads' (1998) 22 Law and Human Behavior 603.

20 Gary L Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (2020) 44 Law and Human Behavior 3. – DOI: https://doi.org/10.1037/lhb0000359.

21 Ryan J Fitzgerald, Eva Rubínová, and Stefana Juncu, 'Eyewitness Identification around the World' in Andrew M Smith, Michael P Toglia, and James Michael Lampinen (eds), *Methods, Measures, and Theories in Eyewitness Identification Tasks* (Routledge 2021). – DOI: https://doi.org/10.4324/9781003138105-16.

22 Graham Pike and others, 'Eyewitness Identification Procedures: Do Researchers and Practitioners Share the Same Goals?' (2021) 23 International Journal of Police Science & Management 17. – DOI: https://doi.org/10.1177/14613557211004625.

23 Richard A Wise, Martin A Safer, and Christina M Maro, 'What U.S. Law Enforcement Officers Know and Believe about Eyewitness Factors, Eyewitness Interviews and Identification Procedures' (2011) 25 Applied Cognitive Psychology 488. – DOI: https://doi.org/10.1002/acp.1717; Kristjan Kask, 'Comparison of Knowledge of Law Enforcement and Lay People Regarding Eyewitness Testimony' (2011) 18 Juridica International 161.

24 Kristjan Kask and Regiina Lebedeva, 'Identification Parades in Estonia: The State of the Art' (2015) 14 Proceedings: Estonian Academy of Security Sciences 25.

2. System variables associated with constructing the lineup

2.1. The pre-lineup interview

For construction of a lineup, witnesses need to be interviewed before the identification procedure.[*25] The main purpose of the pre-lineup interview is to obtain details specific to the culprit that are useful for selecting fillers for the lineup.[*26] As witnesses tend to provide vague descriptions of people[*27], officers need to use evidence-based procedures, such as the cognitive interview, that have been shown to enhance the quality of such descriptions.[*28] It should be noted, however, that even if the witness is not able to describe the culprit in detail, this does not imply inability to identify the culprit from a lineup. The relationship between descriptions of people and the accuracy of identification is weak[*29]: the two are facilitated by separate cognitive processes[*30]. Holistic processing facilitates identification of faces, while verbal retrieval is based on features.

The pre-lineup interview also presents a good opportunity for the officer to get more information about the event, specifically the conditions under which the witness observed or interacted with the culprit.[*31] This information is useful for assessing the reliability of the witness's memory, as well as for ascertaining whether conducting an identification procedure is reasonable. Furthermore, the pre-lineup interview allows the officer to instruct the witnesses not to discuss the event with other people and not to attempt to identify the culprit on their own – for instance, from social-media content[*32] – since both impair later identification.[*33] Because witnesses tend to talk to each other,[*34] it might be useful also to warn the witness about the possible presence of misinformation, to reduce the negative effect it can have on memory.[*35]

25 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 9.

26 Rebecca Tyler and others, 'Let's Talk about Faces: Identifying Faces from Verbal Descriptions' (2023) 114 British Journal of Psychology 262. – DOI: https://doi.org/10.1111/bjop.12610.

27 Christian A Meissner, Siegfried L Sporer, and Jonathan W Schooler, 'Person Descriptions As Eyewitness Evidence' in RCL Lindsay and others (eds), *The Handbook of Eyewitness Psychology, Volume II: Memory for People* (Lawrence Erlbaum 2007). – DOI: https://doi.org/10.4324/9780203936368.

28 Geri E Satin and Ronald P Fisher, 'Investigative Utility of the Cognitive Interview: Describing and Finding Perpetrators' (2019) 43 Law and Human Behavior 491. – DOI: https://doi.org/10.1037/lhb0000326.

29 Christian A Meissner, Siegfried L Sporer, and Kyle J Susa, 'A Theoretical Review and Meta-Analysis of the Description–Identification Relationship in Memory for Faces' (2008) 20 European Journal of Cognitive Psychology 414. – DOI: https://doi.org/10.1080/09541440701728581; Gary L Wells, 'Verbal Descriptions of Faces from Memory: Are They Diagnostic of Identification Accuracy?' (1985) 70 Journal of Applied Psychology 619. – DOI: https://doi.org/10.1037/0021-9010.70.4.619; Siegfried L Sporer, 'Psychological Aspects of Person Descriptions' in Siegfried L Sporer, Roy S Malpass, and Guenter Koehnken (eds), *Psychological Issues in Eyewitness Identification* (Lawrence Erlbaum 1996). – DOI: https://doi.org/10.4324/9781315821023.

30 Jonathan W Schooler, 'Verbalization Produces a Transfer Inappropriate Processing Shift' (2002) 16 Applied Cognitive Psychology 989. – DOI: https://doi.org/10.1002/acp.930.

31 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 10.

32 Ibid 11.

33 Rachel Zajac and Nicola Henderson, 'Don't It Make My Brown Eyes Blue: Co-Witness Misinformation about a Target's Appearance Can Impair Target-Absent Line-up Performance' (2009) 17 Memory 266. – DOI: https://doi.org/10.1080/09658210802623950; Mitchell L Eisen and others, '"I Think He Had a Tattoo on His Neck": How Co-Witness Discussions about a Perpetrator's Description Can Affect Eyewitness Identification Decisions' (2017) 6 Journal of Applied Research in Memory and Cognition 274. – DOI: https://doi.org/10.1016/j.jarmac.2017.01.009; Weslley Santos Sousa and Antônio Jaeger, 'Memory Conformity for High-Confidence Recognition of Faces' (2022) 50 Memory & Cognition 1147. – DOI: https://doi.org/10.3758/s13421-022-01325-y; Heather M Kleider-Offutt, Beth B Stevens, and Megan Capodanno, 'He Did It! Or Did I Just See Him on Twitter? Social Media Influence on Eyewitness Identification' (2022) 30 Memory 493. – DOI: https://doi.org/10.1080/09658211.2021.1953080.

34 Elin M Skagerberg and Daniel B Wright, 'The Prevalence of Co-Witnesses and Co-Witness Discussions in Real Eyewitnesses' (2008) 14 Psychology, Crime & Law 513. – DOI: https://doi.org/10.1080/10683160801948980.

35 Hartmut Blank and Céline Launay, 'How To Protect Eyewitness Memory against the Misinformation Effect: A Meta-Analysis of Post-Warning Studies' (2014) 3 Journal of Applied Research in Memory and Cognition 77. – DOI: https://doi.org/10.1037/h0101798.

2.2. Evidence-based suspicion

Before the suspect is placed in a lineup, there should be 'articulable evidence that leads to a reasonable inference that a particular person, to the exclusion of most other people, likely committed the crime in question'.[*36] A mere hunch or the suspect fitting a general description of the culprit is not evidence-based suspicion.[*37] Carrying out lineup procedures without evidence-based reasons for suspecting the individual in question – as investigative authorities have demonstrated that they are willing to do[*38] – can be a risk factor for mistaken identifications. When eyewitnesses choose someone from the lineup, around 63% of the time it is the suspect,[*39] who may or may not be the culprit. The behaviour of witnesses overall stays the same in terms of the frequency of the suspect, whether guilty or innocent, getting selected. Thus, the police more commonly putting suspects in a lineup **without prior evidence** connecting them to the crime brings a greater chance of the suspect – and hence a witness-identified suspect – not being the culprit. That is, an overall increase in the rate of culprit-absent lineups results in an increase in false identifications (and known-innocent filler identifications,[*40] which undermine eyewitnesses' credibility in any identification further down the line since there is evidence that witnesses who initially identified a filler make more errors in subsequent lineups[*41]). In summary, implementing the lineup after establishing evidence-based suspicion (but still as soon as possible, because memory tends to deteriorate as the retention interval increases[*42]) increases the probability that the suspect is the culprit and, hence, of correct identification.[*43] In turn, the reliability of eyewitness-identification-based evidence increases.

2.3. Lineup structure

Regardless of the number of culprits involved in the crime and irrespective of the number of suspects the police have pinpointed, a lineup should always contain only one suspect.[*44] Firstly, if multiple suspects are placed in a single lineup, there is a higher chance of one of them standing out, as selecting fillers who match both the descriptions of all the culprits and the appearance of all the suspects in the lineup is difficult. Secondly, having fillers in a lineup facilitates detecting unreliable witnesses who choose fillers: nearly 37% of all identifications are filler identifications.[*45] Were the lineup to consist of only suspects, those unreliable witnesses would pick out one of the suspects.[*46] Given that suspect-only and multiple-suspect lineups increase the number of false identifications by unreliable witnesses, there should be a separate lineup for each suspect.

36 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 12.

37 See Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 12–13 on what constitutes evidence-based suspicion.

38 Jacqueline Katzman and Margaret Bull Kovera, 'Evidence Strength (Insufficiently) Affects Police Officers' Decisions To Place a Suspect in a Lineup' (2022) 46 Law and Human Behavior 30. – DOI: https://doi.org/10.1037/lhb0000476.

39 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 5.

40 Andrew M Smith and others, 'Mistaken Eyewitness Identification Rates Increase When Either Witnessing or Testing Conditions Get Worse' (2019) 43 Law and Human Behavior 358. – DOI: https://doi.org/10.1037/lhb0000334.

41 Laura Smalarz and others, 'Identification Performance from Multiple Lineups: Should Eyewitnesses Who Pick Fillers Be Burned?' (2019) 8 Journal of Applied Research in Memory and Cognition 221. – DOI: https://doi.org/10.1016/j.jarmac.2019.03.001.

42 Kenneth A Deffenbacher and others, 'Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation' (2008) 14 Journal of Experimental Psychology: Applied 139. – DOI: https://doi.org/10.1037/1076-898x.14.2.139.

43 Gary L Wells, Yueran Yang, and Laura Smalarz, 'Eyewitness Identification: Bayesian Information Gain, Base-Rate Effect Equivalency Curves, and Reasonable Suspicion' (2015) 39 Law and Human Behavior 99. – DOI: https://doi.org/10.1037/lhb0000125.

44 Gary L Wells and John W Turtle, 'Eyewitness Identification: The Importance of Lineup Models' (1986) 99 Psychological Bulletin 320. – DOI: https://doi.org/10.1037/0033-2909.99.3.320; Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 17.

45 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 5.

46 Ibid 19.

2.4. Lineup media

The medium used to present lineup members varies between and within countries; it may be live or video- or photo-based.[*47] Research has found no evidence to suggest that any of these forms is better than the others at improving eyewitness identification performance.[*48] In general, photo lineups are the most practical option. However, care should be taken with choosing the photos. The photo of a suspect should depict the suspect at the age that person was at the time of the crime.[*49] Older photos should not be used, since age-related changes in faces have been shown to increase mistaken identifications.[*50] Furthermore, it should be guaranteed that none of the photos stands out due to contextual factors (clothing, background, brightness, etc.), as these too can increase the likelihood of a mistaken identification.[*51] Live lineups might be preferred when a witness has described something distinctive about the body or gait of the culprit.[*52] However, it is recommended to use separate lineups for each distinct aspect (e.g., face *versus* voice or face *versus* clothing), since studies show that the diagnostic value of the information obtained increases if the witness identifies these aspects independently of each other.[*53]

2.5. The lineup size and suspect position

The recommended minimum number of lineup members ranges from three to 10.[*54] If a witness sees a three-person lineup, the chance of randomly selecting the suspect, who may or may not be innocent, is 25%. The figure drops to 14% for a six-person lineup and to 9% in the 10-person case. In theory, then, increasing the lineup size should reduce false identifications as fillers draw false identifications away from an innocent suspect. However, it also makes finding a set of fillers who match the culprit's description more difficult.[*55] The academic literature has yet to reach a uniform decision as to the optimal number of lineup members. Although some authors have found that increasing the lineup size beyond three members has no benefit,[*56] others have concluded that expanding the lineup to six members increases discriminability of guilty and innocent suspects.[*57] To be on the safe side, practitioners are recommended to increase the number of fillers to at least five, though it is more important to focus on the quality of the fillers.[*58]

47 Fitzgerald, Rubínová, and Juncu (n 21) 305.

48 Eva Rubínová and others, 'Live Presentation for Eyewitness Identification Is Not Superior to Photo or Video Presentation' (2021) 10 Journal of Applied Research in Memory and Cognition 167. – DOI: https://doi.org/10.1016/j.jarmac.2020.08.009; Ryan J Fitzgerald, Heather L Price, and Tim Valentine, 'Eyewitness Identification: Live, Photo, and Video Lineups' (2018) 24 Psychology, Public Policy, and Law 307. – DOI: https://doi.org/10.1037/law0000164.

49 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 20.

50 Ahmed M Megreya, Adam Sandford, and A Mike Burton, 'Matching Face Images Taken on the Same Day or Months Apart: The Limitations of Photo ID' (2013) 27 Applied Cognitive Psychology 700. – DOI: https://doi.org/10.1002/acp.2965.

51 Catriona Havard, Stephanie Richter, and Martin Thirkettle, 'Effects of Changes in Background Colour on the Identification of Own- and Other-Race Faces' (2019) 10(2) i-Perception 2041669519843539. – DOI: https://doi.org/10.1177/2041669519843539.

52 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 7.

53 Sean Pryke and others, 'Multiple Independent Identification Decisions: A Method of Calibrating Eyewitness Identifications' (2004) 89 Journal of Applied Psychology 73. – DOI: https://doi.org/10.1037/0021-9010.89.1.73.

54 Fitzgerald, Rubínová, and Juncu (n 21) 303.

55 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 19.

56 Alex R Wooten and others, 'The Number of Fillers May Not Matter As Long As They All Match the Description: The Effect of Simultaneous Lineup Size on Eyewitness Identification' (2020) 34 Applied Cognitive Psychology 590. – DOI: https://doi.org/10.1002/acp.3644; Melisa Akan and others, 'The Effect of Lineup Size on Eyewitness Identification' (2021) 27 Journal of Experimental Psychology: Applied 369. – DOI: https://doi.org/10.1037/xap0000340.

57 Stefana Juncu and Ryan J Fitzgerald, 'A Meta-Analysis of Lineup Size Effects on Eyewitness Identification' (2021) 27 Psychology, Public Policy, and Law 295. – DOI: https://doi.org/10.1037/law0000311.

58 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 19.

Irrespective of lineup size and medium, the suspect should be placed in the lineup randomly. According to some studies, having a 'favourite position' for suspects[*59] can lead to the suspect's position in the lineup influencing the witness's identification decision.[*60]

2.6. Lineup fillers

When constructing the lineup, the most important principle is that the suspect must not stand out from the fillers (fair lineup).[*61] Research attests that unfair lineups impair witnesses' ability to distinguish between guilty and innocent suspects.[*62]

There are two strategies for constructing a lineup: selecting fillers who match the description of the culprit and choosing ones who resemble the suspect in appearance. Matching fillers to the suspect may lead to a lineup in which all individuals are too similar, which hampers witnesses' ability to discriminate between guilty and innocent suspects.[*63] Lineups with description-matched fillers have been shown to yield higher discriminability than lineups with suspect-matched fillers.[*64] Accordingly, selecting fillers who match the culprit's description is generally recommended. That said, when the suspect noticeably differs from the witness's description or that description is very vague, an exception might be necessary.[*65] Vague descriptions could lead to the use of low-similarity fillers, thereby increasing the chance of both innocent- and guilty-suspect identifications.[*66] In addition, law enforcement must consider distinctive features of the culprit/suspect (tattoos, scars, etc.). These features (or the relevant body parts) can be covered/obscured in all lineup members or, in photo lineups, digitally duplicated for or removed from all individuals. There is evidence that all approaches are equally effective.[*67] Overall, one can conclude that, while the optimal suspect–filler similarity in lineups has yet to be determined, the most important requirement is that the suspect not stand out in any way. Finally, in every case, the process of selecting the fillers should be documented.[*68]

59 Kask and Lebedeva (n 24).

60 Matthew A Palmer, James D Sauer, and Glenys A Holt, 'Undermining Position Effects in Choices from Arrays, with Implications for Police Lineups' (2017) 23 Journal of Experimental Psychology: Applied 71. – DOI: https://doi.org/10.1037/xap0000109; Curt A Carlson, Scott D Gronlund, and Steven E Clark, 'Lineup Composition, Suspect Position, and the Sequential Lineup Advantage' (2008) 14 Journal of Experimental Psychology: Applied 118. – DOI: https://doi.org/10.1037/1076-898x.14.2.118. For results that contradict these, see Julia Meisters, Birk Diedenhofen, and Jochen Musch, 'Eyewitness Identification in Simultaneous and Sequential Lineups: An Investigation of Position Effects Using Receiver Operating Characteristics' (2018) 26 Memory 1297. – DOI: https://doi.org/10.1080/09658211.2018.1464581.

61 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 17.

62 Melissa F Colloff, Kimberley A Wade, and Deryn Strange, 'Unfair Lineups Make Witnesses More Likely To Confuse Innocent and Guilty Suspects' (2016) 27(9) Psychological Science 1227. – DOI: https://doi.org/10.1177/0956797616655789.

63 Carmen A Lucas and Neil Brewer, 'Could Precise and Replicable Manipulations of Suspect–Filler Similarity Optimize Eyewitness Identification Performance?' (2022) 28 Psychology, Public Policy, and Law 108. – DOI: https://doi.org/10.1037/law0000329; Curt A Carlson and others, 'Lineup Fairness: Propitious Heterogeneity and the Diagnostic Feature-Detection Hypothesis' (2019) 4 Cognitive Research: Principles and Implications 1. – DOI: https://doi.org/10.1186/s41235-019-0172-5.

64 Carlson and others (n 63).

65 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 18.

66 Ryan J Fitzgerald and others, 'The Effect of Suspect–Filler Similarity on Eyewitness Identification Decisions: A Meta-Analysis' (2013) 19 Psychology, Public Policy, and Law 151. – DOI: https://doi.org/10.1037/a0030618.

67 Alyssa R Jones and others, '"All I Remember Is the Black Eye": A Distinctive Facial Feature Harms Eyewitness Identification' (2020) 34 Applied Cognitive Psychology 1379. – DOI: https://doi.org/10.1002/acp.3714; Colloff, Wade, and Strange (n 62).

68 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 18.

3. System variables associated with presenting the lineup

3.1. The number of witnesses

An identification procedure should be conducted with each witness individually, without other witnesses being present. Numerous studies show that interactions with co-witnesses influence eyewitness reports,[*69] the accuracy of identification decisions,[*70] and confidence in those decisions.[*71] In addition to hearing about a co-witness's decision,[*72] the behaviour of another witness (e.g., speed of identification[*73]) could influence one's pick from the lineup. Therefore, to guarantee that the identification decision is based solely on one's memory of the culprit, it is essential to separate co-witnesses throughout the procedure. Furthermore, recording the responses of all witnesses, not just the one who identified the suspect, is necessary.[*74]

3.2. Presentation method

Most commonly, lineups are presented either simultaneously (all members are shown at once) or sequentially (members are shown one by one). Debate in the academic literature on which method should be preferred is still ongoing. While several studies have demonstrated an advantage of sequential lineups over simultaneous ones, showing that sequential lineups lead to more correct rejections without affecting the rate of correct identifications,[*75] more recent research indicates that simultaneous lineups are superior, because they lead to higher discriminability.[*76] A third group of studies have found no significant differences between the two methods.[*77] Clearly, researchers have not reached consensus on which lineup procedure is recommended.

Another common procedure is the 'showup', where the witness is presented with a single suspect, without fillers. Showups are highly suggestive, in that the witness expects the person presented, having been chosen for the showup, to be the culprit. Research has shown that witnesses make more mistaken identifications from showups, relative to lineups, and are overconfident in their decisions.[*78] There are two

69 Daniel B Wright and others, 'When Eyewitnesses Talk' (2009) 18 Current Directions in Psychological Science 174. – DOI: https://doi.org/10.1111/j.1467-8721.2009.01631.x.

70 Zajac and Henderson (n 33); Eisen and others, '"I Think He Had A Tattoo On His Neck"' (n 33).

71 Sousa and Jaeger (n 33).

72 Lora M Levett, 'Co-Witness Information Influences Whether a Witness Is Likely To Choose from a Lineup' (2013) 18 Legal and Criminological Psychology 168. – DOI: https://doi.org/10.1111/j.2044-8333.2011.02033.x; ibid.

73 Amy Bradfield Douglass, Carmen A Lucas, and Neil Brewer, 'Cowitness Identification Speed Affects Choices from Target-Absent Photospreads' (2020) 44 Law and Human Behavior 474. – DOI: https://doi.org/10.1037/lhb0000420.

74 Steven E Clark and Gary L Wells, 'On the Diagnosticity of Multiple-Witness Identifications' (2008) 32 Law and Human Behavior 406. – DOI: https://doi.org/10.1007/s10979-007-9115-7.

75 Nancy K Steblay, Jennifer E Dysart, and Gary L Wells, 'Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion' (2011) 17 Psychology, Public Policy, and Law 99. – DOI: https://doi.org/10.1037/a0021650; Gary L Wells, Nancy K Steblay, and Jennifer E Dysart, 'Double-Blind Photo Lineups Using Actual Eyewitnesses: An Experimental Test of a Sequential versus Simultaneous Lineup Procedure' (2015) 39 Law and Human Behavior 1. – DOI: https://doi.org/10.1037/lhb0000096.

76 Laura Mickes, Heather D Flowe, and John T Wixted, 'Receiver Operating Characteristic Analysis of Eyewitness Memory: Comparing the Diagnostic Accuracy of Simultaneous versus Sequential Lineups' (2012) 18 Journal of Experimental Psychology: Applied 361. – DOI: https://doi.org/10.1037/a0030609; Karen L Amendola and John T Wixted, 'Comparing the Diagnostic Accuracy of Suspect Identifications Made by Actual Eyewitnesses from Simultaneous and Sequential Lineups in a Randomized Field Trial' (2015) 11 Journal of Experimental Criminology 263. – DOI: https://doi.org/10.1007/s11292-014-9219-2.

77 Joanna D Pozzulo and others, 'Simultaneous, Sequential, Elimination, and Wildcard: A Comparison of Lineup Procedures' (2016) 31 Journal of Police and Criminal Psychology 71. – DOI: https://doi.org/10.1007/s11896-015-9168-3; Matthew Kaesler and others, 'Do Sequential Lineups Impair Underlying Discriminability?' (2020) 5 Cognitive Research: Principles and Implications 35. – DOI: https://doi.org/10.1186/s41235-020-00234-5.

78 Mitchell L Eisen and others, 'Comparing Witness Performance in the Field versus the Lab: How Real-World Conditions Affect Eyewitness Decision-Making' (2022) 46 Law and Human Behavior 175. – DOI: https://doi.org/10.1037/lhb0000485; Scott D Gronlund and others, 'Showups versus Lineups: An Evaluation Using ROC Analysis' (2012) 1 Journal of Applied Research in Memory and Cognition 221. – DOI: https://doi.org/10.1016/j.jarmac.2012.09.003; Jeffrey S Neuschatz and others, 'A Comprehensive Evaluation of Showups' in Monica K Miller and Brian H Bornstein (eds), *Advances in Psychology and Law* (Springer International 2016). – DOI: https://doi.org/10.1007/978-3-319-29406-3_2.

possible reasons for the superiority of lineups here: the known-innocent fillers attract some of the inaccurate choices that in showups always fall on the innocent suspect,[*79] and a lineup gives witnesses an opportunity to compare facial features across people.[*80] In conclusion, avoiding showups is strongly recommended.[*81]

3.3. Double-blind testing

The identification procedure is a social interaction between a witness and an administrator; therefore, it is not free of influences arising from that interaction.[*82] Often, lineups are conducted by officers who know which person in the lineup is the suspect; i.e., a single-blind procedure.[*83] Studies attest that this administrator knowledge has a suggestive effect on witnesses' behaviour, identifications from lineups, and even lineup records.[*84]

Compared to conditions wherein administrators are unaware of the identity of the suspect (double-blind procedure), administrators who know which lineup member is the suspect are more likely to convey verbal cues (e.g., asking the witness to take another look or repeating the identification choice)[*85] and non-verbal signals (smiling when the witness looks at the suspect or after a suspect identification, intonation, eye contact, emphasis on certain words, etc.)[*86] that steer the witness away from fillers and toward identifying the suspect, whether or not that suspect is actually the culprit.[*87] Furthermore, these cues act as confirmatory feedback to the witness, inflating their confidence in the identification decision[*88] and potentially distorting their memory of the culprit.[*89]

Also, administrator knowledge can influence how the lineup outcome is interpreted and recorded. Administrators aware of the suspect's identity are more likely to interpret ambiguous statements about suspects (but not fillers) as identifications,[*90] interpret witnesses' confidence in the identification of a

79 Andrew M Smith and others, 'Fair Lineups Are Better Than Biased Lineups and Showups, but Not Because They Increase Underlying Discriminability' (2017) 41 Law and Human Behavior 127. – DOI: https://doi.org/10.1037/lhb0000219.

80 Melissa F Colloff and John T Wixted, 'Why Are Lineups Better Than Showups? A Test of the Filler Siphoning and Enhanced Discriminability Accounts' (2020) 26 Journal of Experimental Psychology: Applied 124. – DOI: https://doi.org/10.1037/xap0000218.

81 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 26; Neuschatz and others (n 78).

82 Kovera and Evelo, 'Eyewitness Identification in Its Social Context' (n 6).

83 Fitzgerald, Rubínová, and Juncu (n 21) 298.

84 Margaret Bull Kovera and Andrew J Evelo, 'The Case for Double-Blind Lineup Administration' (2017) 23 Psychology, Public Policy, and Law 421. – DOI: https://doi.org/10.1037/law0000139; Margaret Kovera and Andrew J Evelo, 'Improving Eyewitness-Identification Evidence Through Double-Blind Lineup Administration' (2020) 29 Current Directions in Psychological Science 563. – DOI: https://doi.org/10.1177/0963721420969366.

85 Steven E Clark and others, 'Lineup Administrator Influences on Eyewitness Identification and Eyewitness Confidence' (2013) 2 Journal of Applied Research in Memory and Cognition 158. – DOI: https://doi.org/10.1016/j.jarmac.2013.06.003; David M Zimmerman and others, 'Memory Strength and Lineup Presentation Moderate Effects of Administrator Influence on Mistaken Identifications' (2017) 23 Journal of Experimental Psychology: Applied 460. – DOI: https://doi.org/10.1037/xap0000147; Mitchell L Eisen and others, 'Does Anyone Else Look Familiar? Influencing Identification Decisions by Asking Witnesses To Re-Examine the Lineup' (2018) 42 Law and Human Behavior 306. – DOI: https://doi.org/10.1037/lhb0000291; Mitchell L Eisen and others, 'Variations in the Encoding Conditions Can Affect Eyewitnesses' Vulnerability to Suggestive Influence' (2022) 36 Applied Cognitive Psychology 1188. – DOI: https://doi.org/10.1002/acp.4000.

86 Steve D Charman and Vanessa Quiroz, 'Blind Sequential Lineup Administration Reduces Both False Identifications and Confidence in Those False Identifications' (2016) 40 Law and Human Behavior 477. – DOI: https://doi.org/10.1037/lhb0000197; Lynn Garrioch and CA Elizabeth Brimacombe, 'Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence' (2001) 25 Law and Human Behavior 299. – DOI: https://doi.org/10.1023/a:1010750028643.

87 Sarah M Greathouse and Margaret Bull Kovera, 'Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification' (2009) 33 Law and Human Behavior 70. – DOI: https://doi.org/10.1007/s10979-008-9136-x; Zimmerman and others (n 85); Charman and Quiroz (n 86).

88 Nancy K Steblay, Gary L Wells, and Amy Bradfield Douglass, 'The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications' (2014) 20 Psychology, Public Policy, and Law 1. – DOI: https://doi.org/10.1037/law0000001; Jennifer E Dysart, Victoria Z Lawson, and Anna Rainey, 'Blind Lineup Administration As a Prophylactic against the Postidentification Feedback Effect' (2012) 36 Law and Human Behavior 312. – DOI: https://doi.org/10.1037/h0093921; Garrioch and Brimacombe (n 86).

89 Laura Smalarz and Gary L Wells, 'Confirming Feedback Following a Mistaken Identification Impairs Memory for the Culprit' (2014) 38 Law and Human Behavior 283. – DOI: https://doi.org/10.1037/lhb0000078.

90 Steve D Charman, Kureva Matuku, and Alexis Mook, 'Non-Blind Lineup Administration Biases Administrators' Interpretations of Ambiguous Witness Statements and Their Perceptions of the Witness' (2019) 33 Applied Cognitive Psychology 1260. – DOI: https://doi.org/10.1002/acp.3579.

suspect as higher than their confidence in that of a filler,[*91] and record fewer filler identifications. Records by administrators who are unaware of the suspect's identity are more objective and thorough.[*92] Although administrator knowledge can have severe repercussions, generally neither administrators nor witnesses are aware of the effect that administrator knowledge has on either party.[*93]

In summary, while the single-blind procedure increases both guilty- and innocent-suspect identification counts relative to the double-blind procedure[*94], the additional identifications do not hold any value, since they arise from the suggestive nature of the procedure and are not based on memory.[*95] To prevent the administrator from intentionally or inadvertently influencing the witness, researchers advocate using a double-blind procedure and informing the witness about it.[*96]

The double-blind procedure implies that any administrator should handle a given lineup only once. Research has revealed that having already administered the lineup procedure to a witness can bias the decisions of subsequent witnesses, potentially leading to false identifications.[*97] Although a double-blind lineup therefore may create some practical concerns, it is necessary, because simply instructing the administrator to refrain from any feedback[*98] or telling the witness that the lineup administrator does not know the identity of the suspect (i.e., creating presumed-blind conditions)[*99] has not been found effective. Minimising contact between administrators and witnesses can help reduce false identifications,[*100] but it does not always do so.[*101] A more effective alternative would be computer-based administration of the identification procedure or allowing the eyewitnesses to self-administer the procedure by means of an envelope method.[*102]

91 Jesse H Grabman and Chad S Dodson, 'Prior Knowledge Influences Interpretations of Eyewitness Confidence Statements: "The Witness Picked the Suspect, They Must Be 100% Sure%' (2019) 25 Psychology, Crime & Law 50. – DOI: https://doi.org/10.1080/1068316x.2018.1497167.

92 Dario N Rodriguez and Melissa A Berry, 'The Effect of Line-up Administrator Blindness on the Recording of Eyewitness Identification Decisions' (2014) 19 Legal and Criminological Psychology 69. – DOI: https://doi.org/10.1111/j.2044-8333.2012.02058.x; Dario N Rodriguez and Melissa A Berry, 'Administrator Blindness Affects the Recording of Eyewitness Lineup Outcomes' (2020) 44 Law and Human Behavior 71. – DOI: https://doi.org/10.1037/lhb0000352.

93 Garrioch and Brimacombe (n 86); Clark and others (n 85); Amy Bradfield Douglass, Caroline Smith, and Rebecca Fraser-Thill, 'A Problem with Double-Blind Photospread Procedures: Photospread Administrators Use One Eyewitness's Confidence To Influence the Identification of Another Eyewitness' (2005) 29 Law and Human Behavior 543. – DOI: https://doi.org/10.1007/s10979-005-6830-9.

94 Dario N Rodriguez and Melissa A Berry, 'Eyewitness Science and the Call for Double-Blind Lineup Administration' (2012) 2013 Journal of Criminology. – DOI: https://doi.org/10.1155/2013/530523; Kovera and Evelo, 'The Case for Double-Blind Lineup Administration' (n 84); Kovera and Evelo, 'Improving Eyewitness-Identification Evidence through Double-Blind Lineup Administration' (n 84).

95 Wells, Steblay, and Dysart (n 4); Kovera and Evelo, 'The Case for Double-Blind Lineup Administration' (n 84).

96 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 14; National Research Council (n 5) 106.

97 Douglass, Smith, and Fraser-Thill (n 93); Nicole A McCallum and Neil Brewer, 'Can Lineup Administrators Blind to the Suspect's Identity Influence Witnesses' Decisions?' (2018) 25 Psychiatry, Psychology and Law 93. – DOI: https://doi.org/10.1080/13218719.2017.1347937.

98 Garrioch and Brimacombe (n 86).

99 Laura Smalarz, Hussein Ireri, and Jacob A Fink, 'Presumed-Blind Lineup Administrators Can Influence Eyewitnesses' Identification Decisions and Confidence' (2021) 27 Psychology, Public Policy, and Law 466. – DOI: https://doi.org/10.1037/law0000317.

100 Ryann M Haw and Ronald P Fisher, 'Effects of Administrator–Witness Contact on Eyewitness Identification Accuracy' (2004) 89 Journal of Applied Psychology 1106. – DOI: https://doi.org/10.1037/0021-9010.89.6.1106,

101 Jesse N Rothweiler, Kerri A Goodwin, and Jeff Kukucka, 'Presence of Administrators Differentially Impacts Eyewitness Discriminability for Same- and Other-Race Identifications' (2020) 34 Applied Cognitive Psychology 1530. – DOI: https://doi.org/10.1002/acp.3733.

102 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 16.

3.4. Pre-lineup instructions

When asked to view a lineup, witnesses usually approach it with the presumption that the culprit is one of the people shown.[*103] In consequence, they may feel pressured to choose the suspect or responsible for ensuring the continuation of the investigation, which might lead them to select a person who seems in some way familiar (instead of rejecting the lineup) despite doubts. Therefore, paying attention to how witnesses are instructed before the identification procedure is essential.

One of the instructions studied most is whether the witness is told that the perpetrator may or may not be present in the lineup (unbiased instructions). When no such warning is provided or when the witness is discouraged from giving a 'no-choice' response, the instructions are biased. By leading to an increase in both innocent- and guilty-suspect identifications,[*104] biased warnings promote low discriminability, alongside increased confidence in false identifications.[*105] Therefore, an explicit 'not present' response option should accompany the presentation of lineup members.

Furthermore, researchers have recommended that the witness be presented with an explicit 'don't know' option, to decrease guessing. Although the frequency of 'don't know' responses varies between studies,[*106] research shows that the presence of this option generally decreases false identifications without reducing correct ones.[*107] Moreover, there is strong evidence that poor memory of the culprit leads to more opting out.[*108] Hence, making this option available seems not to undermine identification performance.[*109]

In conclusion, it is recommended to present the witness with, in addition to verbal instructions, explicit 'not present' and 'don't know' options both, to reduce guessing.[*110] What is more, the recommendation to give unbiased instructions extends to how the witness is asked to come to the station (e.g., 'Come and see whether you can identify the perpetrator' *versus* 'Come and look at the lineup'), as this is another factor that can affect the likelihood of a false identification, irrespective of unbiased instructions received later.[*111] Researchers also recommend informing the witness that the lineup administrator does not know which

103 Amina Memon, Fiona Gabbert, and Lorraine Hope, 'The Ageing Eyewitness' in Joanna Adler and Jacqueline Gray (eds), *Forensic Psychology: Concepts, Debates and Practice* (Willan 2004) 107; Neil Brewer and Gary L Wells, 'Obtaining and Interpreting Eyewitness Identification Test Evidence: The Influence of Police–Witness Interactions' in Ray Bull, Tim Valentine, and Tom Williamson (eds), *Handbook of Psychology of Investigative Interviewing: Current Developments and Future Directions* (Wiley–Blackwell 2009) 208. – DOI: https://doi.org/10.1002/9780470747599.ch12.

104 Nancy Mehrkens Steblay, 'Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects' (1997) 21 Law and Human Behavior 283. – DOI: https://doi.org/10.1023/a:1024890732059; Steven E Clark, 'A Re-Examination of the Effects of Biased Lineup Instructions in Eyewitness Identification' (2005) 29 Law and Human Behavior 575. – DOI: https://doi.org/10.1007/s10979-005-7121-1; Nancy K Steblay, 'Lineup Instructions' in Brian L Cutler (ed), *Reform of Eyewitness Identification Procedures* (American Psychological Association 2013). – DOI: https://doi.org/10.1037/14094-004; James Michael Lampinen and others, 'Comparing Detailed and Less Detailed Pre-Lineup Instructions' (2020) 34 Applied Cognitive Psychology 409. – DOI: https://doi.org/10.1002/acp.3627.

105 Steve D Charman, Rolando N Carol, and Shari L Schwartz, 'The Effect of Biased Lineup Instructions on Eyewitness Identification Confidence' (2018) 32 Applied Cognitive Psychology 287. – DOI: https://doi.org/10.1002/acp.3401; Michael R Leippe, Donna Eisenstadt, and Shannon M Rauch, 'Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback under Varying Lineup Conditions' (2009) 33 Law and Human Behavior 194. – DOI: https://doi.org/10.1007/s10979-008-9135-y.

106 Carmen A Lucas and others, 'The Effects of Explicit "Not Present" and "Don't Know" Response Options on Identification Decisions in Computer-Administered Lineups' (2020) 34 Applied Cognitive Psychology 1495. – DOI: https://doi.org/10.1002/acp.3728; Nathan Weber and Timothy J Perfect, 'Improving Eyewitness Identification Accuracy by Screening Out Those Who Say They Don't Know' (2012) 36 Law and Human Behavior 28. – DOI: https://doi.org/10.1037/h0093976; Shaela T Jalava, Andrew M Smith, and Simona Mackovichova, 'Providing Witnesses with an Option To Say "I'm Not Sure" to a Showup Neither Improves Classification Performance nor the Reliability of Suspect Identifications' (2021) 45 Law and Human Behavior 68. – DOI: https://doi.org/10.1037/lhb0000434.

107 Weber and Perfect (n 106); Timothy J Perfect and Nathan Weber, 'How Should Witnesses Regulate the Accuracy of Their Identification Decisions: One Step Forward, Two Steps Back?' (2012) 38 Journal of Experimental Psychology: Learning, Memory, and Cognition 1810. – DOI: https://doi.org/10.1037/a0028461; Nancy K Steblay and Jonathan D Phillips, 'The Not-Sure Response Option in Sequential Lineup Practice' (2011) 25 Applied Cognitive Psychology 768. – DOI: https://doi.org/10.1002/acp.1755; However, Jalava, Smith, and Mackovichova (n 106) unexpectedly found that an opt-out option led to a large reduction in correct identifications.

108 Jalava, Smith, and Mackovichova (n 106); Steblay and Phillips (n 107).

109 Lucas and others (n 106).

110 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 20; National Research Council (n 5) 107.

111 Deah S Quinlivan and others, 'Do Pre-Admonition Suggestions Moderate the Effect of Unbiased Lineup Instructions?' (2012) 17 Legal and Criminological Psychology 165. – DOI: https://doi.org/10.1348/135532510x533554.

lineup member is the suspect, that the witness will be asked to state the level of confidence in their decision after making it, and that the investigation will continue regardless of the decision of the witness.[*112] Since the level of detail of these instructions varies in practice, more research is required for ascertaining which form is the most effective.[*113] The crucial element is that all of these instructions are meant as a safeguard against suggestion-induced identifications, which do not hold any diagnostic value.

3.5. The immediate confidence statement

When witnesses provide a confidence statement (specifying how confident they are that they have made a correct decision) immediately after making a lineup decision under pristine conditions (i.e., in a setting of a fair lineup with double-blind administration and unbiased instructions), their initial confidence can be predictive of accuracy.[*114] When confidence is not obtained straight away, it becomes susceptible to post-decision events. Research has consistently shown that confirming feedback and positive comments inflate eyewitnesses' confidence in the accuracy of their decision,[*115] especially among inaccurate witnesses,[*116] and can even alter one's memory of the initial confidence.[*117] In consequence, a confidence statement delayed by only a mere few minutes post-identification is not reliable anymore. Following this logic, confidence expressed at a trial in a courtroom is not a reliable indicator of eyewitness accuracy either[*118]: the fact that the case has proceeded to trial confirms to the witness that the prior identification must have been correct.[*119] Therefore, as soon as a decision is made from the lineup, a confidence statement should be asked and recorded. This is true of all lineup decisions, filler identifications and rejections included.[*120] A witness who says that he or she does not know should be asked to state the basis for that decision.[*121] Confidence statements should be documented on a graded scale (numerical or verbal) or in the witness's own words. Although all are predictive of accuracy, witnesses' words might be challenging for administrators to interpret[*122] and can lead to mistakes in protocolling the statements.[*123]

High confidence generally indicates increased likelihood of accuracy when collected immediately after the identification decision is made under pristine conditions. However, confidence is not always predictive of accuracy in individual real-world cases: eyewitnesses can still make high-confidence misidentifications.[*124] There are various factors with potential to affect the confidence–accuracy relationship. More research is needed before scholars can uncover when confidence can aid in assessment of the reliability of identification

112 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 20–21.

113 Lampinen and others (n 104).

114 John T Wixted and Gary L Wells, 'The Relationship between Eyewitness Confidence and Identification Accuracy: A New Synthesis' (2017) 18 Psychological Science in the Public Interest 10. – DOI: https://doi.org/10.1177/1529100616686966.

115 Steblay, Wells, and Douglass (n 88); Dysart, Lawson, and Rainey (n 88).

116 Amy L Bradfield, Gary L Wells, and Elizabeth A Olson, 'The Damaging Effect of Confirming Feedback on the Relation between Eyewitness Certainty and Identification Accuracy' (2002) 87 Journal of Applied Psychology 112. – DOI: https://doi.org/10.1037/0021-9010.87.1.112.

117 Rachel Leigh Greenspan and Elizabeth F Loftus, 'Eyewitness Confidence Malleability: Misinformation As Post-Identification Feedback' (2020) 44 Law and Human Behavior 194. – DOI: https://doi.org/10.1037/lhb0000369.

118 Brandon Garrett, 'Eyewitnesses and Exclusion' (2012) 65 Vanderbilt Law Review 451; John T Wixted and others, 'Test a Witness's Memory of a Suspect Only Once' (2021) 22 Psychological Science in the Public Interest 1S.

119 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 23.

120 National Research Council (n 5) 108; ibid 21.

121 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 21.

122 Jamal K Mansour, 'The Confidence–Accuracy Relationship Using Scale Versus Other Methods of Assessing Confidence' (2020) 9 Journal of Applied Research in Memory and Cognition 215. – DOI: https://doi.org/10.1016/j.jarmac.2020.01.003; Andrea Arndorfer and Steve D Charman, 'Assessing the Effect of Eyewitness Identification Confidence Assessment Method on the Confidence–Accuracy Relationship' (2022) 28 Psychology, Public Policy, and Law 414. – DOI: https://doi.org/10.1037/law0000348.

123 Charman, Matuku, and Mook (n 90).

124 James D Sauer, Matthew A Palmer, and Neil Brewer, 'Pitfalls in Using Eyewitness Confidence To Diagnose the Accuracy of an Individual Identification Decision' (2019) 25 Psychology, Public Policy, and Law 147. – DOI: https://doi.org/10.1037/law0000203.

decisions. Furthermore, confidence should not be considered in isolation, and recent research indeed suggests that it is not the sole predictor of accuracy; some evidence exists that, for example, confidence and decision time together give some indication of accuracy.[*125]

We can summarise the state of knowledge by saying that, although eyewitnesses' initial confidence in their first identification decision may be informative in some contexts, it is not a guarantee of accuracy in evaluating individual identifications in real-world cases.[*126]

3.6. Non-repetition of the identification procedure

In repeated identifications, the same suspect or fillers are presented to the same witness again, whether in identification procedures performed after an initial lineup or showup, after viewing of mugshots[*127] or photo arrays, or in connection with identification carried out outside any police procedure (e.g., from a self-directed search of social media[*128]). In-court identification settings are by no means an exception. Irrespective of the nature of the first procedure, that first identification leaves the witness's memory now containing traces of faces additional to those from the memories of the actual event and suspect.[*129] These contaminate any subsequent identification and confidence in that identification. Researchers have found that although repeated identifications increase the likelihood of identifying the suspect, they do not improve the likelihood of **guilty**-suspect identifications.[*130]

There are three main reasons for prior identification decisions' effect on subsequent identifications.[*131] The first is misplaced familiarity: the suspect seems familiar to the witness, who incorrectly links that familiarity to the witnessed event instead of associating it with the initial procedure that included the suspect (this phenomenon is known as source confusion or unconscious transference).[*132] This exposure to an innocent suspect increases the probability of misidentifying that innocent suspect.[*133] Secondly, the witness might select the suspect/filler a second time due to staying committed to their initial identification of that suspect/filler even if the initial identification was wrong (this is called the commitment effect).

125 Travis M Seale-Carlisle and others, 'Confidence and Response Time As Indicators of Eyewitness Identification Accuracy in the Lab and in the Real World' (2019) 8 Journal of Applied Research in Memory and Cognition 420. – DOI: https://doi.org/10.1016/j.jarmac.2019.09.003; Adele Quigley-McBride and Gary L Wells, 'Eyewitness Confidence and Decision Time Reflect Identification Accuracy in Actual Police Lineups' (2023) 47(2) Law and Human Behavior 333. – DOI: https://doi.org/10.1037/lhb0000518.

126 Shari R Berkowitz and others, 'Convicting with Confidence? Why We Should Not Over-Rely on Eyewitness Confidence' (2022) 30 Memory 10. – DOI: https://doi.org/10.1080/09658211.2020.1849308.

127 Kenneth A Deffenbacher, Brian H Bornstein, and Steven D Penrod, 'Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference' (2006) 30 Law and Human Behavior 287. – DOI: https://doi.org/10.1007/s10979-006-9008-1.

128 C Havard and others, 'From Witness to Web Sleuth: Does Citizen Enquiry on Social Media Affect Formal Eyewitness Identification Procedures?' (2023) 38(2) Journal of Police and Criminal Psychology 309. – DOI: https://doi.org/10.1007/s11896-021-09444-z; Kleider-Offutt, Stevens, and Capodanno (n 33); Camilla Elphick and others, 'Digital Detectives: Websleuthing Reduces Eyewitness Identification Accuracy in Police Lineups' (2021) 12 Frontiers in Psychology. – DOI: https://doi.org/10.3389/fpsyg.2021.640513.

129 HL Roediger, 'Reconstructive Memory, Psychology Of' in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Pergamon 2001). – DOI: https://doi.org/10.1016/b0-08-043076-7/01521-7.

130 Ryan D Godfrey and Steven E Clark, 'Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value' (2010) 34 Law and Human Behavior 241. – DOI: https://doi.org/10.1007/s10979-009-9187-7; Nancy K Steblay and Jennifer E Dysart, 'Repeated Eyewitness Identification Procedures with the Same Suspect' (2016) 5 Journal of Applied Research in Memory and Cognition 284. – DOI: https://doi.org/10.1016/j.jarmac.2016.06.010; Nancy K Steblay, Robert W Tix, and Samantha L Benson, 'Double Exposure: The Effects of Repeated Identification Lineups on Eyewitness Accuracy' (2013) 27 Applied Cognitive Psychology 644. – DOI: https://doi.org/10.1002/acp.2944.

131 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 25; Steblay and Dysart (n 130); Wixted and others (n 118); Godfrey and Clark (n 130).

132 Elizabeth F Loftus, 'Unconscious Transference in Eyewitness Identification' (1976) 2 Law and Psychology Review 93; David R Ross and others, 'Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person' (1994) 79 Journal of Applied Psychology 918. – DOI: https://doi.org/10.1037/0021-9010.79.6.918; JD Read and others, 'The Unconscious Transference Effect: Are Innocent Bystanders Ever Misidentified?' (1990) 4 Applied Cognitive Psychology 3. – DOI: https://doi.org/10.1002/acp.2350040103; Ryan J Fitzgerald, Chris Oriet, and Heather L Price, 'Change Blindness and Eyewitness Identification: Effects on Accuracy and Confidence' (2016) 21 Legal and Criminological Psychology 189. – DOI: https://doi.org/10.1111/lcrp.12044.

133 Tiffany Hinz and Kathy Pezdek, 'The Effect of Exposure to Multiple Lineups on Face Identification Accuracy' (2001) 25 Law and Human Behavior 185. – DOI: https://doi.org/10.1023/a:1005697431830.

Commitment can lead to lineup errors.*[134] Even repeated identical procedures have been shown to produce commitment effects and misplaced familiarity, with witnesses choosing more but not more accurately.*[135] The third reason is that the repeated identification procedure might seem to suggest what choice the witness is expected to make. For example, changing only the fillers or only the suspect in a lineup implies that the police suspect the only person not changed or the only person changed, respectively.*[136]

In sum, identifications from repeated procedures, not least in-court identifications, cannot be reasonably considered reliable evidence. Therefore, the eyewitness's memory should be tested only once, regardless of the fairness of the lineup procedure and the decision of the witness.*[137]

3.7. Video-recording of the identification procedure

Both witnesses and police officers can be biased in their decisions.*[138] The memories of both are susceptible to suggestion and subject to error,*[139] and the errors that arise can seep into police reports.*[140] To prevent discrepancies in police reports or even potential misconduct, it is recommended to video-record the entire identification procedure (including the interaction preceding and following the lineup itself, along with the pre-lineup interview).*[141] A video recording aids in preserving a more complete and precise picture of the lineup, the administration of the identification procedure, and the interaction between the lineup administrator and the witness. Furthermore, video-recording might promote adherence to best practices among lineup administrators*[142], and the recording can be introduced as evidence and used by the court to evaluate the quality of the conditions and any suggestiveness of the procedure, in aims of determining the credibility of the identification decision.*[143]

4. Estonia's regulation of the identification procedure

The procedural act of the identification lineup, which covers presenting 'a person or thing, or any other object for identification to the suspect, accused, victim or witness'*[144], is regulated in the CCP's Section 81. To our knowledge, Estonian law enforcement has no further official guidelines that regulate the identification

134 Deffenbacher, Bornstein, and Penrod (n 127); Charles A Goodsell, Jeffrey S Neuschatz, and Scott D Gronlund, 'Effects of Mugshot Commitment on Lineup Performance in Young and Older Adults' (2009) 23 Applied Cognitive Psychology 788. – DOI: https://doi.org/10.1002/acp.1512; Amina Memon and others, 'Eyewitness Recognition Errors: The Effects of Mugshot Viewing and Choosing in Young and Old Adults' (2002) 30 Memory & Cognition 1219. – DOI: https://doi.org/10.3758/bf03213404.

135 Wenbo Lin, Michael J Strube, and Henry L Roediger, 'The Effects of Repeated Lineups and Delay on Eyewitness Identification' (2019) 4 Cognitive Research: Principles and Implications 16. – DOI: https://doi.org/10.1186/s41235-019-0168-1.

136 Steblay, Tix, and Benson (n 130); Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 26.

137 Steblay and Dysart (n 130); Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 25; Wixted and others (n 118).

138 Meterko and Cooper (n 8); Charman, Matuku, and Mook (n 90).

139 Annelies Vredeveldt and Peter J van Koppen, 'The Thin Blue Line-Up: Comparing Eyewitness Performance by Police and Civilians' (2016) 5 Journal of Applied Research in Memory and Cognition 252. – DOI: https://doi.org/10.1016/j.jarmac.2016.06.013.

140 Stefan Schade and Markus M Thielgen, 'Problems with Police Reports As Data Sources: A Researchers' Perspective' (2022) 13 Frontiers in Psychology 873235. – DOI: https://doi.org/10.3389/fpsyg.2022.873235; Nancy K Steblay, 'All Is Not As It Seems: Avoidable Pitfalls in the Interpretation of Lineup Field Data' (2018) 24 Psychology, Public Policy, and Law 292. – DOI: https://doi.org/10.1037/law0000171; Saul M Kassin and others, 'Police Reports of Mock Suspect Interrogations: A Test of Accuracy and Perception' (2017) 41 Law and Human Behavior 230. – DOI: https://doi.org/10.1037/lhb0000225; Rodriguez and Berry, 'The Effect of Line-up Administrator Blindness on the Recording of Eyewitness Identification Decisions' (n 92).

141 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 23; National Research Council (n 5) 108.

142 Saul M Kassin, 'Eyewitness Identification Procedures: The Fifth Rule' (1998) 22 Law and Human Behavior 649. – DOI: https://doi.org/10.1023/a:1025702722645.

143 Karima Modjadidi and Margaret Bull Kovera, 'Viewing Videotaped Identification Procedure Increases Juror Sensitivity to Single-Blind Photo-Array Administration' (2018) 42 Law and Human Behavior 244. – DOI: https://doi.org/10.1037/lhb0000288.

144 From here on, we use the term 'witness' to refer to all individuals to whom the lineup can be presented.

procedure. Although the conditions for preparing and conducting this procedure are prescribed in a somewhat sparse manner in Section 81 of the CCP, at least four essential rules can be deduced. We present these rules here in aims of analysing the extent to which they correspond to the findings from empirical research comprehensively summarised above.

First, as a rule, an identification lineup has to consist of at least **three similar members**.[*145] The Supreme Court of Estonia has bound this requirement with a need to avoid influencing witnesses and to ensure that they consider all characteristics of the lineup members presented in the course of deciding on identification.[*146] If the members are not similar – i.e., if two (or more) fillers do not match the description previously given by the witness about the person perceived – there is a high probability of the witness selecting the person presented to them for identification and discarding the fillers *ab initio*. When, in effect, only one person is presented to the witness for identification, the witness may conclude that the administrator expects identification of this very person.

In this respect, the law is aligned with the main scientific findings, but it also displays some shortcomings. It sets a threshold of three members, which empirical research approves, but is unclear on the similarity aspect. As noted above, empirical studies on eyewitness identification suggest that three is the minimum number of members for a proper lineup. To reduce mistaken identifications, it is recommended to increase the lineup to six members (one suspect and five fillers). However, the quality of fillers is also crucial, with the key rule being that the suspect should never stand out. The problem is that the law does not specify the procedure for selecting fillers. Here, research recommends selecting them primarily on the basis of the culprit's description while considering similarity to the suspect. Furthermore, special care should be taken in the construction of photo lineups, with attention to factors such as using a photo of the suspect that is reasonably contemporaneous with the crime and making sure that none of the photos stands out because of contextual factors.

The law is vague regarding whether these three or more similar members must be presented for identification simultaneously. The Supreme Court has not touched on this question. Still, what scholarly literature addresses it expresses the opinion that the wording of the CCP (§81(2)'s 'with at least two other similar objects') indicates simultaneity.[*147] Current scientific knowledge suggests that simultaneous lineups are not inferior to sequential lineups and, hence, that they serve the purpose of obtaining a reliable identification decision well.

The law is not clear on how many witnesses and suspects shall be present for one identification. Since its language uses a singular form to refer to the one(s) to whom the person for identification is presented ('to the suspect, accused, victim or witness'), it can be argued that an identification procedure has to be conducted with each witness individually, without the presence of other witnesses. Scientific evidence suggests that this is necessary for reducing the likelihood of suggestion-induced identification decisions. The singularity argument ('A person, thing or any other object is presented for identification') can be applied likewise for claiming that only one suspect should be in a lineup at a time and that all-suspect lineups hence are ruled out. We would remind the reader here that the scientific literature and also the procedural-tactics textbook by Herbert Lindmäe[*148] recommend that a separate lineup be used for each suspect, to decrease the number of false identifications by unreliable witnesses. Furthermore, the position for the suspect should be picked randomly every time. That is another factor not addressed by Estonian law.

It is clear from the law that the rule of similar members must never be transgressed. Still, the law does state that the rule of three may be deviated from if the lineup is objectively impossible to organise due to the nature of the object or person (e.g., a corpse or a building), or due to the peculiarity of the object or person (e.g., an extremely tall person).[*149] These exceptions are closely related to the requirement, dealt with above, that the lineup be composed of similar members. If objectively exceptional circumstances make it impossible to fulfil this requirement but an identification lineup as a procedural act remains vital, the procedure may still be arranged, just without accompanying members. Of course, in this case, the identification lineup is actually a showup, but the law uses the same term as for settings with three similar members.

145 CCP, s 81(2).

146 Judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-33-06 [6.2].

147 Eerik Kergandberg and Priit Pikamäe (eds), *Kriminaalmenetluse seadustik. Kommenteeritud väljaanne* (Juura 2012) s 81, comment 3 (by M Sillaots); Kergandberg and Sillaots (n 4) 278.

148 Herbert Lindmäe, *Menetlustaktika* (Juristide Täienduskeskus 1995) 93.

149 CCP, s 81(3) [1–3].

While the law permits showups under some exceptional circumstances, scientific literature strongly advises against their use, for the above-mentioned reason of suggestibility: if a single person is presented to the witness, the witness automatically (and correctly) assumes that this is the suspect and might feel pressured into an identification. Conducting a lineup procedure is all the more challenging when the suspect has distinctive or peculiar features (or when the object is a building), so a showup might well be tempting; however, a photo lineup could serve as a viable alternative in these instances. Distinctive features or peculiarities can be digitally removed from the suspect's photo, duplicated, or covered in all photos of lineup members. Furthermore, certain peculiarities (e.g., height, weight, and gait) do not prevent constructing a photo lineup for identification of faces. According to the scientific review paper by Wells and colleagues, an exception to the requirement for a lineup is to be made only when immediate identification is necessary and a lineup is not feasible, particularly if a detained suspect fits the description of the culprit and is near the crime scene but there are insufficient grounds for prolonged detention.[*150] Importantly, all procedural safeguards apart from the inclusion of fillers (e.g., unbiased instructions) must be in place in these cases, to reduce the suggestiveness inherent to showups.[*151] To conclude, in light of the difficulty of evaluating whether a witness's identification from a showup was based on memory or, instead, was due to the suggestiveness of the procedure, it should be standard practice not to conduct an identification procedure if a lineup cannot be constructed.

Estonian law enables a person to be presented for identification by means of a photograph, or an audio or video recording if the necessity arises,[*152] but it does not specify whether the rule of three members (with the associated strict restrictions) applies to said situations. The Supreme Court, in judgements from earlier years, considered presenting one photo permissible in principle, explaining that there is no reason to assume that submitting one photo for identification would always lead to a different result than submitting at least three photos of similar persons for identification. According to the Supreme Court, if the witness has been presented with only one photo for identification, it is necessary to assess the likelihood of the witness having made an objective decision. Above all, examining the justification of the witness's decision is required – how many features were pointed out during identification, and which ones?[*153] However, in a later judgement, the Supreme Court explained that in a situation wherein the investigator wants to determine whether the victim or the witness recognises the person shown in a photo captured in a printout from a security-camera recording rather than ascertain whether the suspect can be recognised on the basis of three or more similar photos, the procedural act described cannot be considered an identification lineup.[*154] It is not possible to assess definitively whether the court overturned its previous practice with this decision. Still, it would undoubtedly be more logical in view of the purpose of an identification lineup if the requirement of three similar members were to apply also to the submission of photos, audio, and video recordings. Significantly, empirical research has not found any evidence that live lineups are better at improving identification performance than photo or video lineups are. Therefore, the same standards should apply to all lineups, regardless of their medium. In that light, presenting just one photo for identification, accepted by the case law of the Supreme Court on the basis of the argument that presenting three would not lead to a different result, should be heavily opposed. Although presenting one person or photo (in a live or photo showup setting) to a witness does not **always** lead to a result different from what presenting three or more (i.e., a lineup) would produce, decades of research has found that showups result in more false identifications. What is more, Wells and colleagues have weighed in on the matter, emphasising that photo showups should never be employed.[*155] There is no justification for not taking the time to arrange a proper photo lineup if the investigators already have a photo of the suspect.

The second essential rule that can be derived from the law is that an identification lineup must be **a one-time operation**.[*156] Empirical findings demonstrate that only one uncontaminated opportunity

150 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 26.

151 Ibid 27.

152 CCP, s 81(4).

153 Judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-33-06 [6.2]; also see that chamber's judgement 3-1-1-98-07 [9].

154 Judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-36-15 [9.2].

155 Wells and others, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (n 20) 7.

156 CCP, s 81(5).

exists for a given witness to identify a particular suspect. Therefore, a decision emerging from a subsequent identification procedure should not be considered reliable evidence, for it is always influenced by the first identification (be that an identification from a lineup, perusing a mugbook, or simply encountering the suspect in a corridor). In-court identification is not exempt from this principle. Whatever the rationale behind conducting a repeated identification procedure, the effect is the same, so researchers strongly recommend testing the memory of the eyewitness only once. However, the CCP permits two exceptions to the rule. Firstly, the lineup may be repeated under the same circumstances if the initial lineup was conducted using photographs or video recordings.[*157] It must be emphasised at this point again that scientific research has not uncovered any differences in eyewitnesses' identification performance between lineup media. Accordingly, there appears to be no reason to arrange a second lineup in live form. Secondly, according to the law, the lineup may be repeated if there is reason to believe that changes in the subject's appearance led to non-recognition, and restoration of the subject's former appearance is possible.[*158] Here, one could well ask why the former appearance of the suspect was not restored for the first identification procedure. Since the decision from the second lineup is biased irrespective of the reasons for the failure in the first identification procedure, investigators should take more care to conduct a fair and unbiased lineup procedure the first time around.[*159]

The third essential rule is that the identification process must be **documented**,[*160] and the person or lineup presented for identification must be photographed or video-recorded accordingly,[*161] step by step, in a clear and easy-to-follow manner. This rule encompasses the following requirements. Firstly, the material features of the person on the basis of which the lineup was formed have to be presented in the report of any identification lineup.[*162] Secondly, a person is to be presented to the witness for identification only after the latter has been questioned about the recognisable features of said person.[*163] Under the Supreme Court's interpretation, this is a rule without any exceptions[*164], and the scientific literature agrees. In the opinion of the Supreme Court, the purpose of the requirement of previous questioning is to evaluate the reliability of the conclusions made by the witness later, in the identification-lineup setting, so the sequence of procedural acts – questioning, then lineup – is paramount. Also, the preceding questioning of the witness is necessary for preparing the identification lineup in that the witness explains the features of the culprit, alongside the perception of conditions, during this pre-lineup interview.[*165] Additionally, the pre-lineup interview should function as a means to determine the feasibility of conducting an identification procedure in the first place. If the investigator concludes from the statements of the witness that the circumstances during the crime make it almost impossible for the witness to identify the culprit, a lineup should not be conducted. Not conducting an identification procedure when the fundamental prerequisites for reliable identification are unmet (see the ADVOKATE factors in the Turnbull Guidelines[*166]) reduces mistaken identifications and prevents any negative impact that these could have on the subsequent investigation. Finally, the pre-lineup interview allows the investigator to instruct the witness to avoid looking up the culprit independently and discussing the crime event with other witnesses.

The third documentation-related requirement is that the witness, if recognising the person from the lineup, is invited to name the characteristic features that constitute the basis of the identification decision and to explain the relationship between the person and the event.[*167] A witness who does not recognise the person shall be invited to explain in what respect the person or persons presented differ from the person related to the event.[*168] The Supreme Court has explained that requiring the report of an identification lineup to include an explanation by the witness has a substantive meaning for ensuring the right to a defence

157 CCP, s 81(5).

158 Ibid.

159 Kergandberg and Sillaots (n 4) 278.

160 See the CCP, s 82.

161 CCP, s 81(7).

162 See the CCP, s 82(1) [1–2].

163 CCP, s 81(1).

164 Judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-52-09 [11.2].

165 Judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-21-09 [10]; ibid [11.2].

166 *R v Turnbull* [1976] 3 All ER 549.

167 CCP, ss 81(6) and 82(1) [4–5].

168 Ibid.

– a right that can only be exercised if there is a possibility of the defence comparing the statements made in the lineup setting with the statements given previously (during questioning) and material for assessing whether and to what extent the characteristics through which the person was recognised are the same as those that the witness had previously stored in memory in connection with the crime event and on the basis of which they had hoped to recognise the person.[*169] If, during the pre-lineup interview, the witness does not describe the features from which they hope to recognise the person, it is impossible to assess the basis for the witness's later conclusion as to the person's identity or differences detected during the identification-lineup procedure. Therefore, there is no substantive difference between a situation wherein the witness could not describe the features enabling recognition of the person and one in which the witness was not questioned about the features of the person at all.[*170] That said, the witness not detailing the characteristics from which identification of the person from the lineup followed does not automatically render the identification unreliable.[*171] The latter stance of the Supreme Court is consistent with research showing that even if the witness cannot describe the culprit in detail, it does not mean that they will not be able to identify the culprit from the lineup. Furthermore, the above-mentioned weak relationship between descriptions of individuals and identification accuracy suggests that it is ill-advised to assess the reliability of identification evidence solely in terms of how many and which features the witness mentioned after the identification.

Another possibility to evaluate the reliability of the identification decision that the CCP does not regulate is the option of asking the witness to state their confidence in their decision immediately after it is made. This initial confidence can be predictive of accuracy. Confidence statements obtained later on (even under oath at trial) are not good indicators of eyewitness memory and accuracy. As discussed above, they may have been influenced by several post-decision events. For this reason, confidence should be obtained before the witness is requested to specify the features behind the identification. It is important also that the confidence statement provided by the witness be recorded as objectively as possible, since witnesses may later have trouble remembering how confident they were during the identification procedure.

While the CCP articulates a requirement to protocol the whole identification procedure and that the lineup presented to the witness be recorded (this can aid the court in assessing whether the lineup fulfils the requirements set forth in the CCP), studies have shown that reports do not always represent the entire procedure objectively. After all, being compiled by investigators, they may be biased. A more objective method than recording merely the lineup, as is required by law, would be to video-record the entire identification procedure.

The fourth requirement is related to the explanations a person gives for the identification carried out during the lineup procedure. They are considered **statements** for purposes of the CCP. This means that during the court proceedings, upon request by a party to the matter, the court may disclose the statements from the report of the identification lineup so as to verify the reliability of those statements during cross-examination in court.[*172] It follows also that the hearsay prohibition provided for in the CCP's Section 66(2^1) applies to statements made during the identification-lineup procedure (see the CCP's §81(8)). According to Section 81(8) of the CCP, the procedural rules applicable to witness examination provided for in Section 68's 2–6 likewise apply. This raises several concerns. Firstly, the CCP's Section 81(8) precludes the applicability of Section 68(1), which directs the investigator to provide witnesses with an explanation of their rights and obligations. One might ask, therefore, whether the rights and obligations and the nature and purpose of the procedural act should not be explained to witnesses before the lineup procedure. A question arises also as to whether leading questions are allowed during the identification-lineup procedure (see also the CCP's §68(4)). Legal scholars have argued that such questions may be allowed only when the witness explains the connection between the person and the event under investigation, not when the witness cites features of the person recognised.[*173]

The previous section illustrates that the law does not regulate the interaction between the witness and the lineup administrator before and during the identification procedure at a satisfactory level. This is

169 Judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-21-09 [10].

170 Judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-84-11 [15].

171 Judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-98-07 [9].

172 Judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-52-09 [9]; judgement of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-62-07 [12.3–12.4].

173 Kergandberg and Pikamäe (n 127) s 81, comment 10 (by M Sillaots).

especially problematic, as law-enforcement officials underestimate the impact of their actions on lineup outcomes,[*174] even though there is ample scientific evidence that the interaction between the administrator and the witness can have a detrimental effect on the behaviour of witnesses and on the accuracy of their decisions (this is true especially in respect of the administrator's knowledge of the identity of the suspect, the pre-lineup instructions administered, and feedback given to the witness). The associated suggestive influences, which can be exacerbated by leading questions, lead to decisions that are not based on the uncontaminated memory of witnesses. Therefore, for greater reliability of eyewitness evidence, it is strongly recommended that unbiased pre-lineup instructions be presented to the witness during a double-blind identification procedure.

The four rules presented above are the essential requirements that Estonian law states for an identification lineup. Interestingly, the law does not set any specific requirements as to **when** this procedural act may be conducted, stating only that it can be done 'where this is needed'. Because the law permits presenting any 'person' for identification, one may conclude that this person need not be a suspect in the meaning of the CCP's Section 33(1).[*175] From the empirical findings surveyed, we argue this to be a significant shortcoming of the law. As eyewitnesses' identification decisions are affected by both memory-related and non-memorial factors, it is imperative to conduct the identification procedure only when there are evidence-based grounds to suspect that the suspect is truly guilty of the crime.

5. Conclusions

Several variables that affect eyewitness identification evidence can be controlled by the criminal-justice system. Although many still need further research, quite a few practices have a solid scientific basis. Above, we presented a review of those variables: we explained their influence on eyewitnesses' decisions and introduced recommendations originating from research. Based on that review, we analysed whether the guidelines for eyewitness identification in Estonia, specifically those in the CCP, follow best practices stemming from scientific research.

That research supports several aspects of what the law articulates. The recommendation that the suspect should not stand out is regulated solidly via the rule that all lineup members are to be similar. Furthermore, the law specifies that conducting a pre-lineup interview is a must. This interview serves evaluation of the conditions under which the witness observed the event and the culprit, thus assisting in determining whether it is justified to proceed with an identification procedure. Standard practice should be for a lineup procedure not to be conducted if the conditions of the event do not allow for reliable identification. Furthermore, the pre-lineup interview should guarantee, firstly, that the lineup fillers are chosen on the basis of the description of the culprit and, secondly, the opportunity to assess whether the characteristics the witness named when describing the culprit match those the witness later relied upon to identify a member of the lineup. However, the features named after the identification decision should not be regarded as the sole indicator of the identification decision's reliability. In addition, we encourage lineup administrators to record how confident the witness is in their lineup decision. If obtained immediately after the decision, a confidence statement can add to the information about the accuracy of that decision.

The law establishes the requirement of at least three lineup members; however, lineups of six might ensure better discriminability and reduce the likelihood of picking the suspect by chance. Moreover, the law is vague on whether the rule of three applies to photo lineups as well. This is especially problematic as photo lineups have become more common. Given that decisions from photo lineups are as accurate as decisions from live lineups when the foundational principles are followed, the same requirements, including that 'rule of three', should apply across all lineup media. Consequently, showups should be avoided, whatever the medium.

Although the law states that an identification procedure should be conducted once, it allows exceptions. Research consistently shows that decisions from repeated identification procedures, including in-court identification of the defendant, are unreliable. Furthermore, the exceptions specified in the CCP are not

174 Kask (n 23).

175 According to this provision, the suspect 'is a person who has been arrested on suspicion of having committed a criminal offence, or a person in respect of whom there is sufficient cause to suspect them of having committed a criminal offence and who is subjected to a procedural operation'.

supported by scientific evidence, and any need for them can be prevented by focusing on conducting the identification procedure properly the first time. Therefore, it might be time to review the law whereby repeated identification procedures are permitted.

Of special concern is that there are no guidelines at present regulating **when** and **how** the identification procedure shall be administered. This could have a detrimental effect on identification evidence. Firstly, the procedure should be carried out only when there are evidence-based grounds for suspicion. Secondly, we propose requiring the use of a double-blind procedure. Our third recommendation is that witnesses be presented with unbiased instructions. The purpose of these measures is to safeguard the identification process from intentional and unintentional biases.

Finally, the law states that the identification procedure should be thoroughly documented. We would emphasise that all lineup decisions by all witnesses should be subject to protocols, not just the incriminating evidence. Additionally, because the reports are compiled by police officers, they might not be objective enough to enable the court to assess whether the identification evidence was secured through an appropriate procedure. For these reasons, we encourage lineup administrators to video-record the entire identification procedure and recommend that courts use this recording in assessing the reliability of identification evidence.

It has become clear that, with no other official guidelines on how to conduct the identification procedure, the CCP leaves many decisions up to law enforcement. On account of law-enforcement officials' lack of knowledge about eyewitness factors, identification procedures may not adhere to scientific recommendations, potentially impacting investigations. To ensure the reliability of identification evidence, it is crucial to follow evidence-based best practices.

In conclusion, we believe that, along with a review of the law, Estonian law enforcement needs additional official guidelines for arranging and conducting fair lineup procedures. These guidelines can be regularly updated for closer alignment with science-based recommendations. Also, lawyers and courts would benefit from such guidance when assessing the reliability of eyewitness identification evidence. We urge the criminal-justice system to collaborate with researchers and implement evidence-based practices, since memory can be truly tested only once. Reliable eyewitness identification evidence can be an asset but only when acquired through a procedure that is grounded in scientific findings.

https://doi.org/10.12697/JI.2023.32.09

Kai Härmand

Judge
Harju County Court, Estonia

AI Systems' Impact on the Recognition of Foreign Judgements: The Case of Estonia

Abstract. Prominent search engines yield many millions of hits[*1] when one searches for the keywords 'robot judge'. While the discussion around AI technologies and their impact on society is increasingly focused on questions of whether and how the use of AI should be regulated and what kind of legal boundaries, we need for safeguarding fundamental rights in its context, the fact is that algorithmic systems are already used in the realms of litigation and judicial systems. The article presents an attempt to ascertain how the use of AI in judicial proceedings affects the cross-border recognition of judgements and, thereby, influences society in general. Special attention is given to the pivotal matter of trust in judicial decisions of other countries. More precisely, can the use of AI reshape or otherwise influence the current procedure of cross-border recognition of judgements and the judicial duties of a judge in that procedure, at least in the case of Estonia?

Keywords: AI in judiciary, cross-border litigation, recognition of judgements, international private law

1. Introduction

From a Web search for the keywords 'robot judge', the search engine reports finding 58,900,000 results.[*2] This is little surprise as international entities, states, and non-governmental organisations alike follow the call to discuss ethical, legal, and fundamental-rights issues related to the use of artificial intelligence (AI) in numerous sectors. The European Union (EU) is taking steps to amend its legal framework[*3] with guiding

1 One such search from Google, on 15 January 2023, produced 58,900,000 results.

2 The results differ with factors such as time. For instance, the figure cited is from 15 January 2023, and the result count from a search on 18 March was 36,500,000.

3 The EU AI strategy was launched in April 2018; see the communiqué at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0237&from=EN>. This was followed in 2020 by the White Paper on Artificial Intelligence: A European Approach to Excellence and Trust, available at <https://commission.europa.eu/document/d2ec4039-c5be-423a-81ef-b9e44e79825b_en>. The proposal for a Regulation instrument laying down harmonised rules on artificial intelligence was published in April 2021.

principles for a 'human-centric' approach to AI that entails respect for European values and principles. Likewise, several states have adopted AI strategies[*4] and legal acts, and courts have made their first decisions on AI[*5], with the case law developing by the day.[*6] In another part of the landscape, scientists are calling for suspension of the training of powerful AI-based systems, arguing that 'AI systems with human-competitive intelligence can pose profound risks to society and humanity' and that, therefore, governments should step in.[*7]

The discussion coalescing around AI technologies and their impact on society is increasingly focused on the questions of whether – and, if so, how – the use of AI should be regulated and what kind of legal boundaries we would need for safeguarding fundamental rights. We ought to recognise, however, that algorithmic systems are already with us: many arenas, not least litigation and judicial systems, have been employing them for more than a decade already.[*8]

Back in 1996, Richard Susskind explained several possibilities connected with disruptive technologies in justice systems.[*9] In the field of litigation and operation of judicial systems, smart algorithmic systems have been in use for 10 years or more, mainly for crime prevention and predictive policing but also for processing of minor offences all over the world[*10]. In the civil-litigation domain, semi-automatic algorithm-based procedures have been applied for small-claims processes in Estonia since 2006[*11].

How AI, a rapidly advancing area of algorithmics, may affect judicial processes and the work of a judge in general has been discussed by several authors. In 2018, Tania Sourdin argued that the role of a judge is one of transmission; some judicial work will be conducted or assisted by technological tools, but the core function of the judge remains – partly because society is not willing to accept machines deciding over human life, partly because judicial decision-making is so complex even in its essence alone.[*12] When reporting on their study of the judgements of the European Court of Human Rights, Masha Medvedeva, Michel Vols, and Martijn Wieling considered how the predictive analytical tools may affect the parties to the procedure. They concluded that these analysis tools showed accuracy levels of 75%. While systems may get improved, one must consider that these tools are not able to assess the changes in the society using them.[*13]

In Estonia, academic discussion of the need to regulate the use of AI took a more serious turn in 2018, hand in hand with the drafting of the AI Strategy. In the report of the country's AI expert group, based on legal research conducted by Tallinn Technical University, several legislative changes were suggested.[*14] The Ministry of Justice drafted a legislative-intent document for the regulation of AI (referred to as the Krati VTK)[*15], and

4 Just a few examples are Estonia adopting an AI strategy (its 'Kratt strategy') in July 2019, Singapore doing similarly in 2019, and the UK National AI strategy being adopted in 2021. For more information, see L Galindo K Perset, and F Sheeka, 'An Overview of National AI Strategies and Policies' (OECD Going Digital Toolkit Note 14, 2021). – DOI: https://doi.org/10.1787/c05140d9-en.

5 *Stephen Thaler v Controller General of Patents Trade Marks and Designs* [2021] EWCA Civ 1374 (Court of Appeal), the UK judgement from 21 September 2021 on case A3/2020/1851.

6 Joint cases *UF* (C-26/22) and *AB* (C-64/22) *v Land Hessen and SCHUFA Holding AG*, Opinion of Advocate General P Pikamäe (ECLI:EU:C:2023:222), from 16 March 2023, also addressing case 634/21 (*OQ v Land Hessen, joined party SCHUFA Holding AG*.)

7 On 29th March 2023, the Future of Life Institute published its open letter signed by hundreds of scientists and visioners. See 'Pause Giant AI Experiments: An Open Letter' <https://futureoflife.org/open-letter/pause-giant-ai-experiments/> accessed 22 June 2023.

8 Examples can be found in analysis tools such as DecisionExpress or BiblioExpress. See also the *Yearbook of Estonian Courts 2019* article 'Artificial Intelligence: A Substitute or Supporter of Judges?' <https://aastaraamat.riigikohus.ee/en/artificial-intelligence-a-substitute-or-supporter-of-judges/> accessed 26 March 2023.

9 Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Clarendon 1996) 120–21.

10 For example, COMPAS software. See <https://en.wikipedia.org/wiki/COMPAS> accessed 22 June 2023.

11 The payment-order procedure was introduced via the Civil Procedure Act, ss 481–97, which entered into force on 1 January 2006.

12 Tania Sourdin, 'Judge v. Robot: Artificial Intelligence and Judicial Decision-Making' (2018) University of New South Wales Law Journal 4 1114. – DOI: https://doi.org/10.53637/zgux2213.

13 Masha Medvedeva, Michel Vols, and Martijn Wieling. 'Using Machine Learning to Predict Decisions of the European Court of Human Rights' (2020) Artificial Intelligence and Law 28 237. – DOI: https://doi.org/10.1007/s10506-019-09255-y.

14 'Eesti tehisintellekti kasutuselevõtu eksperdirühma aruanne' https://www.digar.ee/arhiiv/nlib-digar:945441 accessed 17 July 2023.

15 'Algoritmiliste süsteemide mõjude reguleerimise väljatöötamise kavatsus („krati VTK")' <https://eelnoud.valitsus.ee/main/mount/docList/93ebe63d-de8c-4662-9908-3232aa7f987c#KTJpa4Nn> accessed 26 March 2023.

preparation of a draft law to amend the administrative-procedure law followed.[*16] The aim with the Krati VTK was to establish regulation to protect fundamental rights and ensure transparency of the use of AI and automated decision-making in public administration.

Discussion of that draft law has stalled – it not been adopted by the Parliament of Estonia, the Riigikogu. Nevertheless, several articles by Estonian authors address automated decision-making in public administration, and some relevant case law from the Supreme Court has emerged[*17]. In a few judgements, the latter has expressed a stance on the use of automated case-management systems etc. and the influence of these systems on access to information, but it has not yet tackled the directly use of AI in public administration.

Writings on jurisprudence do address this matter, however. For instance, Kätliin Lember studied the use of AI in public administration – namely, in the preparation of administrative decisions and with regard to state-liability questions.[*18] Furthermore, Supreme Court judge Ivo Pilving explained in his article the possibilities for making amends in the event of discretion breakdowns related to public authorities issuing automated administrative decisions, alongside the issues of state liability that arise. He concluded that the Estonian legislative framework of state liability is aligned well with the challenges that automated decision-making in public administration may present.[*19]

Private-law perspectives, especially in relation to liability issues associated with using AI, have been discussed by the European Parliament. As a result, recommendations to the European Commission offer suggested ways of amending civil law.[*20]

However, the use of AI in concrete judicial procedures has not received much attention from academics. This article is an effort to start filling the gap by investigating some specific aspects of everyday judicial co-operation and asking whether the use of AI in the judicial process may affect the trustworthiness of judicial decisions and cross-border recognition of judgements. In particular, the discussion examines what procedural-law tools exist and how a judge can use them to assess the risks of the decisions made/suggested by AI. Specifically, are the tools of judicial co-operation sufficient for collection of evidence and information in the recognition procedure? Are there ways to overcome such risks?

To begin answering these questions, the article maps the principles for trustworthy AI as recognised in Europe and the legal requirements characterising a fair trial. Both are elements that a judge must vet in the recognition process. The article also gives a few examples of the use of AI, from several countries whose judgements might be subject to recognition in Estonia. Then, the piece analyses the relevant procedural tools from an Estonian standpoint and illustrates the legal risks with the aid of several illustrative cases of AI functioning in judicial proceedings. While Estonia serves as an example, its relevance is broader: since the legal requirements for judicial co-operation are laid down in EU law, in numerous regulations on cross-border judicial cooperation, the conclusions may be of valid use by either comparison or analogy in the cases of other EU member states as well.

2. Principles and future regulations related to AI in the European Union

In 2018, the Council of Europe adopted its ethics charter for AI in the judiciary[*21] (hereinafter 'the Charter'), which sets forth ethics principles related to the use of AI in judicial systems and processes. In so doing, it is considered the first European text of its kind. The Charter provides a framework of principles and concrete

16 'Haldusmenetluse seaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus 634 SE' <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/21f6df90-a333-413a-a533-ebbf7e9deebe/Haldusmenetluse%20seaduse%20muutmise%20ja%20sellega%20seonduvalt%20teiste%20seaduste%20muutmise%20seadus> accessed 26 March 2023.

17 See the 30 September 2022 order of the administrative chamber of the Supreme Court of Estonia in case 2-21-2395, the same chamber's 9 December 2022 order in case 3-22-348, and that chamber's order from 16 June 2021 in case 3-20-999, all explaining the use of public registries and the publication of administrative decisions, including the fundaments of access to information and access to justice.

18 Kätliin Lember, 'Tehisintellekti kasutamine haldusakti andmisel' [2019] Juridica 10 749.

19 Ivo Pilving, 'Krati komistuskivid ja riigivastutus automatiseeritud haldusmenetluses' [2022] Juridica 6 400.

20 See the European Parliament's report of 27 July 2017 with recommendations to the Commission on Civil Law Rules on Robotics (in the 2015/2103(INL) series).

21 European Commission for the Efficiency of Justice, 'CEPEJ European Ethical Charter on the Use of Artificial Intelligence (AI) in Judicial Systems and Their Environment', (4 December 2018) <https://www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment> accessed 26 March 2023.

examples to guide policymakers, legislators, and justice professionals in developing AI for national judicial processes.

However, the main principles to be followed in practice for deployment are still vague and ambiguous, starting with the definition of AI itself. There are many ways to define AI, and scientists' understandings of it vary and are constantly changing. One could jokingly define AI as 'something that computers are not able to do so far'.[*22] However, rapid progress in the development of large language models[*23] has led to concerns that all tasks consisting of writing structured text will be automated by computer systems. It has been said also that today's vague definitions of AI permit attaching that label to any computer-based decision-support system with analysis or models at its core.[*24] To address such challenges, the European Commission appointed a group of experts (High-Level Expert Group on Artificial Intelligence-the HLEG) to advise on its artificial-intelligence strategy.[*25] The HLEG has articulated its recommendations for EU ethics guidelines for trustworthy and human-centric AI (hereinafter 'the Guidelines') and also for AI-related regulation. Among its outputs are a definition of AI offered for use in EU legislation.[*26]

For the EU, the key principles linked to AI were emphasised already in 2018's strategic communication on artificial intelligence for Europe[*27], and the intended human-centric approach and ethics standards are detailed specifically in the AI ethics guidelines.[*28] The essence of the human-centricity objective here is for any use of AI systems to be in the service of humanity and the common good, with the goal of improving human welfare and freedom, but it also means that the human being enjoys a unique moral status of primacy in all aspects of the society. Every AI system should respect human autonomy, prevent harm to human beings, be fair, and be explicable.[*29] It was not long before these principles started becoming part of hard law. Soon, the proposal for a European Parliament Regulation instrument laying down harmonised rules on artificial intelligence and also amending certain legislative acts will bear fruit in the adoption of the EU's AI Act.[*30]

The Charter underscores five main principles to be followed in the use of AI in judicial systems. These are the principle of respect for fundamental rights; a principle of non-discrimination; enshrinement of the value of respect for quality and security; the principle of keeping the systems 'under user control'; and a principle of 'transparency, impartiality, and fairness', meaning that the data-processing methods must be made accessible and understandable. External audits of the development and deployment of an AI system covered by these principles are authorised under these principles.[*31]

According to the Guidelines, three criteria should be met throughout the AI system's life cycle:

(1) it should be lawful and in compliance with the legal framework established;
(2) it should be ethical, ensuring compliance with good ethics and solid fundamental values; and
(3) it should be robust from a technical and social perspective both; that is, the AI-based system should perform in a safe, secure, and reliable manner, and safeguards should be foreseen to prevent any unintended adverse impacts.

The Guidelines stipulate seven key requirements to be met throughout the development, deployment, and use of AI systems:

(1) human agency and oversight
(2) technical robustness and safety

22 Leonid Guggenberger, 'Einsatz künstlicher Intelligenz' [2019] Beck-Online, NVwZ 844.

23 OpenAI, 'GPT-4 Technical Report' (arXiv:2303.08774). – DOI: https://doi.org/10.48550/arXiv.2303.08774.

24 Maximillian Herberger, 'Künstliche Intelligenz und Recht' [2018] Beck-Online, NJW 2825.

25 'EU Digital Strategy' <https://digital-strategy.ec.europa.eu/en/policies/expert-group-ai> accessed 26 March 2023.

26 The definition of AI, prepared in connection with the Ethics Guidelines for Trustworthy AI, is linked to via <https://ec.europa.eu/futurium/en/ai-alliance-consultation.1.html> accessed 22 June 2023. See also <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60659> accessed 30 March 2023.

27 Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions: 'Artificial Intelligence for Europe' COM (2018) 237 final, of 25 April 2018.

28 'Ethics Guidelines for Trustworthy AI', linked to via <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> accessed 26 March 2023.

29 Guidelines (n 24) 10.

30 'Proposal for a Regulation of the European Parliament and of the Council on Laying Down Harmonised Rules on Artificial Intelligence and Amending Certain Union Legislative Acts' COM (2021) 206 final, of 21 April 2021.

31 Ethical Charter (n 20) 12.

(3) privacy and appropriate data governance
(4) transparency
(5) diversity, non-discrimination, and fairness
(6) environmental and societal well-being
(7) accountability

In light of the subject matter of this article, transparency, fairness, and non-discrimination conditions and meeting the accountability criterion are the most relevant of the requirements. These are also requirements or principles for a fair trial according to the ECHR's Article 6[*32]. Although the Guidelines provide definitions for these requirements, those definitions' origins lie in the Charter and ECHR[*33]. From the perspective of the Guidelines, fairness has a substantive and a procedural dimension – meaning, on one hand, equal and just distribution of benefits and costs alike and, on the other, ensuring non-discrimination and avoiding stigmatisation[*34] In its Article 2, the Guidelines document cites fundamental rights as the very basis for trustworthy AI. As all governmental power should be legally authorised and limited by law, any AI systems acting as part of the governmental or judicial power must, in their turn, respect justice and the rule of law, and they must be constructed so as to maintain and foster democratic processes[*35]. Therefore, AI systems used in the judiciary must incorporate an inherent commitment to guaranteeing compliance with both the principle of the rule of law and mandatory legal provisions, so as to ensure due process and equality before the law.

The Guidelines define following the principle of explicability as an element crucial for accountability whereby trust in AI systems can be validly maintained. For this, the development and the deployment of (especially high-risk) AI need to be transparent, the capabilities and purpose of any AI system must be openly communicated, and decisions – to the greatest extent possible – should be explainable to anyone directly or indirectly affected.

While explainability is a key property sought from the decisions made by ethical AI systems, the high speed of technology development means that the prerequisite competencies are not widely available. This challenge deserves further attention.

The requirement of accountability complements all of the other requirements, and the principle of accountability has to be honoured throughout the life cycle of the relevant AI systems. Therefore, in the scheme foreseen per the AI Act proposal, these systems must be audited regularly and independently, negative impacts should be reported and assessed methodically, in a principled manner, and adequate remedies should be applied in response to any of the latter identified.

With more specific regard to the fundamental-rights issue, the explanatory memorandum on the proposal for that act emphasises it directly. Article 3.5 presents justification for restrictions on the freedom to conduct business and the freedom of art and science to safeguard public interests such as the protection of other fundamental rights in situations wherein high-risk AI technology is developed and used.

Employing a risk-based approach, the proposal articulates classification of the risk level on the basis of the function performed by the AI system and the specific purpose for which that system is used. According to Recital 32 and Article 54 of the proposal, AI systems used in the judiciary are to be regarded as high-risk AI systems.[*36]

In 2020, the European Commission for the Efficiency of Justice (CEPEJ) published a feasibility study for the possible introduction of a mechanism for certifying artificial-intelligence tools and services in the sphere of justice and the judiciary.[*37] The study report emphasises that it is necessary to create a mandatory certification system for all AI systems developed and deployed in a justice system, with certification maintained over the entire life cycle of the AI system by approved bodies. Such certification enables verifying the continuous compliance of AI systems in the judicial sphere, and it is strongly recommended to automate compliance-monitoring, to make it systematic and more consistent.

32 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950).

33 Guidelines (n 24) 21.

34 Guidelines (n 24) 12.

35 This principle is stipulated also in art 3 of the Estonian Constitution.

36 The text of the article was subject to change several times during the negotiations.

37 European Commission for the Efficiency of Justice, 'Possible Introduction of a Mechanism for Certifying Artificial Intelligence Tools and Services in the Sphere of Justice and the Judiciary, Feasibility Study' CEPEJ (2020) 15Rev <https://rm.coe.int/feasability-study-en-cepej-2020-15/1680a0adf4> accessed 22 June 2023.

As AI systems operate automatically, the rules laid down in Article 22 of the General Data Protection Regulation (GDPR) are similarly relevant.[*38] Estonia's Advocate General Priit Pikamäe explicitly stated in his opinion in the *Schufa Holding AG* case (C-634/21) that the term 'decision' for purposes of that article's first paragraph must be interpreted in a broad sense. Any person subject to an automated decision should be given all relevant information on the requirements and criteria applied by the automatic system(s), and the method followed in the automated work should be explained.[*39]

3. Due process and the standard of the fair trial

Common agreement as to what constitutes a judicial process or due process in Europe is stipulated in the European Convention on Human Rights, or ECHR ('the Convention').[*40] Also, the denominators and values connected with due process are set out in Article 2 of the Treaty on European Union[*41] and the EU Charter of Fundamental Rights.[*42] The principles are interpreted by the case law of the European Court of Human Rights (ECtHR), but it has not yet dealt with the question of AI in judicial context. For guidance, we can look also to Article 24 of the Estonian Constitution[*43], where the right to a fair trial is enshrined.

The minimum standard for following due process, also termed the principle of a fair trial, is stipulated in paragraph 1 of Article 6 of the Convention: in the determination of one's civil rights and obligations or of any criminal charge against a person, everyone is entitled to a fair and public hearing before an independent and impartial tribunal established by law, held within reasonable time. Judgement shall be pronounced publicly but the press and public may be excluded from either the entire trial or a portion of it in the interests of morals, public order, or national security, when the interests of juveniles or the protection of the private life of the parties so requires.

Several judgements of the ECtHR serve to explain the principle of a fair trial in detail. For example, in *Pönka v. Estonia*[*44] and in *Sakhnovskiy v Russia*[*45], the court stated that, while being heard in person is part of due process, participation via videoconference is not a violation of Article 6 of the Convention. The rulings also underscored that a court has discretion to solve the case by means of written procedure if the procedural rules allow it discretion with regard to this matter. One may conclude, then, that participating in the trial in real time and the right to be heard in real time by the judge is evidently an important part of the fairness required of judicial proceedings.

The ECJ, in turn, ruled in cases C-7/21 and C-21/17 that the right to be served (properly) is an element of the right to a defence and stated that the court, in the process of recognition of judgements, has an *ex officio* duty to assure that right. Integral to the right to a defence is the possibility of understanding the procedure.[*46]

The Constitutional Review Chamber of the Supreme Court of Estonia has ruled that access to justice, including participation in the hearing, may depend on the technological avenues offered by the court.[*47] Hence, national jurisprudence has held technology to be a part of the judicial proceedings and, therefore, encompassed by the principle of a fair trial.

One may conclude that the right to be heard and to a defence starts with proper service of the claim and entails active, preferably oral participation – which may be remote – in the court hearing.

38 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.

39 Opinion of Pikamäe (n 5) [38–40] and [57–58].

40 Convention for the Protection of Human Rights (n 31).

41 Consolidated Version of the Treaty on European Union [2012] OJ C326 [13–390].

42 Charter of Fundamental Rights of the European Union [2012] OJ C326 [391–407].

43 See the Constitution of the Republic of Estonia: RT 1992, 26, 349.

44 *Pönkä v Estonia* (ECtHR judgement in case 64160/11, 8 November 2016).

45 *Sakhnovskiy v Russia* (ECtHR judgement in case 21272/03, 2 November 2010).

46 *LKW WALTER Internationale Transportorganisation AG v CB and Others* (ECJ judgement of 7 July 2022, in C-7-21) 527, [36 and 42]; *Catlin Europe* (ECJ judgement of 6 September 2018 in C-21/17) 675 [33].

47 In the judgement of the constitutional review chamber of the Estonian Supreme Court in case 3-4-1-31-15 (10 May 2016) and in case 3-3-1-35-15 (12 April 2016).

4. The legal framework for the recognition of foreign judgements

4.1. Pre-conditions for recognition under EU law

At the EU level, recognition of judgements is mostly harmonised*[48]. As all legislation regulating the recognition of judicial decisions in the EU shares similar procedure for that recognition, this article focuses on the regulation specific to recognising foreign judgements on civil and commercial matters (per the Brussels I Regulation*[49]).

Predominantly, judgements of third jurisdictions are recognised under the Hague Convention on the Recognition of and Enforcement of Foreign Judgments in Civil and Commercial Matters.*[50] In addition to this, there is a new, advanced version of the convention on recognition of judgements, which has not yet entered force.*[51] Another relevant mechanism is the recognition of arbitration judgements within the scope of the New York Convention.*[52]

Regulations give a broad interpretation to decisions that fall within their jurisdiction. Relevant ECJ case law explains this interpretation in detail. The ECJ ruled in case C-46/20 that a divorce decree drawn up by the civil registrar that contains a divorce agreement constitutes a judgement within the meaning of the Brussels IIa Regulation.*[53] The term also covers a court order or a decision of an administrative body acting as a judicial body.*[54] Similarly, an act of a public notary may be deemed a judgement, as the regulation on succession certificates stipulates*[55]. Recital 20 of the succession-certificate regulation states directly that the term 'court' must be interpreted as having a broad meaning.

The recognition procedure as dealt with by the various regulations and conventions differs in its details, but the procedure itself at this level has no significant meaning for purposes of this article, so description at that level of detail is not offered here. What is important is that the recognition of a foreign judgement is a formal procedure guided by the principle of mutual trust in judicial decision-making. The set of circumstances deemed to justify refusal to recognise a judgement made in another state is highly restricted. This set consists primarily of cases wherein a judgement is issued in serious breach of defendants' rights or it runs counter to public order. As an open legal concept, *ordre public* is always subject to interpretation by the courts.

Brussels I (recast) set the requirements for any refusal to recognise a judgement. According to Article 45's paragraph 1, upon application by any interested party, the recognition of a judgement shall be refused:

(a) if such recognition is manifestly contrary to public policy (or ordre public) in the Member State addressed or
(b) where the judgement was given in default of appearance, if the defendant was not served with the document by which the proceedings were initiated or with an equivalent document in sufficient time and in such a way as to enable the defendant to arrange a defence, unless the defendant failed to commence proceedings to challenge the judgement when it was possible for said party to do so. The latter constitutes the minimum standard for due process as stipulated in the Convention's Article 6 (1).

48 Among other relevant acts are those regulating payment orders and small-claims procedure.

49 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 [2012] OJ L351:TOC [1–33].

50 The Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

51 The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the HCCH 2019 Judgments Convention).

52 The United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

53 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* (ECJ judgement in C-29/76, 14 October 1976) 137.

54 Recitals 11 and 12 of the Brussels I Regulation.

55 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 L 201, 27.7.2012, [107–134].

Recital 29 of the Brussels I regulation, articulating the right to due process and a fair trial, emphasises that the declaration of enforceability should not jeopardise respect for the rights connected with one's defence. The above-mentioned enforceability grounds related to one's right to a defence should consider whether the defendant had an opportunity to arrange a defence, whether the claim was duly served, and whether the judgement was made by default.

Recital 28 of the Brussels I regulation gives guidance on how to interpret *ordre public*. Where a judgement articulates a measure or order not known in the law of the Member State addressed, that measure or order should be adjusted to one of equivalent effect. How and by whom the adaptation is to be carried out should be determined by each Member State. In Estonia, the relevant body is the court – the court should investigate the measure at issue that is laid down in the judgement.

The ECJ has ruled that the concept of public order, stipulated as it is by EU legislation, must be interpreted by the ECJ even if the court of the Member State in question is free to determine its content.[*56] The recognition of judgements relies on mutual trust and on uniform interpretation of fundamental rights in EU law; therefore, it hinges on the common understanding of *order public*.[*57] The court also has clarified the notion of a breach of public order and has specified the corresponding requirements. In the *Renault SA v. Maxicar SpA* case, the court referred to an action constituting 'manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of the right recognized as being fundamental within that legal order'.[*58]

4.2. The Estonian setting

A document is a judgement if, pursuant to Article 2 (a) of the Brussels I regulation, it is a judicial document that solves the case itself. Hence, an automatically generated payment order is a final decision and may be enforced according to Estonia's Code of Enforcement Procedure, Article 2 (para 1, §1).[*59] It is an outcome of a judicial procedure. In the recognition procedure, the status of the document (i.e., whether it constitutes a judgement) is proved by the certificate issued in accordance with Article 53 of the Brussels I regulation stating the legal status of the document and presenting a declaration of due process.

In Estonia, the recognition process is conducted in the action-by-petition procedure and the court has *ex officio* investigative duties to ascertain the facts and compile the evidence, inclusive of the relevant legislation of the foreign country. Among these duties is that of establishing the fact of whether the judgement was issued with the aid of AI and, if it was, to what extent. One implication that should follow is the duty of the court to find out the law of the foreign country, which in Estonia is a question of fact to be proved by a party, according to Section 293(1) of the Civil Procedure Act (CPA)[*60]. Per the CPA's Section 438(1) and Section 442(8) and also the Private International Law Act[*61]'s Section 2(1), the implementation of domestic law and the determination and implementation of the applicable foreign substantive law is fundamentally a duty of the courts. At the same time, the Private International Law Act's Section 4 divides the burden of determining foreign law between the court and the parties (as does the CPA's §234). The parties have the right to submit evidence pertaining to the content of foreign law, and the court has a corresponding right to require the parties to submit relevant evidence.

Whomever this duty falls to, the private international law instruments remain the same. For third countries, the governing instrument is the 1970 Hague Convention.[*62] For the EU, it is the Regulation instrument on collection of evidence.[*63] The Hague Convention may be implemented broadly, and it affords the collection of evidence in arbitration, in addition to court settings.[*64]

56 *Dieter Krombach v André Bamberski* (ECJ judgement in C-7/98, 28 March 2000) 164.

57 *Diageo BV v Simiramida-04 EOOD* (ECJ judgement in C-681/13, 16 July 2015) 471.

58 *Renault SA v Maxicar SpA and Orazio Formento* (ECJ judgement in C-38/98, 11 May 2000) 225.

59 Code of Enforcement Procedure: RT I 2005, 27, 198.

60 Civil Procedure Act: RT I 2005, 26, 197.

61 Private International Law Act: RT I 2002, 35, 217.

62 Convention on the Collection of Evidence in Civil and Commercial Matters, Estonian version: RT II 1996, 1, 2.

63 Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ I174 [1–24].

64 OL Knöfel, 'Judicial Assistance in Taking of Evidence Abroad in Aid of Arbitration: A German Perspective' (2009) Journal of Private International Law 5(2) 281. – DOI: https://doi.org/10.1080/17536235.2009.11424360.

In a nutshell, the court has three opportunities to collect information. The parties may collect and submit evidence, the court may request it from the counterparties of the Member State in question (the central authority or relevant court in the other Member State), or the court may choose to collect the evidence itself. The Supreme Court of Estonia has ruled that it may be the court's duty to determine the relevance of the foreign law[*65] in cases wherein the legislation in question can be found. Maarja Torga has concluded that, while a judge has no obligation to know the law of a foreign state, the ability to find relevant legislation may be a valuable judicial skill, especially where there exists an *ex-officio* duty to do so.[*66] For German courts, domestic commentaries recommend resorting to this approach for discovering the potentially important legislation of a foreign country only when that legislation is written in German as the language of record.[*67]

In conclusion, it would be difficult for the court or parties to understand the essence of the foreign law, as opposed to merely identifying said law. The most suitable method for collecting evidence about the use of AI in the process of issuing a judgement is most likely through the central judicial authority. As is elaborated upon below, this information is seldom readily available in clear form from publicly accessible sources.

5. International developments of AI in the sphere of the judiciary

5.1. The Chinese example

To illustrate possible future developments in how AI systems could operate in the world's various court systems and be involved in litigation, one could look closely at China, which has made extensive efforts to apply AI solutions in courts that cover vast populations. Chinese judgements may be all the more important in that China looms large in other respects too – the judgements might be subject to recognition in Estonia, especially with China being one of the biggest trade partners to the European Union (according to Eurostat[*68]).

China's State Council published the Artificial Intelligence Development Plan, a national strategy white paper, in 2017.[*69] It proposed a technology-driven judicial reform to fortify the position of the courts and reduce human error in judicial decisions.[*70] Under its 'smart courts' strategy, China has already developed its first robot judges, called Xiaozhi. They appear able to adjudicate some civil cases efficiently – for example, cases involving consumer credit or private loan agreements.[*71] Although 'Xiaozhi' is defined as an AI-based legal assistant for the judge and it is operated by the judge, AI determines the cause in the process. The AI lists questions of factual circumstances to be clarified, forms a chain of evidence, and reconstructs a timeline of the entire loan process. The Xiaozhi began with skills in automated review of particular facts, automatic scheduling of a hearing, voice recognition and transcription of the minutes of the hearing, identification of evidence, and analysis; then, in 2019, the assistants mastered new skills, such as generating the chain of evidence, asking factual questions (related to facts not in evidence), and formulating

65 Judgement of the Tallinn Circuit Court of 27 December 2012 in case 2-10-31402.

66 M Torga, 'Eesti kohtute, notarite ning haldusorganite võimalused teha kindaks välisriigi õiguse sisu', [2020] Juridica 1 25.

67 See K Bacher in V Vorwek and C Wolf (eds), *Beck'scher Online-Kommentar ZPO* (34th edn, CH Beck 2019) s 293, 11–28.

68 Statistics are available at <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china_en> accessed 22 June 2023.

69 G Webster, R Creemers, and P Triolo, 'Full Translation: China's "New Generation Artificial Intelligence Development Plan" (2017) <https://www.newamerica.org/cybersecurityinitiative/digichina/blog/full-translation-chinas-new-generationartificial-intelligence-development-plan-2017/> accessed 23 March 2023. See also Jeffrey Ding, 'Deciphering China's AI Dream: The Context, Components, Capabilities, and Consequences of China's Strategy to Lead the World in AI' (Oxford University, March 2018) <www.fhi.ox.ac.uk/wp-content/uploads/Deciphering_Chinas_AI-Dream.pdf> accessed 22 June 2023..

70 Nyu Wang, '"Intelligent Justice": Human-Centered Considerations in China's Legal AI Transformation; AI and Ethics'. – DOI: https://doi.org/10.1007/s43681-022-00202-3.

71 N Wang and MY Tian, "Intelligent Justice": AI Implementations in China's Legal Systems' in A Hanemaayer (ed), *Artificial Intelligence and Its Discontents: Social and Cultural Studies of Robots and AI* (Cham, Palgrave Macmillan 2022). – DOI: https://doi.org/10.1007/978-3-030-88615-8_10.

the judgement.[*72] Characterisations of this system give the impression that a judge has little manoeuvring room to change the list of questions the AI assistant uses.

Alongside Xiaozhi, several other AI solutions operate in Chinese courts, where they have been widely adopted to make the Chinese judicial system more efficient, with a stated aim of better serving the public. At the same time, sources point out that China's public security agencies use AI for locating lawbreakers and for more precise governance of social services in various milieux – which extends even to social scoring.[*73] Moral governance is an explicit goal of Chinese state strategy, pursued by introducing a minimal moral standard and enhancing the 'moral integrity' of citizens. In such a context, giving citizens marks for good or bad behaviour is a valid tool[*74] One element of behaviour taken into account in this broader framework is a person's credit rating and activities as a bad debtor[*75]; citizens' actions in the court system presumably form another component to the social scoring, yet data on this part of the picture are not freely available.

None of the descriptions I could find, even for Xiaozhi alone, specify either the merit scheme or the nature of the data used for training the system. Moreover, there are indications that the AI systems form a part of the Judicial Accountability Reform, which was triggered because the judges make their judgements independently and decisions of judges are not directly supervised.[*76] Although the clear conflict with judicial independence that this situation spotlights is not the subject of this article, one may conclude that transparency is not clearly ensured in Chinese courts' application of AI. The issue is an important one, both for individual jurisdictions and for the interfaces between them.

5.2. Other examples of online dispute-resolutions systems

Online dispute-resolution (ODR) systems seem to be the most popular AI systems utilised in many states to settle disputes. Although what they produce may be enforceable settlements, it must be stressed that all of the ODR systems described here are provided by the state court system for voluntary use. Since the result of ODR may be a legally binding decision with cross-border enforceability, considerations related to recognition of judicial decisions prove relevant here.

In February 2019, British Columbia and the Ontario Superior Court of Justice launched a pilot project[*77] to use Digital Hearing Workspace as an online case-management platform whereby parties in civil cases can submit electronic materials for a hearing. Likewise, it provides authorised parties with access to event-related documents.[*78] Another prominent tool is Smartsettle ONE, a privately developed online negotiation application that courts are piloting as a voluntary settlement tool.[*79] Its Web site introduces the tool as an 'elegant and intelligent app with five sophisticated algorithms' but fails to describe or even identify those algorithms. While it offers an opportunity to try the system and test oneself against the robot, it gives no information on the training data, statement about legal criteria, or relevant information about the process.

A final system worthy of note is the ODR tool Rechtwijzer, introduced back in 2015 to help settle divorce cases in the Netherlands. Its method stands in contrast against the opacity noted above: a report on its experimental use explains the workings of the system. The tool asks the parties questions, and it provides settlement options on the basis of their input and the information given by the parties earlier. There is no

72 Gao Yuanxuan 高媛萱, Fa Xia 夏法, and Jingyi Luo 骆静怡, 'AI Faguan zhuli Xiaozhi zaici xianshen tingshen xianchang, ta you zhangwo le sixiang xinjineng' AI 法官助理小智再次现身庭审现场, 它又掌握了四项新技能 ['AI Judge Assistant Xiaozhi Appeared at the Court Hearing Again and It Has Mastered Four New Skills'] (25 December 2019) <https://hznews.hangzhou.com.cn/chengshi/content/2019-12/25/content_7648278.htm> accessed 26 March 2023.

73 Huw Roberts and others, 'The Chinese Approach to Artificial Intelligence: An Analysis of Policy, Ethics, and Regulation' (2020) AI & Society 36(1) 59. – DOI: https://doi.org/10.1007/s00146-020-00992-2.

74 Roberts (n 71) s 3.4.

75 L Hornby, 'Chinese App Names and Shames Bad Debtors' (Financial Times, 2019) <https://www.ft.com/content/2ad7feea-278e-11e9-a5ab-ff8ef2b976c7> accessed 26 March 2023.

76 Yu M and Du G, 'Why Are Chinese Courts Turning to AI?' (The Diplomat, 2019) <https://thediplomat.com/2019/01/why-are-chinese-courts-turning-to-ai/> accessed 26 March 2023.

77 Tara Vasdani, 'From Estonian AI Judges to Robot Mediators in Canada, U.K.' <https://www.lexisnexis.ca/en-ca/ihc/2019-06/from-estonian-ai-judges-to-robot-mediators-in-canada-uk.page> accessed 25 March 2023.

78 'Digital Hearing Workspace' <https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/digital-hearing-workspace/> accessed 23 March 2023.

79 'Smartsettle ONE' <https://www.smartsettle.com/smartsettle-one> accessed 25 March 2023.

need for legal representation, but the systems give additional information on the opportunities to seek legal advice or mediation.[*80]

One may conclude that information about the use and the functionality of the AI is more readily available in the case of ODR, but specifics still are lacking. Details on the training data and the legal norms used – details essential for assessing conformity with ethics guidelines – are missing.

5.3. The Estonian e-filing system and AI-based tools

In Estonia, the judiciary is using two AI tools to support the everyday work of the courts, but neither of them makes judicial decisions. Both tools are part of the e-filing system and the Court Information System (KIS). The function, legal basis, and operation of the KIS, which functions also as a database, are stipulated in the statute on creating this registry.[*81] The legal foundations for the e-filing system are described in the government regulation on establishment of the e-filing system and the statute on maintaining said system.[*82] The CPA also refers to e-filing, in Article 60[1]; therefore, the e-filing system as a whole and all its functions have to be in accordance with the legal requirements stipulated in the CPA. Since the tools are not part of the judicial decision-making itself, they have no effect on the recognition of Estonian judgements across borders. Nonetheless, there is a transparency requirement – again, one demonstrably not fulfilled. Understanding might require at least good knowledge of the Estonian language and some sense of Estonian state administration.

5.3.1. Salme

Speech-recognition software Salme, based on natural-language technology, helps to record court hearings and, simultaneously with the audio recording of the session, create a transcrip of the session. Little technical information is available about Salme beyond the documentation provided in connection with its procurement process.[*83] The tender was for creating peech-recognition software, interfacing with the KIS, and supplying an online service for the processing of transcripts. What information is available comes from the news of the launch of Salme's version 3.0, on the relevant e-Estonia Web page[*84], and from the procurement registry, where the original documentation, specification of the task subject to tender, and the stated purpose behind the Salme system are archived.[*85]

5.3.2. Krat

Another AI tool used by Estonia's judiciary is the anonymisation software Krat, which removes participants' personal data from court judgements. Once again, very little information is publicly available, and again the best path to some understanding of the tool's nature is to search the public procurement registry.[*86] Procurement documentation describes the project as development of a user interface for scrubbing personal data from court decisions such that they can be safely disclosed.

A master's thesis by Silver Kullamaa examines the technical aspects and functionality of the system, with Kullamaa reaching the conclusion that there is a risk of breach of privacy because the anonymisation process

80 Esmée A Bickel and others, 'Online Legal Advice and Conflict Support: A Dutch Experience' (report of the University of Twente, March 2015).

81 The KIS is a case-management system used in the first- and second-instant courts as a back-end element of the e-filing system.

82 The government regulation of 3 July 2008 (11) on establishment of the e-filing system and the statute for maintaining the e-filing system: RT I 2008, 31, 197.

83 There was no information about Salme on the court's Web site <www.kohus.ee> or in the electronic file at <https://etoimik.rik.ee/> as of 26 March 2023.

84 E-Estonia, 'Introducing Salme, Estonian Courts' Speech Recognition Assistant' (26 January 2022) <https://e-estonia.com/introducing-salme-estonian-courts-speech-recognition-assistant/> accessed 26 March 2023.

85 Procurement details available at <https://riigihanked.riik.ee/rhr-web/#/procurement/1575598/general-info> accessed 26 March 2023.

86 Procurement details were available at <https://hanked.ee/hange/kohtulahendite-isikuandmetest-puhastamise-ja-avalikustamise-kis-kasutajaliidese-arendused-652327> accessed 26 March 2023.

is not linked to the functions of the e-filing system.[*87] In both cases, the procurement documentation describes the functionality of the outcome but does not mention any legal framework, ethics factors, or fundamental-rights issues related to or to be addressed via the development of the system. No applicability issues, auditing possibilities, or other relevant requirements for monitoring system deployment are mentioned.

This state of affairs is in conflict with the principles set down in the Charter a year prior to the procurement. It is also not in line with the recommendations of the HLEG released two years before that procurement. It is worth mentioning that, according to Article 9 of the Ministry of Justice statute, data-protection issues and the participation in the CEPEJ work fall under the purview of the Ministry of Justice, as the administrative arm of the courts.[*88]

5.3.3. Payment orders for small claims

Finally, Estonia has also developed a semi-automated process for small claims and maintenance decisions whereby computer-generated payment orders are issued. These are considered to be judgement for purposes of enforcement.

This payment-order process for small claims is a semi-automated civil proceeding in Estonian courts. It employs algorithms, yet there is human oversight of some functionality, related to such matters as jurisdiction and service of documents. While the description of the process on the official Web site of the courts does not state directly that the process is semi-automated, one can deduce this via an educated guess upon reading the description.[*89]

6. Conclusion

Within the legal framework that exists now and that for the near future, any AI used in the judiciary is considered high-risk and therefore must be accountable, transparent, and explainable. However, from examining the publicly available information on AI systems operating in courts of various states against the EU principles for appropriate use of AI, a lack of transparency becomes evident. In the examples cited here, even the fact that a court is using an AI solution at all to assist with the judicial proceedings is not expressly stated on the official Web site. When some information can be found by means of search engines, from academic research, or via media publications, one still only gets a general idea that AI-based systems exist in these contexts, not a sense of what they do.

Furthermore, substantive considerations for the development of the pertinent instruments are not properly described, if mentioned publicly at all. Relevant public information is available only in individual countries' languages (Chinese, Estonian, etc.) and mostly with journalistic tones. The mechanism of action is vaguely described in some cases – e.g., those of the Canadian ODR or small-claims processing in Estonia. Examples offered in this article are of systems or tools that are currently used in judicial applications from various countries. One inevitably concludes that none of the AI tools identified in this article honour the principles of transparency and accountability. Meeting transparency and fairness requirements necessitates official information published by public authorities. As for the nature of the details, the barest minimum should be explicit indications at government level (on the official Web site of the courts, for example) that automated procedures or AI systems are used in the judicial process to assist a judge or to help a court with its functions. For greater clarity, there should be information on the training data used for the AI system and on the basic criteria applied.

If an AI system operating in the judiciary does not fulfil the requirements for trustworthy AI as established in the given country's legislative/legal framework or its ethics principles, a judge in the course of deciding over recognition of a judgement possibly made by or with the assistance of such an AI system may consider the judgement either to be contrary to *ordre public* or to be at least not in the line with the principle of a fair trial. Such considerations may, in their turn, constitute grounds for refusal to recognise the judgement across borders.

87 Silver Kullamaa, 'Business and System Analysis for the Process of Disclosure of Court Decisions' (master's thesis for Tallinn Technical University, 2021).

88 Government regulation of 23 December 1996 (319) on the statute of the Ministry of Justice: RT I 1997, 1, 7.

89 See the introduction to payment-order proceedings provided in 'Maksekäsu kiirmenetlus' <https://www.kohus.ee/kohtusse-poordujale/tsiviilkohtumenetlus/maksekasu-kiirmenetlus> accessed 26 March 2023.

https://doi.org/10.12697/JI.2023.32.10

Eneli Laurits

District prosecutor[*1]
Visiting lecturer, IT law, University of Tartu
Doctoral student, University of Tartu

Protection of the Right to Privacy in States' Unilateral Access to Extraterritorially Located Data in Criminal Investigations

Abstract. The process of striving to enhance law enforcement's access to digital data held extraterritorially while finding the right balance in fundamental-rights protection began with establishing the Convention on Cybercrime. Evolving risks of evidence being lost, intimately connected with the urgency of collecting digital data, impose a constant need for new, more efficient models for data acquisition and access. The article examines the set of mechanisms connected with states gaining access unilaterally (without needing foreign states' assistance) to extraterritorially located data from the perspective of protecting suspects' privacy and family-life rights. In light of the fact that one virtually steps onto foreign ground to gain such access, most states have refrained from regulating it domestically and have officially addressed the issue by means of international co-operation instruments created for situations significantly different from this, yet investigators in circumstances such as a domestic criminal investigation wherein the only connection to the other state lies in an e-mail message sent via a foreign service provider ought to avoid resorting to extremely burdensome mutual legal-assistance instruments. At the same time, sufficient domestic guarantees of fundamental-rights protection should be in place.

The author proposes a model for unilaterally accessing extraterritorial data that considers the rights of individuals involved in criminal procedure and, alongside these, state interests in unilaterally accessing and receiving extraterritorially held data.

Keywords: fundamental rights, right to private life, extraterritorial data access, criminal investigation

[1] The author presents her personal views, which do not reflect the official position of the Prosecutor's Office.

Introduction

As of January 2023, there were more than five billion Internet users, accounting for 64.4% of the globe's population. Of this total, 4.76 billion, or 59.4% of the world's population, engaged in social-media use.[*2] The recent unprecedented speed of growth in digital technology and the convergence of computing and communication devices have together come to dictate how we socialise and do business – and how crimes are committed. Today, it is impossible to imagine a world without the Internet.

The endeavour to enhance law enforcement's access to digital data held extraterritorially in a manner that strikes the right balance in fundamental rights' protection is a process that started with establishment of the Budapest Convention on Cybercrime. The latest efforts are the Second Additional Protocol to the Convention on Cybercrime, for enhanced co-operation and disclosure of electronic evidence[*3], and continuing discussion of the European Union 'e-evidence proposal'[*4]. The urgency of collecting digital data is always connected to the risk of evidence being lost, hence the constant need for more efficient data acquisition and new access models. However, bumping up against territoriality, matters of virtual territoriality specifically, has created issues that challenge traditional thinking.

Consensus seems to have been reached that traditional mutual legal assistance (MLA) is ineffective in cases of requesting volatile digital information[*5]. States have therefore turned to informal co-operation mechanisms and started asking for data directly from service providers. Since these providers respond on a voluntary basis and in line with their own conditions, thereby producing a fragmented landscape and unpredictable, perhaps unsatisfactory outcomes for law enforcement, international co-operation instruments designed to render mutual help more effective, such as the European Investigation Order (hereinafter 'EIO'), have been introduced. Nonetheless, several countries have responded to these developments by beginning to explore another question: under what conditions may authorities request access to data by applying their domestic tools and thus circumvent burdensome international co-operation mechanisms. In the case *United States v. Microsoft Corp.*, the US court system had to consider the circumstances in which law-enforcement agents in the United States may obtain digital information from abroad. The Microsoft Ireland dispute in question ended at Supreme Court level. On 30 March 2018, the US Department of Justice moved to drop the lawsuit, with Microsoft filing its agreement with that motion. The Supreme Court then dropped the case. At that point, the government and Microsoft maintained that the newly passed CLOUD Act had rendered the lawsuit meaningless in that the law had created clear new procedures for obtaining legal orders for data in cross-border situations of the relevant nature.

After the US legislature passed the CLOUD Act into law and the European Commission began discussing the e-evidence proposal, a new instrument arose in their wake: state-to-ISP co-operation. This mechanism is meant to enhance the effectiveness of accessing digital data held outside the requesting state. Even though states recognise that obtaining data from foreign servers is a breach of sovereignty[*6], there are ongoing efforts to establish more efficient structures for mutual legal co-operation, with new forms of co-operation being formulated accordingly, states still seek legal opportunities to access extraterritorial data unilaterally. This phenomenon is especially prominent in 'dark Web'[*7] investigations; since it is possible to claim a 'loss

2 Statista. 'Worldwide Digital Population 2023', available via < https://www.statista.com/statistics/617136/digital-population-worldwide/ accessed 14 April 2023)

3 Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence (CETS No 224), https://www.coe.int/en/web/cybercrime/second-additional-protocol accessed 14 July 2023)

4 In April 2018, the European Commission proposed new rules aimed at enabling police and judicial authorities to obtain electronic evidence more quickly and more easily. They were included in the "Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters" and the accompanying "Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings. COM (2018) 225 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A225%3AFIN and COM (2018) 226 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A226%3AFIN both accessed 14 April 2023) In November 2022, the Commission announced that a political agreement had been reached between the European Parliament and the Council h(see <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_72466 accessed 14 April 2023).

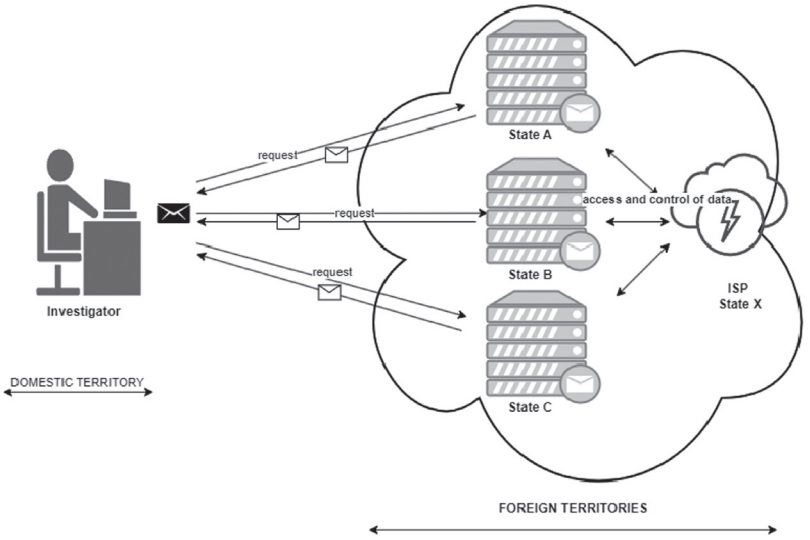
5 Council of Europe Cybercrime Convention Committee, (T-CY) assessment report: The Mutual Legal Assistance Provisions of the Budapest Convention on Cybercrime, p 23.< https://rm.coe.int/16802e726cc accessed 14 April 2023)

6 B.Koops and M.Goodwin. 'Cyberspace, the Cloud, and cross-border criminal investigation. The limits and possibilities of international law' [2016] (5) Tilburg Law School Research Papers Tilburg Institute for Law, Technology, and Society Center for Transboundary Legal Development, 9. – DOI: https://doi.org/10.2139/ssrn.2698263.

7 The dark web, also referred to as the darknet, is an encrypted-content portion of the internet that is not indexed by search engines and requires a special anonymity-oriented browser, such as the Tor browser or the Invisible Internet Project (I2P)

of location'*[8] here, the foreign-territory issue never arises. However, if matters of international law such as sovereignty are left aside and one addresses this issue from the perspective of a suspect, the question of protection of fundamental rights, especially the right to protection of one's private life, arises.

This article focuses on examining states' unilateral access (i.e., access not depending on help from a foreign state) to extraterritorially located data via the lens of protecting suspects' right to their private and family life. The discussion here examines whether there is any significant difference in the protection and guarantees of suspects' rights if a state unilaterally accesses and copies data material that resides outside its physical territory as opposed to requesting it from the other state. The question is situated within the context of recent trends toward international collaboration in digital collection of information. This paper positions it alongside analysis of protection of suspects' right to a private life.



The figure above illustrates the situation of unilateral extraterritorial access to data held in different jurisdictions. The https request sent by the investigator takes less than a second, and the response (marked with an envelope symbol) consumes just as little time. This is the connection to foreign territories. Tackling the attendant issues in terms of granting sufficient guarantees for fundamental-rights protection allows us to argue that unilateral access to data is not entirely a question of intra-state regulations and entails certain international obligations. Still, those obligations must not influence adherence to protecting the fundamental rights of subjects in criminal-law procedure. For the analysis below, traditional legal methods such as analytical comparison are applied.

I present a model for unilaterally accessing extraterritorial data in cases of so-called domestic investigations wherein the data are accessible and there is no need to request help of any kind. This approach permits me to argue that there may be identifiable cases in which the connection to the other state is so insignificant that it would be safe to assume there to be no interest of the other state in assessing the virtual actions taken on its territory (namely, performed on the server located there). The proposed model considers suspects' rights in criminal proceedings and other states' interests in unilaterally accessing and receiving extraterritorial data. Therefore, all those cases wherein there is an obvious significant interest of the other state lie beyond the scope of this article.*[9] Neither does the paper discuss issues that, in theory,

layer to access. This type of web browser keeps a user's identity hidden by routing the requests through a series of proxy servers that renders the originating IP address untraceable.

8 Loss of location is a situation in which law enforcement may no longer ascertain the physical location of the perpetrator, criminal infrastructure, or electronic evidence. Data may be mirrored across several servers or move between jurisdictions.

9 One well-known example of remotely accessing servers in foreign soil is the case of Vasily Gorshkov and Alexey Ivanov; ('Russian Computer Hacker Convicted by Jury' (2001) <https://www.justice.gov/archive/criminal/cybercrime/press-releases/2001/gorshkovconvict.htm> accessed 11 July 2023). In that case, however, the interest of the other state in being involved in evidence collection on its territory is obvious (in that the suspects were its citizens) and is not an example falling under the model proposed in this article. In said case, an undercover operation by the FBI involved persuading key Russian

could arise from the fact that the other state might, by principle, not be co-operative in criminal-procedure settings even if the investigation is of a domestic nature and the only connection to the investigating state lies in the location of the ISP. These questions are not addressed in the article since their answers do not affect the fundamental-rights guarantees extended to suspects and, therefore, deserve an approach different from that taken here.

I posit that there should be robust domestic legislative strides motivated by pursuit of the strictest protection for fundamental rights in connection with the grounds for those extraterritorial measures taken by states in their domestic criminal investigations that might have a connection to another state. Domestic legislation for unilateral extraterritorial-data access should be grounded in judicial review and should, by default, consider the interests of the foreign state.

Suspects' right to a private life

Unilateral access to stored computer data is tightly bound up with the right to respect for one's private and family life. Article 8 of the European Convention on Human Rights[*10] (hereinafter 'the ECHR') encompasses the right to respect for these, along with one's home and correspondence, with protection for the confidentiality of private communications, whatever the content of the correspondence might be and whatever form it may take. According to the Court's case law, telephone calls are covered by the notions of 'private life' and 'correspondence' for the purposes of Article 8's Section 1[*11], and it similarly addresses e-mail[*12], instant-messaging messages[*13], and information that is derived from the monitoring of personal Internet usage[*14] and from other data stored on computer servers[*15] or hard drives.[*16] This means that the confidentiality of all the exchanges individuals may engage in through their communication is protected. There is no *de minimis* principle for deeming interference to have occurred: opening a single message is enough.[*17] Article 8 covers all forms of interception, monitoring, and seizure, all of which could come into play in states' unilateral access to extraterritorial data.

That unilateral access to extraterritorial data is described in Article 32 b of the Convention on Cybercrime. Article 32 represents an attempt to regulate trans-border access to digital data, defined as accessing or receiving stored computer data held within another state-party territory through a computer system in the investigating state's territory. Article 32 refrains from defining access as search (and seizure). To access and receive data in such a manner, the latter state would need to have the genuine consent of the person with lawful authority to disclose the data to the requesting party through the relevant system. In contrast, Article 19 of the Convention on Cybercrime regulates the search and seizure of stored computer data located on the investigating state's territory, thus articulating a difference between accessing and copying, on one hand, and searching and seizing (thereby making unavailable), on the other.

individuals to travel to the United States. The operation arose from a nationwide investigation of Russia-based computer intrusions directed at Internet service providers, e-commerce sites, and online banks in the United States. The hackers had used their unauthorised access to the victims' computers to steal credit-card details and other personal financial information, and the FBI undertook undercover actions in response to entice persons responsible for these crimes to enter US territory. A few days after the two men in question were arrested, the FBI obtained access via the Internet to two of the men's computers in Russia. The FBI copied voluminous data from their accounts based in Russia. In response, Russia's Federal Security Bureau, or FSB, initiated criminal-law proceedings against FBI agent Michael Schuler, alleging unauthorised access to computer information.

10 European Convention on Human Rights. 4.XI.1950 (Rome) <https://www.echr.coe.int/documents/convention_eng.pdf accessed 14 April 2023)

11 C*oman Zakharov v Russia,* 47143/06,https://hudoc.echr.coe.int/eng?i=001-159324 accessed 14 July 2023)

12 *Copland v United Kingdom*, 62617/00, § April 2007. s 41 < https://hudoc.echr.coe.int/eng?i=001-79996 accessed 14 July 2023)

13 *Carbulescu v Romania*, 61496/08, § September 2017. s 81 < https://hudoc.echr.coe.int/eng?i=001-177082 accessed 14 July 2023)

14 *Copland v United Kingdom* (n 11), s 416

15 *Cieser and Bicos Beteiligungen GmbH v. Austria*, 74336/01, §6 October 2019. s 45 < https://hudoc.echr.coe.int/eng?i=001-82711 accessed 14 July 2023)

16 *Cetri Sallinen and Others v. Finland*, 50882/99, §7 September 2005, s 71 < https://hudoc.echr.coe.int/eng?i=001-70283 accessed 14 July 2023)

17 *Narinen v.Finland*, 45027/98, § June 2004. s 32 < https://hudoc.echr.coe.int/eng?i=001-61798 and Idalov v.Russia, 5826/03, §2 May 2012. s 197 < https://hudoc.echr.coe.int/eng?i=001-110986 both accessed 14 July 2023)

Legal scholars have argued that with computer searches the one-step search process is replaced by a two-step search process wherein the first step is to seize the digital data medium and the second is to search for the digital data on that data medium.[*18] Indeed, search for digital data is very different when there is a possibility of searching for the data while one is in possession of the data medium as opposed to when there is no physical access to that medium. The latter precludes a chance of recovering data that the user has locally deleted.[*19] For instance, the extent to which an investigator going through the contents of an e-mail account can copy material is limited to the data accessible to the end user. Therefore, content such as user-deleted files is out of the reach to the investigator. On the other hand, when seizing a data medium on which e-mail messages are managed in a raw or 'meta' form (e.g., a server), the investigator can look for a much richer set of data, including data deleted from the user's perspective. States' unilateral access to data does not afford the possibility of seizing the actual data medium; hence, the investigatory authorities gain access to fewer data.

In a broad sense, it is possible to distinguish between two types of situation involving unilateral access to potentially extraterritorially located data[*20] – namely,

1) situations wherein the data become accessible during a public investigative measure (e.g., in the course of a search) and
2) situations in which the data are accessible during surveillance measures.

Both of these measures are conducted on the physical territory of the state authorising said actions under its legislation. During an authorised (home) search, the opportunity of accessing a functional device might arise and, with it, an opportunity to access various 'cloud-computing' (external-server-based) accounts connected to the suspect[*21]. The same kind of access to data is obtained via surveillance measures of various sorts. Because the data accessible thereby reside in foreign territory, international co-operation instruments are used – the external server is traditionally considered foreign territory. However, in establishing whether there is an infringement of rights related to a person's private life or correspondence, where precisely any individual datum resides or has resided is of no relevance. The ECHR protects the confidentiality of all forms of communication between natural persons, covering all communication that has taken place via the modern technologies that millions of people use for everyday interaction.

The conditions on which a state may interfere with the enjoyment of a protected right are set forth in paragraph 2 of Article 8 of the ECHR. Namely, this is permitted in the interests of national security, public safety, or the economic well-being of the country; for the prevention of disorder or crime; for protection of public health or morals; or in aims of protecting the rights and freedoms of others. Limits to the rights are allowed if 'in accordance with the law' or 'prescribed by law' and at the same time 'necessary in a democratic society' for honouring one of the above-mentioned objectives. The language 'in accordance with the law' implies that domestic law must provide a mechanism of legal protection against public authorities' arbitrary interferences with the rights safeguarded by virtue of Article 8, Section 1 of the ECHR. In this respect, the national law must be clear, foreseeable, and adequately accessible. A signatory state has a positive obligation, inherent to Articles 3 and 8 of the convention, to enact criminal-law provisions effectively and apply them in its practice through effective investigation and prosecution.

To be deemed of an appropriate extent, domestic fundamental-rights protection has to meet certain criteria. Firstly, the prevailing level of attention to protecting suspects' private life and the secrecy of correspondence attests that it is strict. In the absence of a *de minimis* principle, all forms of communication fall under Article 8 of the ECHR because any form of interception, monitoring, seizing, accessing, copying, etc. applied must be explicitly permitted by law. In connection with this, data categorisation too is of

18 O. Kerr. "Search Warrants in an Era of Digital Evidence" (2005) 76 Mississippi Law Journal,87.

19 Deleting files may in actuality merely mark the associated space on a hard drive as unallocated. That is, in many systems, when a computer file is deleted from the user's standpoint, it is not truly erased from the physical drive. Instead, the space occupied by the file becomes unallocated and available for saving of other data.

20 There is also an option that the data being accessible for the investigator with the consent of the relevant suspect/victim/witness. In this case, the person targeted is included in the investigative measure, and that person's credentials are used to enter the digital environment and to carry out the investigative measure. Naturally this action is in a context of jeopardy: will witnesses and victims, let alone the suspect, co-operate.

21 Naturally, this is a separate question from whether and on whit grounds the investigator would be allowed to look through the device. And there is a further complication – what authorization should be required for going beyond looking through the actual filesystem of the device and starting to conduct investigative measures that are not anchored to the physical ground of the relevant state.

importance – 'content data' (the payload) traditionally enjoy the highest level of protection, relative to, for example, traffic details, or 'traffic data' (a form of metadata). Consequently, it is noteworthy that the lowest possible threshold was set in the Court of Justice of the European Union judgement in Case C-746/18[*22], which responded to a preliminary-ruling request from the Estonian Supreme Court with regard to processing of personal data in the electronic-communications sector. It was decided that any permission even for location and traffic data alone, notwithstanding the fact that a judge need not grant the request for such data, has to be given by an independent body (and not by the police or a prosecutor either, for that matter). This leads to the conclusion that all other categories of data need more extensive protection, since it is possible to derive information on the habits of one's day-to-day life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of at least the persons concerned, and the social environments frequented by those individuals by means of said data.

To ensure compliance with the above-mentioned conditions, the access granted to the competent national authorities for retained data must be subject to prior review either by a court or by an independent administrative body and to the condition that the decision of that court or other entity be made in light of a well-reasoned request by those authorities submitted in line with, among other things, the framework of procedures in place for prevention of, detection of, or prosecution for crime.[*23] With the decision described above, the Court of Justice of the European Union ruled that even traffic data deserve independent oversight and that access to this material shall not be taken lightly. It is clear that access to other, 'higher' categories of data has to be controlled more strictly and subjected to more protective measures. A broad interpretation of the right to one's private life leaves no possibility of assuming that some forms of communication would be excluded. In summary, the domestic approach to protecting private-life and communication rights has to be strict if it is to meet the standards for fundamental-rights guarantees.

At this juncture, it bears reiterating that states' unilateral access involves data stored in various remote Web-based accounts and that, accordingly, the matter of infringement of fundamental rights comes into question. Traditionally, to receive such (extraterritorial) data, states would need to appeal to mutual international co-operation instruments, because voluntary international co-operation thus far has not extended to stored content data as it has to traffic data. The reason for this divergence seemingly has lain in the more serious breach of data subjects' fundamental rights that accessing the former may constitute. Nevertheless, states have started taking a separate tack, through regulations that distinguish between receiving/accessing digital data and doing the same with data in physical form, where the latter has traditionally been subject to mutual international co-operation.

Mutual international co-operation and data collection

Mutual legal assistance is the formal method by which states request and aid in obtaining evidence located in one state to assist in criminal investigations or proceedings in another state. This instrument functions for receipt of electronic content data from foreign service providers. In contrast, non-content data in many cases may be requested directly from foreign service providers in settings of voluntary co-operation. The notions of sovereignty and trust guide governance of MLA. Since the assistance requests typically must comply with the laws of both the requesting and the request-receiving state, the individuals targeted benefit from the protection afforded by both legal systems.

In Europe, the Convention on Mutual Assistance in Criminal Matters addresses MLA between EU countries[*24]. However, when considering the context of e-evidence, states have continuously sought

22 The request for a preliminary ruling is tied in with the interpretation of Art 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, 'the (Directive on privacy and electronic communications) (J [2002] L 01,p7) as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ [2009] L 37,p1) read in tight of Artis7, 8, and 11 and of Article 52(1) of the EU Charter of Fundamental Rights see (https://curia.europa.eu/juris/liste.jsf?language=en&num=c-746/18 accessed 14 July 2023)

23 Case C-746/18, § March 2021, s 51 < https://curia.europa.eu/juris/document/document.jsf;jsessionid=BCA6EE6349285FC617B81575B8DB4CD4?text=&docid=238381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9202831 accessed 14 July 2023)

24 The convention is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0712(01)&from=EN accessed 14 April 2023)

solutions that can improve speed and effectiveness while simultaneously protecting the fundamental rights of participants in criminal proceedings. Therefore, another instrument was introduced: the European Investigation Order (EIO)[*25] for criminal-law matters[*26]. The fundamental principle behind the EIO is mutual recognition and trust. This means that the executing authority is, in theory at least, obliged to recognise the request of the other country and ensure execution, while the issuing authority should ascertain whether the evidence sought is necessary and proportionate for the proceedings; whether the investigative measure chosen is necessary and proportionate for the gathering of the evidence in question; and whether, by means of issuing the EIO, another Member State should be involved in the collection of that evidence.

Full respect should be accorded to fundamental rights in the course of issuing and executing an EIO, and this duty indeed is explicitly recognised in the corresponding directive's first article (in para 4[*27]). It also establishes limited grounds for refusal of execution, in Article 11. Notwithstanding these grounds for refusal, the option of resorting to them has rarely been exercised[*28]; the very low number of refusals (cases of non-execution) reflects the implied trust in the other party's legal system. The European Union's advocate general has stated, in a request for a preliminary ruling, that 'the role of the issuer is to be the guarantor of legality and, by extension, individual rights, and therefore, it has to complete the form most appropriately to ensure that the executing authority which receives it is in no doubt that the conditions laid down in Article 6(1) of Directive 2014/41 have been respected'[*29].[*30] The division of roles is clearly established – the issuing state carries the burden of ensuring proportionality, legality, and respect for the fundamental rights in need of protection.

The Court of Justice of the European Union has concluded that in the event that the national law of the issuer does not comply with the ECHR's minimum standards, said Member State shall not issue EIOs[*31]. Advocate General Michal Bobek has expressed the opinion that[*32]

> whoever wishes to use the system of judicial assistance and mutual recognition under Directive 2014/41, or under any other instrument of judicial cooperation and mutual recognition for that matter, must come, metaphorically speaking, with clean hands, or [,] rather, cannot come with hands that are knowingly dirty. The failure to observe that rule of basic hygiene, which has been repeatedly recognised and systematically emphasised, may indeed lead to that person being asked to leave the room and to come back only after having found some soap and carried out the necessary procedures.

The report on Eurojust's casework in the field of the EIO focuses on issues identified in cases handled by that agency's national desks over the span of a two-year reference period starting on the deadline date for transposition (22 May 2017). During that reference period, Eurojust registered 1,529 cases involving EIOs in its case-management system. According to the report, only a few cases featured non-execution issues. Eurojust has not dealt with cases wherein fundamental-rights grounds were at stake.[*33] The numbers listed are not surprising, in that one of the aims for EIOs was to create a smoothly functioning

25 Directive 2014/41/EU, retaining to the European Investigation Order (approved in April 2014)

26 A clear distinction has been drawn relative to such previous instruments for co-operation, as the European arrest warrant, since the EIO is not such an instrument as interferes with the right to liberty of the person concerned. The investigative measures taken in application of an EIO may, however, interfere with the person's right to privacy or property rights.

27 It states: 'This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected'

28 'Report on Eurojust's casework in the field of the European Investigation Order, (November 2020, 36.< ttps://www.eurojust.europa.eu/sites/default/files/assets/2020_11_eio_casework_report_corr.pdf (accessed 14 April 2023)

29 According to Article 6, the issuing of the EIO has to be necessary and proportionate for the purpose of the proceedings and in consideration of the rights of the person suspected or accused pf a crime. Additionally, the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case and shall be assessed by the issuing authority in each case.

30 Case C-584/19, 8 December 2020, Opinion of Advocate General Campos Sanchez-Bordona. s 75 <https://curia.europa.eu/juris/document/document.jsf?text=&docid=228705&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4207137 (accessed 14 April 2023)

31 Ibid, §7.

32 Case C-852/19, 29 April 2021, Opinion of Advocate General Michal Bobek. s 91 < ttps://curia.europa.eu/juris/document/document.jsf?text=&docid=240557&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9436731 (accessed 14 April 2023)

33 'Report on Eurojust's casework' (n 27) p3.

comprehensive instrument for obtaining evidence in cases with a cross-border dimension on the basis of the principle of mutual recognition and trust.[*34] One should bear in mind, though, that the requests often are for 'physical' investigative measures on foreign soil – interviewing a witness or searching a house, circumstances demonstrably requiring help from another state – measures that could not be conducted unilaterally. Therefore, the EIO represents an effective and low-bureaucratic-hurdle instrument of state-to-state co-operation, one that EU countries have welcomed. The very low number of related disputes in the courts and the overall satisfaction evident from Eurojust's statistics lead to the conclusion that there are no prominent issues with trusting each other's legal system.

Furthermore, not only is the state-to-state co-operation in the EIO domain simple and trustful, an additional possibility is foreseen for a state's unilateral conduct on another state's territory: interception of telecommunications without a need for technical assistance. In the relevant cases, a notification procedure still enables the target-territory state to object to said unilateral activities. Yet, if there were a recording device in a car travelling across Europe from one state to another that records everything taking place in that car and (should it have a door or window open) in its vicinity and if this recording were extracted in domestic jurisdiction, the activity would not necessitate any notification per the rules on EIOs.

It is not entirely clear why a conversation via telecommunication media is treated differently from face-to-face communication in a room or what the reason might be for granting less protection to conversations that are not conducted by means of telecommunications. Could this distinction be connected to the notion that data from or related to the latter are going to get stored while one would not expect data to be repeated by interception of telecommunications? Even if so, the reason for drawing a distinction between the two forms of data should be stated explicitly. Such inconsistencies tend to leave an impression that the issues connected with data and territoriality have not been thoroughly thought through.

Notification per the EIO Directive is designed to inform the other state about the unilateral investigative measure. The Member State so notified may, in circumstances wherein the action would not have been authorised in a corresponding domestic case, respond that said activity may not be carried out or shall be terminated, and it may notify the requester, where necessary, that any material already collected may not be used or is to be used only under the conditions that the responding state shall specify separately. Given that the cornerstone for the EIO directive is general rather than universal mutual trust and effectiveness of evidence collection, notification of such unilateral activity should not be deemed to constitute an order to recognise any investigative measure; it is a mere reflection of respect for the other country's sovereignty. This is an act of comity that should never bring about any challenges related to the legality of evidence collected through the investigative measure carried out by the Member State submitting the notification. The provision for this mechanism should be interpreted in light of the values of freedom, security, and justice, with mutual trust and respect for different legal systems serving as its basis. In practice, states indeed are answering requests smoothly and thoroughly, bearing in mind the above-mentioned values and the aim articulated for the instrument.

In summary, while one can characterise the notification requirement's existence as implying that unilateral evidence collection on foreign soil is not an absolutely 'silent' procedure that other states have no interest in knowing about, resorting to grounds for objections against evidence collection is rare. Notification is carried out for comity reasons only, with the element of trust holding a crucial role.

Significantly, notification became a key element for the European-level efficiency-focused instrument that followed in this domain. At the heart of the discussions stemming from the adoption by the EU Council of Ministers of its 'general approach' to electronic evidence, on 7 December 2018, was the meaningful requirement to notify[*35]. Since the EIO is widely believed to have still not brought the desired effectiveness for e-evidence requests and to make it easier and faster for law-enforcement and judicial authorities to

34 The initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia, and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. See the explanatory report of 3 June 2010, 2–3 <https://data.consilium.europa.eu/doc/document/ST-9288-2010-ADD-1/en/pdf> accessed 14 April 2023.

35 It states that in cases wherein the European Production Order concerns content data and where the issuing authority has reasonable grounds to believe the person whose data are sought does not reside within its territory, the enforcing State shall be notified and can, as soon as possible, but preferably within ten days, inform the issuing authority of factors that might support withdrawal or adaptation of the Order. 'General Approach on Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters', (30 November 2018, 35(c). <https://data.consilium.europa.eu/doc/document/ST-15020-2018-INIT/en/pdf (accessed 14 April 2023)

obtain 'e-evidence', the Commission had, on 17 April 2018, proposed setting forth new rules in the form of a Regulation and a Directive instrument that create a European Production Order and European Preservation Order.*[36] The proposal is aimed at improving legal certainty and expediting the securing and obtaining of electronic evidence stored and held by service providers established in another jurisdiction. The main feature of the system envisioned is allowing for requests to be submitted directly to private companies, irrespective of the data's location or the storage mechanism and without involvement of foreign-state authorities in the first place. It would co-exist with the judicial co-operation instruments currently in place (such as the EIO and MLA).*[37]

It has not been possible to reach the quick agreement sought with regard to such new EU rules for law-enforcement authorities. However, in a press release on 29 November 2022, the Commission reported that the European Parliament and the Council had reached provisional political agreement on future EU legislation on obtaining e-evidence. At the crux of the negotiations overall was the question of the procedure for the notification. It was agreed that the authority in the originating Member State (the 'issuing authority') has to notify the authorities where the service provider is located only if the relevant individual does not reside in the issuing state or the offence was not committed there and only if traffic or content data are sought. Another important condition agreed upon is that the authority notified shall be allowed to invoke any of several grounds to refuse the order – e.g., by citing protection of fundamental rights or appealing to immunities and privileges.*[38]

The disputes arising from the e-evidence proposal indicate that states value a meaningful notification system. Whether they value a system with an integral challenge mechanism and whether one would be necessary is still being determined. Debates thus far have drawn considerable attention to the necessity of bringing the Member State of the affected person's residence into the equation too. In contrast, Eurojust has echoed the majority's opinion about notification pursuant to the EIO rules (where no assistance is needed), expressing the position that notification is purely for reasons of comity and shall not supply any grounds for questioning legality related to the evidence collected. According to the legal literature, in trans-border remote search-and-seizure situations, international law offers no basis for a specific obligation to notify the other state about a trans-border investigative measure even if the reason proposed for notification by states consists merely of comity considerations. Nevertheless, 'the gesture of notification' may be beneficial for diplomatic relations between countries.*[39]

Expected criteria for unilateral access to extraterritorially located data

The expanding use of Internet-based services, in tandem with which cybercrime is increasing, puts strong pressure on states in connection with their responsibility to protect society and individuals alike against crime, by means that include effective criminal investigations and prosecutions. All instruments employed to this end assume that the state has appropriate safeguards in place for protecting human rights and fundamental freedoms. In practice, this assumption has seldom been challenged: use of the EIO has not yielded any disputes rooted principally in that issue. States' unilateral access to extraterritorial data for purposes of copying must, by default, mesh with the potential interests of other states, since there still is access to foreign ground, even if measured only in milliseconds. The developments in international co-operation suggest that states do have significantly less interest in investigations that are 'purely' domestic.

36 E-evidence – cross-border access to electronic evidence. See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en (accessed 14 April 2023).

37 Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters. Explanatory Memorandum.< ttps://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0225&from=EN (accessed 14 April 2023).

38 See the press release. 'e-Evidence: Commission welcomes political agreement to strengthen cross-border access for criminal investigations' (29 November 2022. < https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7246 accessed 14 April 2023).

39 A.M.Osula, and M.Zoetekouw, „The Notification requirement in transborder remote search and seizure: domestic and international law perspectives (2017) 11(1) Masaryk University Journal of Law and Technology 103, 108–09. – DOI: https://doi.org/10.5817/mujlt2017-1-6.

Nonetheless, it has to be guaranteed that the domestic actions would, in principle, be agreeable to the other state also from the standpoint of protecting the fundamental rights of a party to a criminal proceeding.

The first and most important prerequisite for unilateral access to extraterritorial data consists of a domestic legal regime that strongly values the protection of human rights and fundamental freedoms. All mutual co-operation instruments rely on trust in this. Domestic legislation's interpretation of the 'private life' notion must be broad, then, with all forms of communication falling under this umbrella and all being protected accordingly. Stored messages are considered content data that deserve the fullest protection, so judicial authorisation is generally needed for ensuring the necessary level of protection. States must acknowledge a broad interpretation of communications and the necessity of judicial review if they are to meet the commensurate standard of fundamental-rights protection.

The requirement for strong domestic guarantees of fundamental rights' protection creates a need to regulate computer-system searches explicitly. Hence, one must ask how to word a regulation granting permission to take investigative measures on foreign soil without the data-subject's consent. The wording used in Article 32 b of the Convention on Cybercrime, 'accessing and receiving', discriminates between seizing (which makes something inaccessible) and searching.*[40] In essence, accessing and receiving involves a request message sent to a server located extraterritorially, after which the data are copied. Having lawfully gained access to said data, an IT-ignorant investigator might not even consider the fact that this sequence of events includes milliseconds of virtually stepping onto foreign soil, and such an investigator is bound to continue acting in accordance with the domestic regulation alone, honouring the rights of the suspect according to domestic rules. Therefore, states that have left computer-system searches or accessing computer data through another computer system unregulated may face strong criticism for lack of clarity as to which rules apply if an investigator has access to an e-mail account for purposes of copying content data. In circumstances where no legal regime for this is established, ascertaining the answer in any given case seems to be left to the best judgement of an investigator. Hence, the data might not enjoy any of the protection that judicial review would extend.

An additional criterion should be applied for computer-system searches: 'serious crime'. Extraterritorially held data ought not be legally accessible unless the investigation pertains to a serious crime. The e-evidence proposal sets the same criteria for producing transactional data and producing content data. In contrast, orders to produce subscriber and access data may be issued in relation to any criminal offence, with the justification that 'this threshold has been chosen to ensure a balance for all Member States between efficiency of criminal investigations and protection of rights and proportionality'.*[41] This threshold has the further advantage of being easily enforceable in practice.

With adequate safeguards established in the domestic legal system, the aspects that follow may be tackled properly by way of international responsibilities. That said, not all states are willing to declare that they have no interest in foreign states' actions on their territory. This fact is vividly evident in ongoing discussions' fierce disputes about notification in relation to the e-evidence proposal. Those discussions revolve around fundamental rights and protecting the right to a fair trial; still, these interests are connected mainly to the states' citizens and to a fear that data under the control of an ISP located in the target territory could get used in a manner that said state regards as unacceptable. In these circumstances, domestic legislation would compass different rules for immunities and privileges, which may refer to particular categories of people (such as diplomats) or specifically protected relationships (such as those falling under lawyer–client privilege or the right of journalists not to disclose their sources of information) or other citizenships. In a situation wherein, the criminal procedure is purely a domestic one, other states probably have very little interest in being part of the data-collection process, even if the data at issue are controlled by an ISP within their territory.

To some extent, the principles outlined above have already been enshrined in practice. For instance, in dark Web investigations, states have stopped considering the option of disputing possible sovereignty

[40] For example, Belgium, with provisions introduced to its code of civil procedure (CCP) in 2000, came one of the first in the world to allow the investigation judge to authorize to carry out remote digital searches abroad, were the obligation to inform competent authorities of other states 'if possible' was made explicit. The Belgian CCP specifies that if the search is commenced on Belgian territory and through the computer system situated on domestic territory, the investigator may extend the search to copy the accessible data. This wording differentiates search from measures of accessing and states that the data accessed may only be copied. The Belgians start with a search then extend it to accessing, receiving, and copying (but not seizing) as described in the Convention on Cybercrime.

[41] Explanatory Memorandum (n 36), §31.

factors (if they ever raised the issue at all). Such investigations are generally welcomed rather than feared by other governments*[42]. Here, the servers are situated somewhere physical, just as in non-dark-Web cases, yet the focus of these investigations is rarely on identifying where the servers are such that the state in question can be notified. Instead, and quite obviously, the intent is to identify the individuals who are hiding their identity. Only after the suspects have been unmasked are the necessary avenues of co-operation sought. The application of this approach supports concluding that states are more interested in protecting the fundamental rights of their citizens than they are in being notified about every virtual step on their ground.

Conclusions

In nearly every criminal investigation, some evidence exists in or takes on digital form. That has led states to seek possibilities for better co-operation and test their legal systems so as to determine suitable admissibility rules for domestic court proceedings. Therefore, this article's analysis of the suspect's right to a private life and the guarantees that a state should offer for the protection thereof during criminal proceedings that involve unilaterally accessing extraterritorial digital data is especially pertinent.

It is important that the confidentiality of all exchanges individuals engage in for communication is currently protected, with no *de minimis* principle applied for permissibility of interference. Additionally, all forms of interception, monitoring, and seizure, any of which could be subject to states' unilateral access to extraterritorial data, are subject to protection as lying within spheres of private life per practice under the ECHR. Because unilateral access to extraterritorial data is obtained for receiving and copying data for investigation purposes, there is a significant difference from seizure or rendering inaccessible. Notwithstanding the received data being only accessed, received, and copied, the infringement of fundamental rights, especially that of a person's right to a private life, is significant. For example, a Gmail user might employ a 'timeline' feature that could give investigators valuable information about times, dates, and locations; e-mail exchange (which could go back several years), and messages begun but never sent (stored in a drafts 'folder'). Additionally, there might be smartwatch information linked to the account. In many cases, multiple people could be using a single account, not all of them suspects. With unilateral data access, the breach of private life is considerable, especially since companies that offer online services usually encourage people to apply and inter-connect those services to the fullest extent possible.

Investigative measures for accessing, receiving, and copying user-accessible*[43] content data are often unregulated in the domestic legislative arena in many respects because the data accessed may well reside on foreign ground, on a foreign server. The fact that one takes a virtual step onto that foreign ground, however brief, has been the decisive factor in refraining from regulating this domestically. The only way in which most states have officially addressed the issue is by using burdensome international co-operation instruments that were originally developed for situations significantly different from these. Moreover, the technical elements of the investigative measure considered here might be misunderstood by investigators, who often lack the necessary training. Should the international perspective be overlooked, situations may frequently arise wherein this investigative measure is treated as merely another (domestically regulated and convenient) investigative action. Therefore, practice might not honour the fundamental-rights guarantees required.

Nevertheless, treating access to extraterritorial data as a matter of international co-operation would be the traditional and correct path. Current court practice and legislative steps show that the intent in this situation is to simplify the procedures and delineate the set of cases wherein the investigation is not domestic but 'really' international. Suppose the only connection to the other state in a criminal investigation is an e-mail message sent by a foreign service provider. Investigation in that domestic case should not necessitate resorting to extremely burdensome mutual legal-assistance instruments. The guarantees domestically afforded for fundamental rights should suffice, as mutual trust between states in international co-operation

[42] O. Kerr, and S. Murphy, „Government Hacking to Light the Dark Web: What Risks to International Relations and International Law?",(2017) 70 Stanford Law Review Online 58, available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2957361 (accessed 14 April 2023).

[43] It would be impossible to obtain 'deleted' data, since obtaining material that is invisible from the user perspective would necessitate access to the data medium, e.g., to server.

leaves the heavy burden of ensuring the proportionality and legality of the request to the issuing state. Therefore, a domestic legislature striving for the strictest, most robust protection of fundamental rights would provide the necessary foundation for such extraterritorial measures taken in states' domestic criminal investigations as might have a connection to another state.

Strong domestic legislation addressing unilateral access to extraterritorial data should be built on pillars of judicial review and should, by default, consider the interests of the foreign state. Given the significant breach of private-life rights involved, permission for any such measures should be justified through the lens of the *ultima ratio* principle. Domestic legislation should set minimum-threshold requirements for a data request that are rooted in the mutual international co-operation criteria. Most importantly, unilateral access to extraterritorial data should be allowed in investigation of a serious crime and where either parties to criminal proceedings have a substantial connection to the issuing state or a suspect is not identified yet. Should there be any apparent interest of the state on whose territory the ISP is located, the domestic judge should dismiss the request and mutual international co-operation instruments should be applied instead[*44]. Because notification between states is essential here, domestic legislation should additionally foresee an obligation to notify the affected state for the sake of comity even in circumstances in which no apparent interest has been detected. Given the existing practice built on trust between states in aims of enhancing international co-operation in digital data-sharing, domestic legislation that recognises the interests of other states is most likely to be welcomed.

In light of the resource requirements attendant to mutual international co-operation, even with the 'simplified' instruments (such as EIOs), as things stand – without a clear regulative basis in domestic legislation – it remains too easy to turn a blind eye to the extraterritoriality factor and treat the act of accessing extraterritorial data as a purely domestic one. This might most commonly occur for reason of well-intentioned investigators' limited knowledge of the digital world; however, it nevertheless poses a significant risk to the private life of data subjects who are parties in criminal proceedings. Therefore, domestic legislation should consider the international facet to the investigative measure. That said, the legislator should not turn the matter into an onerous one of international co-operation either, especially when other states are likely to lack interest in it anyway. Without proper balance, the expected protection of the private life of a party in criminal proceedings might get overshadowed by arguments about the possibility of collecting all evidence located extraterritorially.

[44] A case wherein the suspect is the citizen of the State where the ISP is located would serve to exemplify apparent interest.

https://doi.org/10.12697/JI.2023.32.11

Julia Laffranque

Justice, Supreme Court of Estonia
Former ECtHR judge
Visiting Professor, University of Tartu
Member of the Article 255 TFEU panel

Europe Is Looking for a Super-Judge

Abstract. One of the cornerstones of the rule of law is an independent, impartial, and high-quality court. It is therefore of the utmost importance that respect for the rule of law in the European Union (inclusive of its member states) be ensured by a court whose members are themselves elected in accordance with the rule of law. This means that, just as for the courts of the Member States, the ideal – which one would hope gets reflected in real-world practice in most cases – is for the Court of Justice of the European Union to be led by independent and impartial judges. Judges who are not only well-versed in their own national law but also fluent in the nuances of European Union law, are oriented toward the global legal world, display an ability to work in an international environment (encompassing several languages, most importantly French as the working language of said court), have an outstanding record of professional and scientific excellence, express themselves clearly and convincingly (both verbally and in writing), and possess impeccable moral and ethical integrity – in short, individuals who are unquestionably leaders in their field and role models for other judges. Indeed, Article 253 (1) of the Treaty on the Functioning of the European Union (TFEU) specifies that the Court of Justice's judges and Advocates General shall be chosen from among persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are lawyers of recognised competence, with appointment by common accord of the governments of the Member States for a term of six years after consulting with the panel provided for by Article 255 TFEU. Membership of the institution's General Court is similarly regulated. Accordingly, Europe is looking for super-judges and super-Advocates General for the Court of Justice of the European Union. The article gives an overview of the process involved, focusing in particular on the work of the so-called Article 255 panel.

Keywords: Court of Justice of the European Union, Article 255 TFEU panel, appointment of judges to international/European courts, judicial independence and impartiality

A television-series format based on the popular British show *Pop Idol* has been circulating globally for some time. The premise involves finding the best new young singer, with the winner to be rewarded with a record deal and cash. The show, which progresses through several rounds, has continued for numerous series, with versions under various names, many using words such as 'Idol', with Bulgaria's *Music Idol* being one example. Sometimes the word is in the plural (e.g., in Finland), and often it is placed alongside the name of the respective country (as with *Greek Idol*). Synonyms pointing to a shining light feature also, giving us

Turkey's *Türkstar* and novelty-focused forms such as the French *Nouvelle Star*.[*1] In Iceland, meanwhile, they are trying to find an 'idolstar'. Germany, Slovakia, the Czech Republic, and Estonia all are looking for a 'superstar'. It is the title 'Estonia Is Searching for a Superstar' that inspired this article about the hunt for a bright light of jurisprudence.

Finding the best of the best to meet heightened demands is essential for developing and improving quality not only in culture and sport but in every discipline.

1. Why seek super-judges?

Of the European Union institutions, among which there is a democratic balance of power, the Court of Justice of the European Union (CJEU), based in Luxembourg – made up of the Court of Justice and the General Court – has one of the most significant and responsibility-heavy roles in protecting people's fundamental rights and freedoms and in upholding the rule of law.

The CJEU also plays a prominent role in the further development of European law, which sometimes entails stepping in where politicians have failed to reach a compromise irrespective of the EU's establishing treaties and fundamental European values needing to be implemented.

One of the cornerstones of the rule of law is an independent, impartial, and competent court.[*2] It is therefore of the utmost importance that respect for the rule of law in the European Union (not least within its member states) be ensured by a court whose members are themselves elected in accordance with the rule of law. This means that, just as in the courts of the Member States, ideally – and, one would hope, in reality too most of the time – the CJEU should be led by independent and impartial judges. Judges who not only are well-versed in their own national law but also are fluent in the nuances of European Union law, are oriented toward the global legal world, are able to work in an international environment with the multiple languages utilised (especially the working language of the CJEU: French), have an exemplary record of professional and scientific excellence, express themselves clearly and convincingly both verbally and in writing, and have impeccable moral and ethical integrity. In short, they should indisputably be leaders in their field and role models for other judges.

Therefore, Europe is looking for super-judges and super-advocates general for the Court of Justice of the European Union.

The Court of Justice is composed of one judge from each member state of the European Union (27 states at present), assisted by 11 Advocates General, who are elected in the same way as the judges. The five most populous Member States – Germany, France, Spain, Italy, and Poland – always have the right to appoint their own Advocates General, while the other six are appointed by rotation from the other 22 states. Advocates General are jurisconsults of recognised competence who, rather than participate in the deciding on a case, provide the Court of Justice with their independent and impartial non-binding legal opinion on the case.

The General Court has two judges per Member State, for a total of 54 judges.

We are therefore talking about nearly a hundred highly qualified members of the CJEU who are simultaneously involved in the administration of justice. This is daunting even though there are not 92 gaps that need filling with new members all at once (judges and Advocates General from large Member States may be re-elected after their first term, for example).

For the work at the CJEU, which is hard but interesting, judges and Advocates General have several assistants, including a private office with advisers (référendaires) and a secretary (assistants). The conditions, including those related to salaries, are attractive for many, even if one has to leave one's home country for a while.

There is a huge burden of responsibility on both those involved in the selection process and those who are selected. The judges at the Court of Justice of the European Union (CJEU) are among Europe's most

1 The information comes from the Wikipedia Web site, under a key phrase meaning 'Estonia is searching for a superstar'. 'Eesti otsib superstaari' (21 September 2023) <https://et.wikipedia.org/wiki/Eesti_otsib_superstaari> accessed 25 September 2023.

2 See also J-M Sauvé, 'Les leçons du comité 255 au service d'une justice independante, impartiale et de qualité' in J Urbanik and A Bodnar (eds), *Law in a Time of Constitutional Crisis: Studies Offered to Miroslaw Wyrzykowski* (Warsaw, CH Beck 2021) 639. – DOI: https://doi.org/10.5771/9783748931232-639.

powerful political figures. CJEU judges decide hundreds of cases a year that define and enforce the rights of hundreds of millions of EU citizens and shape the rules of the world's second largest economy. It matters which judges get appointed to Europe's highest court – and how effective they are at their jobs.[*3]

In accordance with Article 253(1) of the Treaty on the Functioning of the European Union (TFEU), the Judges and Advocates General of the Court of Justice shall be chosen from among persons whose independence is beyond doubt and who possess the qualifications required for appointment to the **highest** judicial offices in their respective countries or who are lawyers of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation with the panel provided for in Article 255 TFEU hereinafter as (the) Article 255 panel or simply panel).

In accordance with Article 254 TFEU, the members of the General Court are to be persons whose independence is beyond doubt and who are qualified for appointment to **high** judicial office. They too shall be appointed by common accord of the Member States' governments, for a term of six years after consultation with the panel provided for in Article 255.

In addition, the European level features the European Court of Human Rights (ECtHR), based in Strasbourg, which elects judges for a non-renewable term of nine years (one from each member state of the Council of Europe, or 46 as of today). While this entity is extremely influential in establishing and shaping human-rights jurisprudence on a wider scale, the associated selection system is discussed in this paper only insofar as is necessary for pertinent comparison with the process for making decisions about the suitability of candidates for the CJEU.[*4]

2. The Article 255 panel: who 'judges' the judges?

The selection of judges, especially for supreme and constitutional courts, is already a sensitive issue at national level, let alone in the international arena. For a long time, the appointment of judges to international tribunals was a purely diplomatic matter, left for discussion by ministers in the corridors of power, where personnel decisions, guided by the wisdom of national governments, were made behind closed doors.[*5]

Nowadays, however, the above-mentioned CJEU and ECtHR judgements in particular are no longer rare. Neither do they purely settle disputes reaching only the higher levels of states far and wide as the classic international courts used to do. It bears reiterating that these decisions have an impact on people's day-to-day life, on democratic institutions; they resolve social conflicts and set precedents. Likewise, it is far from unimportant that these courts control and legitimise the power exercised by others, similarly to national constitutional or supreme courts.[*6] In addition, at multinational level, they are in constant contact with the institutions of the Member States, especially the judiciary.

Paradoxically, though, judges at European level can be, on one hand, vulnerable and weak – for example, their appointment hinges on political factors internal to the Member States, while there are also issues of having to find a job and return to their home country after the end of their international term of office – while also, on the other hand, extremely influential on account of the impact of their decisions on the whole

3 J Fjelstul and M Gabel, 'How Can the EU Fairly Evaluate the Job Performance of Its Judges?' (LSE European Institute EUROPP blog, 10 May 2023) <https://blogs.lse.ac.uk/europpblog/2023/05/10/how-can-the-eu-fairly-evaluate-the-job-performance-of-its-judges/> accessed 13 August 2023.

4 The author of the article has personal experience of both the European Court of Human Rights and the CJEU: she has successfully completed the process for selection as an ECtHR judge and served nine years as a judge in Strasbourg (between 2011 and 2020); on 21 January 2021, she was elected, on the proposal of the European Parliament, as a member of the Article 255 TFEU panel for the selection of judges and Advocates General of the CJEU (with re-election for service as of 1 March 2022). This article, based on work experience, expresses the personal views of the author; the deliberations of the Article 255 TFEU panel are closed, in line with a principle to which the author of this article remains committed.

5 A von Bogdandy and C Krenn, 'On the Democratic Legitimacy of Europe's Judges: A Principled and Comparative Reconstruction of the Selection Procedures' in M Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) 162. – DOI: https://doi.org/10.1093/acprof:oso/9780198727781.003.0008.

6 S Besson, 'European Human Rights, Supranational Judicial Review and Democracy: Thinking outside the Judicial Box' in P Popelier, C Van de Heyning, and P Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Intersentia 2011) 97.

of Europe.[*7] In this context, the independence and impartiality of judges are indisputably important, as is the participation of independent experts in the selection of pan-European judges, experts who are keenly aware of what objective knowledge is necessary for high-quality work in the European courts.

Until 2009, the normative framework for the selection of judges and advocates general of the CJEU changed little.[*8] Each Member State nominated its own candidate for the post of judge, while the principle 'live and let others live' applied to candidates nominated by other Member States.[*9] It can be said that the system was based solely on mutual trust among the Member States. Any candidate proposed by a Member State was appointed to the CJEU almost automatically. Prior to the changes introduced by the Treaty of Lisbon[*10], the process of appointing judges to the CJEU had been repeatedly criticised precisely for its lack of transparency and accountability[*11], yet – to this very day – there has not been much academic literature on this sensitive subject.[*12]

While its roots run deep, the need for changes to the founding treaties of the European Union in this respect did not arise overnight. It was recognised to some extent in the 1990s, with a debate about reform. Certainly, the requirements intended primarily for national judges, the application of which to international judges became increasingly recommended, had an indirect and later more direct impact. After all, basic UN principles[*13] for the independence of judges are in place at international level, and several important Council of Europe documents, such as the Convention for the Protection of Human Rights and Fundamental Freedoms, or ECHR (specifically, Article 6)[*14], address these, while case-law of the European Court of Human Rights applies and interprets it. There are Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges[*15], the 1998 European Charter on the Law of Judges[*16], etc.[*17] The opinions of the Consultative Council of European Judges (CCJE) of the Council of Europe[*18], among them 'Opinion No 5', on the law and practice of judicial appointments to the European Court of Human Rights, require separate mention. The European Union, not least via the CJEU itself, has

7 M de S.-O.-l'E Lasser, *Judicial Dis-Appointments: Judicial Appointments Reform and the Rise of European Judicial Independence* (Oxford University Press 2020) 14.

8 C Krenn, 'Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success' (2018) 19(7) German Law Journal 2017. – DOI: https://doi.org/10.1017/s2071832200023312.

9 H de Waele, 'Not Quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union' in M Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) 49. – DOI: https://doi.org/10.1093/acprof:oso/9780198727781.003.0002.

10 The Intergovernmental Conference (IGC), which was tasked with drawing up the European Reform Treaty, was opened in Lisbon on 23 July 2007. The text of said treaty was approved by the Heads of State and Government meeting held in Lisbon on 18–19 October 2007, it was signed in Lisbon on 13 December of that year, and it entered into force on 1 December 2009.

11 I Solanke, 'Independence and Diversity in the European Court of Justice' (2009) 15(1) Columbia Journal of European Law 91.

12 For example, T Dumbrovský, B Petkova, and M van der Sluis tried to fill this gap. 'Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States' (2014) 51(2) Common Market Law Review 455, 456. – DOI: https://doi.org/10.54648/cola2014034.

13 Principles of judicial independence approved by the United Nations General Assembly at its session of 29 November 1985. 'Basic Principles on the Independence of the Judiciary' (6 September 1985) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed 23 August 2023; the UN Human Rights Committee's General Comment 32 on Article 14 of the International Covenant on Civil and Political Rights (in particular, paragraph 21, according to which the court must also appear impartial to an ordinary observer), accessible online via <https://digitallibrary.un.org/record/606075> accessed 23 August 2023; and the Bangalore Principles of Judicial Conduct (2002) <www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf> accessed 14 August 2023.

14 RT II 2010, 14, 54.

15 Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, 'Judges: Independence, Efficiency and Responsibilities' (17 November 2010) <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d> accessed 23 August 2023.

16 European Charter on the Statute for Judges, DAJ/DOC 98 (23) (1998) <https://rm.coe.int/16807473ef> accessed 23 August 2023.

17 For example, the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality. CM (2016) 36 final (13 April 2016) <https://rm.coe.int/1680700285> accessed 23 August 2023. The Venice Commission's reports on judicial independence are certainly interesting; for further details, see J Laffranque, 'Judicial Independence Based on the Case-Law of the European Court of Human Rights' in A Parmas (chief ed), *Yearbook of Estonian Courts 2018* (Supreme Court 2019) 41, 57–82.

18 See the CCJE Web page 'CCJE Opinions and Magna Carta' <https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta> and Estonia-language material (from the Supreme Court Web site) <https://www.riigikohus.ee/et/oigusalased-materjalid/rahvusvahelised-dokumendid>; in particular, see the CCJE's Magna Carta of Judges (2010) 3 final (17 November 2010) <https://rm.coe.int/16807482c6> all accessed 14 August 2023.

delineated the need for judicial independence primarily by derivation from the Treaty on European Union (TEU) and the Charter of Fundamental Rights of the European Union*[19].

Numerous factors may have influenced the need for reforms to the appointment of judges to the supranational court system: the enormous influence of the European courts, ever stricter demands for independence of judges in parallel with the tendency toward greater autonomy of the courts, self-regulation (e.g., the establishment of the Article 255 TFEU panel, discussed below, has been called an embryonic form of unintended judicial self-government)*[20], pressure from the European Parliament to make the appointment of the CJEU judges more transparent and accountable, the enlargement of Europe to the east (with the attendant increase in the number of pan-European court judges), and the 2008 economic/financial crisis interwoven with immigration issues. All of these, to a greater or lesser extent, come into play in efforts to guarantee the judges' independence not only from European political power but also from national influences.*[21]

The calls to improve the expertise of judges and to limit the absolute discretion of national governments in the appointment process have therefore led to the establishment of expert panels of judges to supervise judicial candidates in both the CJEU and the ECtHR.*[22]

Article 255 TFEU in its present form dates back to the Convention on the Future of Europe, which in the early 2000s prepared the draft Treaty Establishing a Constitution for Europe. Scholars have identified its impetus as fears of the rise of 'political candidates', particularly with regard to the impending enlargement of the European Union.*[23]

Laying the foundations for the renewed Treaty on European Union and the TFEU, the Treaty of Lisbon, signed on 13 December 2007 and entering into force on 1 December 2009, introduced Article 255 TFEU, which states:

> A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.
>
> The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

That article must, of course, be viewed in the context of Articles 253 and 254 TFEU, the relevant text of which has been referred to above.

The first panel set up under Article 255 TFEU took office on 1 March 2010, immediately after the entry into force of decisions 2010/124/EU and 2010/125/EU (of 25 February 2010), by which the Council of the European Union adopted the rules of procedure, or the 'operating rules', of the panel and appointed its initial membership. In that form, it was chaired by the charismatic Jean-Marc Sauvé, then Vice-Chairman of the French Council of State, a man of outstanding leadership qualities.*[24] The Article

19 In particular, Article 47; see OJ C/326 (26 October 2012) 391–407.

20 Literally, 'some embryonic form of unintended judicial self-government'; see, for instance, A Alemanno, 'How Transparent Is Transparent Enough? Balancing Access to Information against Privacy in European Judicial Selections' in M Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) 204. – DOI: https://doi.org/10.1093/acprof:oso/9780198727781.003.0010.

21 de S.-O.-l'E Lasser (n 7) 14; Dumbrovský, Petkova, and van der Sluis (n 12) 456.

22 B Petkova, 'Selecting Europe's Judges: On the Evolving Legitimacy of Appointments in Luxembourg and Strasbourg' (*Völkerrechtsblog*, 16 July 2014) <https://voelkerrechtsblog.org/selecting-europes-judges-on-the-evolving-legitimacy-of-appointments-in-luxembourg-and-strasbourg/> accessed 14 August 2023.

23 R Barents, 'The Court of Justice in the Draft Constitution' (2004) 11(2) Maastricht Journal of European and Comparative Law 121, 139. – DOI: https://doi.org/10.1177/1023263x0401100202; see also T Björnsson and Y Shany, 'The Court of Justice of the European Union' in Y Shany (ed), *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) 292. – DOI: https://doi.org/10.1093/acprof:oso/9780199643295.003.0012.

24 Council Decision of 25 February 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (2010/124/EU) (27 February 2010) OJ L50 18–19; Council Decision of 25 February 2010 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (2010/125/EU) (27 February 2010) OJ L50 20. The first composition of the Article 255 panel consisted of Jean-Marc Sauvé, Vice-President (substantive head) of the French Council of State (Conseil d'État), as President; Peter Jann, former Judge of the Court of Justice; Lord Jonathan Mance, Judge and former Deputy President of the Supreme Court of the United

255 TFEU panel is now in its fourth composition (the current one is hereinafter referred to simply as 'the panel').[*25]

The panel is, in accordance with the description presented above, composed of seven members chosen from among former members of the Court of Justice and the General Court, members of national supreme courts, and lawyers of recognised competence, one of whom shall be nominated by the European Parliament. In doing so, the latter takes into account the proposal of its Committee on Legal Affairs (JURI Committee) and Rule 128 of the Rules of Procedure of the European Parliament.[*26] The author of this article is the first European-Parliament-nominated member of the panel who has never been a politician or a member of the European Parliament but is a judge.

The European Parliament instructs its president to forward the relevant decision on the candidate for membership of the panel to the President of the Court of Justice. The six names proposed on the president's own initiative (comprising former members of the CJEU and judges of the supreme courts of the Member States) get submitted alongside the European-Parliament-proposed candidate's name[*27] to the Council of the European Union, which, in turn, takes into account the initiative of the President of the Court of Justice, as the provisions of Article 255(2) TFEU dictate. However, the above-mentioned decision of the Council of the European Union states that account should be taken of a balanced membership of the panel, both in geographcial terms and in terms of representation of the legal systems of Member States.[*28]

Critics have observed that the Court of Justice's president holds considerable power to nominate candidates for membership of the panel (encompassing all candidates apart from the single one proposed by the European Parliament)[*29] and that, when adopting the operating rules for the panel, the Council of the

Kingdom, also Member of the House of Lords; Torben Melchior, former President of the Supreme Court of Denmark; Peter Paczolay, President of the Constitutional Court of Hungary; Professor Ana Palacio Vallelersundi, Spanish State Counsellor nominated by the European Parliament, herself a former Member of the European Parliament; and Virpi Tiili, former Judge of the General Court. Sauvé continued as the panel chair for the entire second four-year term, with Lord Mance and Paczolay as the other members (until the latter's resignation, whereupon he was replaced by Miroslaw Wyrzykowski, a former Judge of the Constitutional Court of Poland). Further members of the panel during the second term were Ljuigi Berlinguer, First Vice-President of the European Parliament's Committee on Legal Affairs; Pauliine Koskelo, a judge with the ECtHR and former President of the Supreme Court of Finland; Professor Andreas Voßkuhle, President of the Constitutional Court of the Federal Republic of Germany, and Christiaan Timmermans, former judge for the Court of Justice. The second composition was confirmed by EU Council Decision 2014/76/EU, of 11 February 2014 (see OJ L41, from 12 February 2014, 18), and commenced work on 1 March 2014.

The third composition of the panel was confirmed by Decision 2017/2262/EU of the EU Council, of 4 December 2017 (OJ L324, 8 December 2017, 50), and started its work on 1 March 2018. The original composition's Vosskuhle, Wyrzykowski, and Timmermans remained, with Timmermans becoming the chair of the panel. Carlos Lesmes Serrano, President of the Supreme Court of Spain and the head of the Council for the Administration of Courts; Frank Clarke, President of the Supreme Court of Ireland; Maria Eugénia Martins de Nazaré Ribeiro, a former Judge of the General Court; and, per a proposal from the European Parliament, Simon Busuttil, a former Member of the European Parliament and a member of the Maltese Parliament, were added as new members. By Decision 2020/539/EU of the EU Council, of 15 April 2020 (OJ L122, from 20 April 2020, 1), upon the resignation of Timmermans, Professor Allan Rosas, former Judge and former Vice-President of the Court of Justice, was appointed as a member and also as the president of the panel. By Decision 2021/47/EU of the EU Council, of 21 January 2021 (OJ L21, from 22 January 2021, 1–2), the resignation of Busuttil was followed by the appointment of the author of this article to the panel. Both new members were appointed to serve until the end of the panel's third term, 28 February 2022.

25 The current composition of the Article 255 panel, its fourth, was approved by EU Council Decision 2021/2232, of 14 December 2021 (OJ L448, from 15 December 2021, 1). The panel has been chaired by Rosas since 1 March 2022 and continues to comprise Clarke, the author, and Ribeiro. The new members are Barbara Pořízková, Vice-President of the Supreme Administrative Court of the Czech Republic; Silvana Sciarra, a judge with the Italian Constitutional Court and its current President; and Vassilios Skouris, who served for many years as President of the Court of Justice.

26 Rule 128 of the Rules of Procedure of the European Parliament, 'Nomination of Judges and Advocates General at the Court of Justice of the European Union', states: 'On a proposal from the committee responsible, Parliament shall appoint its nominee to the panel of seven persons charged with scrutinising the suitability of candidates to hold the office of Judge or Advocate General of the Court of Justice and the General Court. The committee responsible shall select the nominee that it wishes to propose by holding a vote by simple majority. For that purpose, the coordinators of that committee shall establish a shortlist of candidates'. The rules as of July 2023 are accessible via <https://www.europarl.europa.eu/doceo/document/RULES-9-2023-07-10-RULE-128_ET.html> accessed 14 August 2023.

27 Allegedly, several Member States lobbied hard for the appointment of their representative; see Dumbrovský, Petkova, and van der Sluis (n 12) 460.

28 For example, see paragraph 3 of the preamble to the decision of the EU Council of 25 February 2010 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (2010/125/EU) and the corresponding list in the preamble to Decision 2021/2232 of the EU Council, of 14 December 2021, in paragraph 3.

29 With regard to the first composition of the panel, proposed by then President of the Court of Justice Skouris, see his recommendation to the EU Council 'Recommendation Concerning the Composition of the Panel Provided for in Article 255 TFEU'

European Union reproduced the draft by the President of the Court of Justice nearly word for word, making only cosmetic linguistic corrections.*30

A letter from the office of the President of the Court of Justice to the Council of the European Union from 11 January 2010 explains that its recommendations are based on the experience of the panel established under Article 3(3) of Annex I to the Protocol on the Statute of the Court of Justice. At the time, that panel drew up a list of candidates with the high-level experience most suited to fulfilling the duties of a judge with the Civil Service Tribunal.*31 That tribunal, which specialised in resolving EU civil service disputes between institutions of the European Union and their functionaries, operated from 2005 to 2016 and consisted of seven members, elected Europe-wide.*32

Clearly, then, although the CJEU itself is not directly involved in the selection of its new members, it exerts an indirect influence on that selection*33, in that the candidates for membership of the panel proposed by the President of the Court of Justice gain the Member States' tacit approval via the Council of the European Union. It has been stressed in the legal literature that the establishment of the Article 255 panel certainly represents a significant improvement in the selection process for the members of the CJEU: the integration of criteria connected with expertise makes sense as a contribution to thoroughly assessing the professional competence of the candidates. At the same time, some doubts have been expressed in the legal literature from the angle of democratic principles, however.*34

At the very least, the European Parliament participates in the process indirectly by proposing a candidate for the Article 255 panel, but it acts less directly than in the case of the selection of judges for the ECtHR, where the final decision is taken by the Parliamentary Assembly of the Council of Europe (PACE), which comprises representatives of the national parliaments. The directly elected European Parliament does not participate in choosing the judges for the CJEU.

In the selection of ECtHR judges, an advisory panel of experts (officially dubbed the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights), also established in 2010 (the seven members of which, as are the members of the Article 255 panel, are either former judges of the ECtHR or senior judges of the Member States)*35, issues its opinion on the basis of written submissions after ascertaining whether three candidates per Member State of the Council of Europe are qualified. This is followed by a hearing of the three candidates from each Member State before the PACE special committee (officially the Committee on the Election of Judges to the European Court of Human Rights, or AS/Cdh), which, in turn, makes a recommendation as to the best candidate, submitting this to the PACE plenary session, wherein the final vote takes place.*36

The selection of the ECtHR and CJEU judges has been characterised as '[n]oise and cooperation in Strasbourg: International parliamentarism in action' in contrast against '[s]ilence and solitude in Brussels:

(Council Document 5932/10, 2 February 2010) <https://data.consilium.europa.eu/doc/document/ST-5932-2010-INIT/en/pdf> accessed 23 August 2023 and the EU Council Decision of 25 February 2010 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (2010/125/EU). See Krenn (n 9) 2018.

30 Ibid 2018; V Skouris, 'Recommendations Relating to the Operating Rules of the Panel Provided for in Article 255 TFEU' 5195/10 (11 January 2010) <https://data.consilium.europa.eu/doc/document/ST-5195-2010-INIT/en/pdf> accessed 14 August 2023 ('Recommendations by President Skouris'); EU Council Decision 2010/124/EU. At the same time, Article 255(2) TFEU mentions that the EU Council acts on the initiative of the President of the Court of Justice; that is to say, according to the wording of the Treaty, the President of the Court of Justice must take the initiative.

31 Recommendations by President Skouris (ibid).

32 See also G Butler, 'An Interim Post-Mortem: Specialised Courts in the EU Judicial Architecture after the Civil Service Tribunal' (2020) 17(3) International Organizations Law Review 586. – DOI: https://doi.org/10.1163/15723747-2019010.

33 U Karpenstein, 'Artikel 255 AEUV' in E Grabitz, M Hilf, and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2017) comments 11–12 on art 255.

34 von Bogdandy and Krenn (n 5) 174.

35 To read more about the panel of experts, see Advisory Panel of Experts on Candidates for Election As Judge to the European Court of Human Rights, 'A Short Guide on the Panel's Role and the Minimum Qualifications Required of a Candidate' (Council of Europe 2020) <https://rm.coe.int/short-guide-panel-pdf-a5-2757-1197-8497-v-1/1680a0ae31> accessed 14 August 2023.

36 For the best overview of the ECtHR procedure for selection of judges, see 'Procedure for the Election of Judges to the European Court of Human Rights' (PACE Information document SG-AS (2023) 01rev02, 25 January 2023) <https://assembly.coe.int/LifeRay/CDH/Pdf/ProcedureElectionJudges-EN.pdf> accessed 14 August 2023. For an example from the relevant literature, see M Pellonpää and C Grabenwarter, '"High Judicial Office" and "Jurisconsult of Recognised Competence": Reflections on the Qualifications for Becoming a Judge at the Strasbourg Court' (2020) 80 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 13.

experts in charge'.[*37] In 2013, Michal Bobek, who would later serve as Advocate General of the Court of Justice, emphasised the importance of controlling the 'point of entry' to the highest courts of Europe and highlighted the contrast between the more democratic procedure of appointment of ECtHR judges and the 'technocratic' procedure of appointment of CJEU judges, while praising the quality of the latter appointments, which has improved precisely because of the Article 255 panel.[*38]

But it has been concluded also that the selection of judges only by qualified majority in the Council of the European Union or by a majority in the European Parliament would create a risk of getting caught up in the political maelstrom and render the legal qualifications of the candidates secondary.[*39] Contrary to representation, judicial quality directly affects the legitimacy of individual decisions: if judges are not independent, if they are biased, or if they lack basic legal skills, their decisions are not worth the paper they are written on.[*40]

It is not easy to strike a balance between avoiding political pressure and the emergence of a community of European judges. Ideally, though, the selection of judges should respect the principles of democracy, legitimacy, independence, impartiality, quality, transparency, and representativeness.

As of the time of writing, in 2023, three of the seven members of the Article 255 panel are former judges of the CJEU: a former President of the Court of Justice, a former Vice-President of the Court of Justice (Allan Rosas, who also acts as the committee president), and a former Judge of the General Court. The remaining four members are all judges of their state's highest courts, some of whom are from their national constitutional court, one of them being also a former judge at the ECtHR. With its current membership, the panel has a majority of women for the first time (four out of seven). In terms of geography and legal systems, Southern Europe shows the strongest representation by numbers, thanks to Italy, Portugal, and Greece. According to the EU's traditional classification, there are two members from Eastern Europe (the Czech Republic and Estonia), one from a Nordic country (Finland), and one from a common-law country (Ireland). A mere 13 years ago, the starting line-up was dominated by Western Europe. These and other aspects of the panel members' background and activities are detailed further on the panel's Web site.[*41]

It is a great honour to be a member of the panel, a truly pan-European club of wise people – indeed the finest group of experts in EU law. While the choice of a super-judge is still limited to the potential of the Member State concerned, the members for the super-judge jury can be chosen from among the best of the best, established super-judges from all over the EU.

The members of the panel are appointed for four years. Someone replacing a member whose term of office expires before the end of that period shall be appointed for the remainder of the term of office of said predecessor.[*42] A member of the panel may be reappointed, to serve for one further term of office.[*43] The panel has a quorum if at least five members are present[*44], and it shall be chaired by one of its members, appointed to serve in this capacity by the Council of the European Union.[*45]

The General Secretariat of the Council of the European Union provides secretarial services for the panel: the administrative assistance necessary for its work, including the translation of documents.[*46] Members of the secretariat's staff shall receive remuneration; however, the members of the panel do not get remunerated for their work – they do it of their own free will and with their own time. The work entails considerable 'homework': before the members hear each candidate, it is necessary for them to prepare thoroughly by familiarising themselves with a large amount of written material (the nature of which is discussed in the next section of the paper). At the hearing of the candidate all members of the panel pose questions.

37 von Bogdandy and Krenn (n 5) 171 and 173.

38 M Bobek speaking on 4 November 2013 at the College of Europe, Bruges, in a debate on the process of appointing judges to the CJEU and the ECtHR. See 'Selecting Europe's Judges: Time for More Democratic Legitimacy?' (European Parliament Research Service, 7 November 2013) <https://epthinktank.eu/2013/11/07/selecting-europes-judges-time-for-more-democratic-legitimacy/> accessed 14 August 2023.

39 Sauvé (n 2) 641.

40 M van der Sluis, 'Judicial Appointments and the Right Kind of Politics' (*Völkerrechtsblog*, 21 April 2014) <https://voelkerrechtsblog.org/judicial-appointments-and-the-right-kind-of-politics/> accessed 15 August 2023.

41 See <https://comite255.europa.eu/en/home> accessed 14 August 2023.

42 See the panel's rule of operation, 3.

43 Ibid.

44 Ibid 5.

45 Ibid 6.

46 Ibid 6, second and third sentences.

The system takes mobility into account. Travel expenses do get covered: the panel meets in Brussels (not Luxembourg, where the CJEU is based), and those members of the panel who have to travel there from their place of residence for performing their duties for the panel are reimbursed for this and paid a daily allowance from the budget of the Council of the European Union.[*47] During the SARS-CoV-2 pandemic and beyond, some panel meetings have been held online – in cases of less extensive debate and when, for example, candidates are not being listened to.

3. Procedures and policy: What does the panel do?

The literature has presented the star-search panel as mysterious, not least because the Article 255 panel's deliberations are closed[*48]. Although the panel gives proper and clear reasons for every opinion[*49], those decisions are communicated only to the representatives of the governments of the Member States[*50], not even to the candidates, let alone disclosed online or in other public or semi-public venues.

Such procedures and practices have given rise to conflicting opinions[*51] about what constitutes sufficient transparency (i.e., how much transparency makes something 'transparent') and how to achieve balance between access to information and privacy in the selection of European judges.[*52]

The panel itself, in response to a request for information addressed to the General Secretariat of the Council of the European Union, has stated that its opinions, in principle, fall within the scope of EU Regulation 1049/2001[*53]. However, insofar as the panel forwards those opinions to the Council of the European Union, which then passes them on to the governments of the Member States, it is the council that is the custodian or possessor of the opinions.[*54] In either case, the above-mentioned European Union regulation provides for certain exceptional cases in which documents are not disclosed, and the panel, relying on the relevant case-law of the Court of Justice[*55], has concluded that the disclosure of its opinions, which contain candidates' personal data, could undermine the protection of their privacy (addressed in Article 4(1)(b) of the regulation). In addition, the panel has found that full disclosure of its opinions would place the quality of the consultation with the Article 255 panel at risk and imperil both the procedure for appointing members for the CJEU and the objectives, since it would eliminate the secrecy of the deliberations. This is why opinions are addressed solely to national governments and are not subject to either direct or indirect publication. In its responses to requests for information, the panel has, therefore, communicated only what does not place the protection of personal data in jeopardy.[*56] The European Ombudsman has supported this approach.[*57]

47 Ibid 9.

48 Ibid 5, second sentence.

49 Ibid 8, first and second sentence of the first paragraph.

50 Ibid 8, second paragraph (third and fourth sentence).

51 It is characterised by the views expressed on 4 November 2013 by the distinguished European researchers and practitioners who gathered at the College of Europe in Bruges to discuss the process for appointment of judges of the CJEU and the ECtHR. Armin von Bogdandy (from the Max Planck Institute of Public Law) called for the provisions for EU democratic principles (articles 9–12 TEU) to be applied in practice in the process of appointing judges to the CJEU, and he criticised the current procedure for lacking transparency. Alberto Alemanno (from Paris University of Economics, HEC) presented detailed legal arguments for allowing public access to the documents of the Article 255 panel. However, Sauvé (Article 255 panel chairman at the time) advocated confidentiality of the panel's activities. For further details, see Bobek's speech 'Selecting Europe's Judges' (n 38).

52 See also Alemanno (n 20) 202–21.

53 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (31 May 2001) OJ L145 43–48.

54 See 'Seventh Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union' (2022) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/2022.2597-qcar22002enn_002.pdf> accessed 15 August 2023 ('Seventh Activity Report'), especially page 16.

55 *Commission v Bavarian Lager* (29 June 2010) ICJ C-28/08 EU:C:2010:378.

56 Seventh Activity Report (n 54) 16.

57 Decision of the European Ombudsman in Case 1995/2017/THH concerning the refusal of the Council of the EU to grant public access to opinions of the Council of the European Union to opinions assessing candidates for the position of Member of the Court of Justice and of the General Court (2019) 22–25 <https://www.ombudsman.europa.eu/en/decision/en/114212> accessed 15 August 2023.

Again, however, critics have argued that, while the lack of transparency in the functioning of the panel is aimed in part at protecting the identity of candidates, it does not achieve this end in practice, since the Member States are obliged to submit all candidates' names to the General Secretariat of the Council of the European Union. Accordingly, unsuccessful candidates are quite easy to identify via the computer network in any case.*[58]

Irrespective of transparency issues, for the general public and probably also for future candidates, the periodic reporting on the activities of the Article 255 panel provides by far the most important and useful material. Each panel 'activity report' is a very useful document, which not only describes the work of the panel over the period in question but also contains detailed information on the procedures established by the panel for the evaluation of candidates, alongside details of the criteria to be applied to candidates, through descriptions of how the panel interprets the requirements laid down in the treaties on which the European Union is founded. At the time of writing, seven activity reports had been published.*[59]

Arguably, Sauvé, who selflessly served as the panel's first president (for two consecutive terms) and established many of the traditions and principles of operation that have endured to the present day, is the one behind the Article 255 panel's way of working and reporting on its activities. For good reason, the panel was known as the Sauvé panel for many years.*[60] He greatly increased the visibility of the panel by introducing it, writing articles, and giving presentations on the subject.*[61]

The work of the panel is cyclical and aligned with the judges' terms of office. For example, between 1 October 2019 and 28 February 2022, there were 13 meetings (on average, one every two months). The largest number of meetings held in any year, from the panel's inception in 2010 through 2022, comes from 2016, when there were 11 in total. In three years – 2010, 2013, and 2021 – there were eight such meetings, while in 2011 there were only three. Meeting length varies also: these are mostly one-day meetings, but two-day meetings may be held at busier times.

Further elucidating the cycle, the panel's Web site provides a graphical depiction of the stages in the panel's work: from application, transfer of the application, examination of the dossier, interview of the candidate to reasoned opinion.*[62] The work mainly includes the phase of examining the file and oral hearing. In summary, as soon as the government of a Member State submits a nomination to the Council of the European Union, the General Secretariat of the council forwards that nomination to the president of the panel*[63], which then asks the candidate for materials to inform the deliberations; after this, the members of the panel start to study the incoming written material, which can sum to dozens of pages per candidate, and form their opinion. In addition, the panel may request the proposing government to provide supplementary information (e.g., on the national application procedure) that it considers necessary for the consultation.*[64] Alongside the details submitted to it, the panel may take into account objective information readily available to the public when assessing a candidate. In the event that information comes to the attention of the panel that could lead to a negative opinion on the candidate, the panel will take it into account only once the candidate and the government of the Member State concerned have had an opportunity to comment on this information.

It has always been important for the panel that the procedure be as efficient as possible and not take too long. Meetings of the panel are held when there are enough vacancies to warrant them and when the term of office of the current CJEU members is about to expire. Per data current as of the last reporting period, it has taken the panel, on average, 82 days from receipt of a nomination to issue its opinion. The process takes

58 Dumbrovský, Petkova, and van der Sluis (n 12) 461.

59 Hence, the Seventh Activity Report (n 54) is the most recent.

60 Lord Mance, 'Jean-Marc Sauvé et le comité 255' in P Delvolvé and others (eds), *Qu'est-ce que le bien commun ? Hommage à Jean-Marc Sauvé* (Paris, Berger–Levrault 2020) 179.

61 J-M Sauvé, 'Les juges européens désormais nommés après avis d'un comité indépendant. Entretien' *Les Petites Affiches* (53) (16 March 2011) 3; J-M Sauvé, 'Qu'est-ce qu'un bon juge européen ?' *Dalloz* (19) (10 May 2011; J-M Sauvé, 'Le rôle du comité 255 dans la sélection du juge de l'Union' in A Rosas, E Levits, and Y Bot (eds), *La Cour de justice et la construction de l'Europe: Analyses et perspectives de soixante ans de jurisprudence* (Springer 2013) 99; an interview with Sauvé in the magazine *Revue de l'Union européenne* [2013] (June/569) 325 and, for instance, one of the many presentations he has given, 'La sélection des juges de l'Union européenne : la pratique du comité de l'article 255', at the colloquium Judges: A Critical Appraisal of Appointment Processes to the European Courts (College of Europe in Bruges, 4 November 2013); Sauvé (n 2).

62 At at <https://comite255.europa.eu/en/fonctionnement> accessed 15 August 2023.

63 Operating rules of the panel 6, first sentence.

64 Ibid 6, second sentence.

into account the need to allow sufficient time for the nominee to send the written documents required and, if necessary, for the panel to translate them.*[65]

The panel has developed a CV in a harmonised format*[66] for candidates for membership of the CJEU, which contains enough mandatory fields to ensure that the candidate's file includes all the information needed for the decision-making process: personal details, professional experience, educational background, language proficiency, data related to the proficiency required for the post, additional information on published research articles and conference presentations, and any other information the candidate considers relevant.

In addition to the CV, the candidate must submit a letter of motivation explaining their reasons for applying and, if possible, 1–3 recent scientific publications under the candidate's authorship that either were originally in English or French or have been translated into one or the other language, as appropriate. In addition to these materials, a presentation of one to three complex legal cases which the candidate has handled in their professional practice must be submitted. The latter is not to exceed five pages per case. If any of this material is missing, the panel asks for the file to be completed. However, a lack of published works or the provision of older works cannot in itself penalise a candidate.

The national government, for its part, must set out for the file the main reasons for preferring this particular candidate and describe the selection mechanism employed in the Member State.

In short, the panel decides on the basis of the following elements:

- the important reasons for which the government submitted the nomination;
- information on the national procedure under which the candidate was selected;
- a letter from the candidate that justifies the application;
- a CV in standardised (harmonized) form;
- the text of 1–3 recent publications by the candidate, written in or translated to English/French;
- a presentation of 1–3 complex judicial cases dealt with in the candidate's professional practice, not exceeding five pages per case.

Candidates usually submit three articles and solutions to three cases. Examination of these and the other written materials is followed by an oral round, which completes the body of information based on the file. To safeguard against decisions being unduly influenced by impressions gathered during personal interviews, the Sauvé panel instituted the general practice of forming a preliminary position on the basis of documentation before testing it via interviews.*[67] Indeed, the interview is preceded by round-table discussion among the members of the panel, which continues after the interview, with the aim of either confirming or refuting the initial impression created through the written material about the candidate. It should be stressed that the panel's opinion is never based solely on the oral interview; it is formed in accordance with the results of analysing the candidate's entire file.

The interview lasts exactly one hour. It starts with a short introduction (about 10 minutes long) in which the candidate must, among other things, choose and present one of the above-mentioned legal issues dealt with that are related to EU law and the possible future job at issue. Candidates may speak English, French, or one of the other official languages of the European Union. In practice, the interviews are conducted in English and French, with questions testing both languages.

The introduction is followed by a 50-minute question-and-answer session with no additional preparation time for the candidate, who must immediately answer the prompt in the language in which the question was asked (either English or French). The panel may ask questions connected with the CV and request clarification, but in most cases the questions pertain to the practice of the CJEU, in aims of assessing the candidate's analysis and reasoning skills, especially in relation to EU law. Also, candidates may be asked for clarification of cases that they have helped resolve, for an opinion on topical issues of EU law, for a general overview of the state of EU law, to present their views on the dialogue between the courts (relations between the EU and the legal systems of the Member States), and (for prospective judges and Advocates General of the Court of Justice) to describe their vision of the mission of the Court of Justice. Furthermore, the candidate often is asked about the rule of law, the Charter of Fundamental Rights, and European integration. The questions are not confined to abstract and theoretical issues; they also probe the

65 Seventh Activity Report (n 54) 9.

66 It has been included, for example, in the seventh activity report of the panel as an example (n 54).

67 Lord Mance (n 60) 182.

candidate's practical experience of EU law. In addition to specific questions, including ones arising from the candidate's written work, there are open-ended queries that provide an opportunity to prove one's potential.

After the oral hearing of the candidate, there is discussion among the members of the panel, to reach a final reasoned opinion. The explanatory memorandum on opinions of the Article 255 panel sets out the main grounds for an opinion. Lord Mance has described the 'kitchen side' of the Sauvé panel thus:

> After the interviews, and once a consensus or sometimes a majority had emerged, the panel had the advantage of being able to select and work from one of two rival draft opinions developed by its president, setting out the pros and cons of the particular candidate. Every such draft received close scrutiny and often underwent considerable revision.*[68]

In most cases, the panel tries to reach consensus on the suitability of the candidate. If arriving at consensus is impossible, the decision is taken by majority. However, a minority member cannot attach a dissenting opinion to the panel's opinion, and the public are not informed as to which members of the Article 255 panel may have been opposed to the candidate's appointment. A member of the panel has the option of withdrawing from the decision if having been involved personally with the candidates' affairs or associated circumstances. There is no known regulation on this recusal, but it has happened in practice.

In the next step, already mentioned, the opinion of the panel is sent to the representative of the national government. In addition, at the request of the EU Presidency, the chairman of the panel may delegate arriving at an opinion to the representatives of the governments of the Member States meeting in EU Council session*[69], since the final decision on the basis of the panel's opinion is actually taken by the governments of the Member States.

There is a separate procedure for the re-election of judges already in office with the Court of Justice and for judges of the General Court and Advocates General*[70] who are eligible for re-election. That is addressed further on in the paper.

4. Which criteria are set, and how are they applied?

Article 255 TFEU requires the panel to give an opinion on the suitability of the candidates. In that regard, the treaty's articles 253 and 254, as referred to above, are rather succinct in terms of the requirements to be met by candidates. They state the condition of independence, firstly. In the case of judges and Advocates General of the Court of Justice, there is the criterion of either possessing the qualifications required for appointment to the highest judicial office in their respective countries or being jurisconsults of recognised competence, whereas in applying for the General Court it is sufficient to qualify for high judicial office.

The Article 255 panel has therefore enjoyed a considerable margin for manoeuvring in the content and clarification of these criteria. Though they must be closed, they are still relatively general. The panel has consistently emphasised that it considers all patterns and competencies in one's legal career to be equally legitimate in an application for membership of the CJEU, on the grounds that it is not the panel's task to participate in dictating the composition of the Court of Justice or the General Court*[71]. Nevertheless, the panel's most recent activity report singled out a judge, a university professor, a lawyer, and a senior civil servant as examples of potential candidates.*[72]

---

68 Ibid 181.

69 Operating rules of the panel (n 63) 8, third and fourth sentence of the second paragraph.

70 As explained above, there are currently five Member States (the most populous) that have the right to appoint their own Advocates General – namely, Germany, France, Spain, Italy, and Poland. Other EU member states appoint Advocates General on a rotating basis (six Member States at a time). Each Advocate General serves for a term of six years, is eligible for reappointment, and cannot be removed during the term of office except in the event of disciplinary removal or resignation. However, given that nominations for countries that are not members of the institution of the Advocate General with permanent standing is on a rotating basis, the extensions are, in effect, limited to the five countries that can always send their own Advocates General.

71 'Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union' (6509/11 / (18.12) (OR. fr), 17 February 2011) <https://data.consilium.europa.eu/doc/document/ST-6509-2011-INIT/en/pdf> accessed 22 August 2023 ('First Activity Report') 4.

72 Seventh Activity Report (n 54) 17.

The panel bases its assessment of the candidate on six considerations, which it has publicised and substantiated in its activity reports.[*73] These are:

- the legal skills of the candidate;
- the candidate's professional experience;
- the ability of the candidate to perform the duties of a Judge;
- language knowledge possessed by the candidate;
- the ability of the candidate to work in an international team where multiple legal systems are represented; and
- the independence, impartiality, probity and integrity are beyond doubt.

The panel assesses all these qualities as a whole; however, a candidate's lack of one of them may lead to forming a negative opinion about that candidate. In its first activity report, the panel gave a thorough characterisation of these criteria: legal expertise, professional experience, ability to perform the duties of a Judge, assurance of independence and impartiality, language skills and aptitude for working in an international environment in which several legal systems are represented. For example, it explained that when assessing legal knowledge it takes into account candidates' discharge of high-level judicial, administrative or academic duties, university degrees (such as a doctorate) and experience of teaching or training, as well as experience as a legal expert or consultant to supreme courts or very important institutions, or participation in scientific associations devoted to the study of law.[*74]

The panel cannot be tasked with testing a candidate's legal knowledge, but if, for example, it emerges during the interview that the candidate has significant gaps in legal knowledge, this may have an impact on the final result of the application. In addition to theory-based knowledge, the panel assesses specifically whether the candidate has a highly developed analytical capacity and knows under what conditions and methods the law may be applied to vital circumstances – with particular regard to, for example, the application of European Union law in the legal systems of the Member States. This is why candidates must prove that they have sufficient knowledge of EU law, that they are able to navigate the material and also to articulate coherent stances on the general issues of EU law, and that they are consistent in their answers.

The wider the range of the candidate's opinions, the greater the interest the panel will take in exploring those opinions. The candidate must be able to demonstrate a solid ability to think independently, as the panel highly appreciates originality. It is necessary, from the panel's perspective, that candidates be able to 'settle in' and contribute effectively to the work of the CJEU within a reasonable timeframe, such that they are prepared for the challenges ahead and understand the mission of the CJEU. Candidates for the position of either judge or Advocate General with the Court of Justice must demonstrate that they are capable of promoting the necessary and legitimate dialogue between the Court of Justice and the Member States' supreme courts. Candidates for the post of Judge or Advocate General of the Court of Justice are therefore expected to demonstrate very extensive legal capabilities, and candidates for the post of Judge of the General Court are expected to demonstrate extensive legal capabilities.[*75]

As for professional experience, the panel shall look at its level, its nature, and the length of service. The panel has come under criticism related to whether it is possible to ascertain from the number of years whether or not someone has amassed sufficient professional experience, all the more so because, in some commentators' view at least, the panel has not expressed a very clear position on whether, for example, a full 20 years of work experience in high office is required or, instead, it is sufficient that a portion of that 20-year span consist of such work (e.g., the candidate may have been a judge of lower instances and then in recent years reached the Supreme Court).[*76] At the same time, some kind of line must be drawn somewhere, and the work-experience conditions for various other important posts in the European Union are presented as fixed numbers. It is precisely with reference to the case of the European Union civil service, but also of the national practices of the Member States administration, that the panel considers that less than 20 years' experience of high-level duties for candidates for the office of Judge or Advocate General of the Court of Justice, and less than 12 or even 15 years' experience of similar duties for candidates for the office of Judge of the General Court, would be unlikely to be deemed sufficient.[*77] The panel applies the general

73 Ibid.

74 First Activity Report (n 71) 9.

75 Seventh Activity Report (n 54) 18.

76 Dumbrovský, Petkova, and van der Sluis (n 12) 465.

77 Seventh Activity Report (n 54) 18.

rule that candidates who do not reach this minimum are not suitable for the post in question. That said, the presumption is open to reconsideration if the candidate demonstrates exceptional legal knowledge.*[78]

Of course, the panel must also take into account the traditions and circumstances of the respective Member State, the administrative practice of the relevant countries, and the peculiarities of specific judicial and university systems. For example, in Eastern European countries, it has been somewhat easier for a certain post-Communist generation to establish an ascending career in the legal profession quickly, while in many countries with common-law traditions it is more typical to become a judge only after many years of successful practice as a lawyer.

The panel also places emphasis on whether the candidate is sufficiently aware of the professional demands imposed on the members of the CJEU, including what independence and impartiality of a judge means concretely, along with the responsibilities that working as a CJEU judge requires: the workload, collegiality, and the need to make clear and well-reasoned decisions. How the candidate perceives these components can be judged by the candidate's answers, which reveal whether the individual is good at reasoning, gives clear and accurate answers, and shows sufficient authority and maturity. The skills of working with and leading a team are of no small importance either (after all, the CJEU members have their own offices and teams, which they have to manage). The same is true of computer/IT skills. Every candidate must be highly adaptable and prepared to start making a personal contribution to the work of the CJEU, preferably from a few months after the start of the work, not just several years after settling in.

Candidates must be able to express themselves in the various official languages of the European Union (ability to speak, or at least understand, a number of official languages of the European Union,) and must have the ability to acquire proficiency, within a reasonable time, in the working language of the CJEU (French) and thus be in a position to contribute to deliberations with other members of the court and take part in case hearings in that language. The latter is by no means a low hurdle, especially for candidates from newer and non-Francophone Member States.

In any case, candidates must have the ability to contribute to court debates and be able to work in an international environment with colleagues from different backgrounds and legal systems. Therefore, it is useful if they have experience of working in a European or international context.

It is certainly difficult to assess whether a candidate is independent, impartial, reliable, has integrity and probity. Still, the panel tries to make sure that there is no factor the influence of which could jeopardise these qualities in the candidate. The panel may request further information in this regard, if necessary, from the Member State.

A further issue has been raised in addition: some have asked whether, when making its choice, the Article 255 TFEU panel should not take into account any shortage of judges with a certain specialisation in the CJEU's membership, such as tax law, intellectual property law, criminal law, or labour law, since some areas of law that previously had little contact with European Union law are increasingly encompassed within the competence of the European Union.*[79]

Another question raised is one of principle as to whether a career system should be favoured for connections between EU judicial bodies, à la from the 'Judicial Counsel (*référendaire)* to the President of the Court' approach, which has the advantage that, when making a choice, one could assume that a person who has worked in the system for a long time knows that system very well. At the same time, however, such conditions inevitably lead to encapsulation and stagnation – EU-level law could become the domain of a certain closed circle. The question, in other words, is how a balance can be struck such that the posts of judge and Advocate General of the Court of Justice are also open to the top players from the outside, to fresh eyes, without the General Court being a springboard, but at the same time the cross-appointment of judges between the courts of the CJEU in justified cases is not excluded, with redirection probably still occurring from the General Court to the higher court, the Court of Justice. As the requirements for a judge of the Court of Justice and the General Court are different and there are differences too in the content of the work, can it be automatically assumed that all the judges of the General Court are suitable, or should they even want to be judges of the Court of Justice at all? Would it be more reasonable for them to rotate back

78 Ibid. This has rarely happened in practice.

79 Damian Chalmers, with the London School of Economics, discussed this on 4 November 2013 at the College of Europe debate in Bruges pertaining to the process of appointing judges to the CJEU and the ECtHR; for further details, consult Bobek's speech 'Selecting Europe's Judges (n 38).

to their Member States, even temporarily, so as to contribute to a better understanding of European Union law in those (national) courts?

An additional important aspect is diversity in the composition of the CJEU. Should regard be given to, for example, the candidate's gender (cf. the election of ECtHR judges, wherein the national governments are compelled to present at least one candidate of underrepresented gender – so far, female – in their lists of three candidate judges for the Strasbourg court), age (for instance, there is no upper age limit for CJEU appointments as there is for the ECtHR at present), religious affiliation, or disability? Might such considerations be justified?

The rise of anti-Europeanism observed in recent years has prompted some writers to ask whether, in addition, the political philosophy of future judges should be taken into account when one is assessing how someone is represented before the Court of Justice; alongside this question, the literature has raised the issue of whether the panel might be biased in relation to views on such matters.[*80] That is, should political ideology (e.g., a pro-European stance) be an important factor in the selection and appointment of the CJEU judges, or, on the contrary, should the panel exert an influence such that equality of representation in the CJEU in this regard, if possible at all, is guaranteed, in the short or long term?

After all, the Court of Justice has been regarded as one of the engines of the European Union's legal community: the guardian of the rule of law in the European Union, whose role is to act as both the constitutional and the supreme court of the European Union[*81] in aims of ensuring that, among other things, the Member States respect the primacy, unity, and effectiveness of European Union law.[*82] There has been talk also of European political philosophy (*la philosophie politique européenne*) as a common value.[*83]

The first argument by advocates of diversity in the court's composition is that the variety of real-world personal experiences of judges from different backgrounds yields a balanced perspective for court decisions and has a substantive impact on the law. Another argument made is that even if the personal experiences of judges do not – or, some argue, should not – affect the substance of the law, the representation of underrepresented groups among the judges provides a sense of involvement and procedural fairness, which encourages more representatives of such groups to respect and utilise mechanisms of the judiciary.[*84]

In the end, potential future judges' character in terms of their personal traits and personalities is probably not insignificant. Is the CJEU faceless, or, if it has a face, what is the role of its individual members in shaping that face?[*85] In choosing candidates for membership of the CJEU, is it necessary to look for legends similar to former star of the US Supreme Court Ruth Bader Ginsburg, or should the CJEU have rather impersonal authority and employ experts of an even level who are not known to the public and who shall not even express a dissenting opinion anyway when remaining in the minority[*86]? Must a super-judge act as a superstar, or is there both room for and indeed a need for 'ordinary' judges to shine – for each one's light to be visible in the institution's constellation as it dispatches its heavy workload?

It should not be forgotten that the judges of the CJEU promote European Union law; i.e., they must also be able to pass it on, teach it, and explain European law to the public in simple language as necessary. These efforts include communicating with the media and, most importantly of all, not only being independent and impartial in all this but giving a clear impression of being so (just as justice must be done and seen to be done). They should also not forget about humanity and empathy.

80 van der Sluis (n 40).

81 See also, for example, the presentation by K Lenaerts before the ECtHR titled 'The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection' (solemn hearing for the opening of the judicial year, 26 January 2018) <https://www.echr.coe.int/documents/d/echr/Speech_20180126_Lenaerts_jy_eng> accessed 15 August 2023.

82 On the prohibition, arising from the direct effect of EU law, of jeopardising the primacy, unity, and effectiveness of EU law in the context of Estonian law, see, for instance, Supreme Court *en banc* 5-19-29/38 (15 March 2022) 49.

83 Also Sauvé (n 2) 646.

84 Petkova (n 22).

85 P Gragl, 'The Faceless Court? The Role of Individual CJEU Members' (2023) 30(1) Maastricht Journal of European and Comparative Law 15. – DOI: https://doi.org/10.1177/1023263x231162771.

86 J Laffranque, 'Dissenting Opinion of a Judge: Its Possibility and Necessity in the Supreme Court of the Republic of Estonia and the European Court of Justice' (*Dissertationes iuridicae Universitatis Tartuensis* (10), Ülikooli Kirjastus) (doctoral thesis, Tartu University 2003.

5. Successes and problems revealed by time: where would the panel go if granted three wishes?

Sauvé himself acknowledged that the mission of the Article 255 panel seems, at first sight, limited and modest, since it cannot replace the member states of the European Union either in proposing or in appointing candidates for membership of the CJEU.[*87] Indeed, let us not lose sight of the end goal: the purpose of the panel's opinions is to **inform** the governments of the Member States before the Member States take a decision on the appointment of judges and advocates general. The opinions of the panel are not legally binding on the Member States.

However, the panel has gained such authority that its opinions have been solidly respected by the national governments. Thus far, no candidate subject to a negative opinion from the panel has been appointed to the position in question (judge of the Court of Justice or of the General Court or Advocate General of the Court of Justice).

In rendering these opinions, the panel has made a serious contribution to strengthening the guarantees (of independence, impartiality, and high-quality knowledge and skills) for the appointment of the CJEU judges and Advocates General. In this regard, it must be borne in mind that, before appointment, any candidate for membership of the CJEU must be approved unanimously by the governments of the Member States.

For example, over the time covered by the seventh report of the Article 255 TFEU panel, it delivered opinions on 53 candidates for the post of Judge or Advocate General of the CJEU. Of these, 29 opinions pertained to the first term of office, which necessitated extensive analysis and consultation by the panel. Seven of those 29 were unfavourable. In all cases, the governments of the Member States took account of the panel's opinion.[*88]

If we compare these figures with those from the early years of the Article 255 panel, the results seem to have been fairly stable. In the first four years of the panel, 22% of cases involved unfavourable opinions; that is, seven out of 32 candidates for the first term of office were rejected, while the corresponding figure for the second four-year period was 17%, or seven out of 41 candidates.[*89] Between 1 March 2018 and 30 September 2019, the third panel issued, in total, 43 opinions, 29 of which were related to the first appointment. Eight in all were unfavourable; i.e., 28% of the candidates were rejected.[*90] The larger statistical landscape, from the dozen years between 1 March 2010 and 1 March 2022, reveals that the panel has delivered 243 opinions in all (67 by the panel in its initial composition, 80 by the second panel, and 96 by the third), of which 97 concerned judges and Advocates General for the Court of Justice, 52 of which pertained to renewal of the term of office, and 146 of which concerned judges of the General Court (61 of whom considered the re-election). In total, there were 113 opinions on re-election, which leaves 130 opinions issued on new candidates: 45 on candidates for the Court of Justice and 85 on nominees for the General Court. In all, 27 of the 130 (i.e., about 21%) were negative.[*91] The rejections of candidates have involved countries all over Europe, and rejections have encompassed candidates for judges and Advocates General of the Court of Justice and for judges of the General Court.

The panel has also delivered unfavourable opinions where the candidates' legal capabilities appeared inadequate in light of the requirements set for the office of Advocate General or for that of Judge of the Court of Justice or the General Court. Opinions of such a nature have likewise been issued where the candidate did not demonstrate sufficient knowledge of European Union law or appropriate understanding of the major issues that fall within the jurisdiction of the courts involved.

In that Advocates General have faced particularly demanding conditions, the legal abilities of weaker candidates for this position in particular were found to be actually inadequate. A similar pattern has been visible to some extent with regard to certain candidates for judges with the Court of Justice and the General

87 Sauvé (n 2) 640.

88 'Appointments to the EU Court of Justice: Seventh Activity Report of the Article 255 Panel Published' (Council of the EU press release, 15 July 2022) <https://www.consilium.europa.eu/et/press/press-releases/2022/07/15/appointments-to-the-eu-court-of-justice-seventh-activity-report-of-the-article-255-panel-published/> accessed (25 September 2023).

89 Lord Mance (n 60) 180.

90 See page 8 of the sixth activity report of the Article 255 TFEU panel, available via <https://comite255.europa.eu/en/work> accessed 15 August 2023.

91 Seventh Activity Report (n 54) 9–10.

Court; it has sometimes evidenced itself in the candidate's failure to demonstrate sufficient knowledge of European Union law (on a few occasions, there have even been gaps in basic knowledge of European law) or show an appropriate understanding of which major issues fall within CJEU jurisdiction.[*92]

While the panel believes that candidates for appointment to the office Advocate General or Judge of the Court of Justice cannot be expected to possess the same capabilities as someone already holding the position in question, it also holds the view that a favourable opinion shall not be delivered in respect of any candidates unless they demonstrate that they possess the ability to make an effective personal contribution.

Both the panel and its first president personally have stressed that, while there is no desire to denigrate the skills of unsuccessful candidates in any way or underestimate their achievements, sometimes even in high positions, in 'the duties they have performed, especially in their Member State of origin […], all candidates must be capable of demonstrating appropriately', on the basis of their file and oral statements, that their knowledge of the EU legal system is adequate and that they are able to grasp the broad issues involved in 'the application of EU law and relationships between legal systems' and to contribute to the work of the CJEU without any particular familiarisation effort and time.[*93]

The panel may also express concerns as to whether a candidate's integrity and probity are beyond doubt. Since these qualities are vital in carrying out the duties of Advocate General or for a judge of the Court of Justice or the General Court, the panel issued an unfavourable opinion in a case wherein its serious doubts in this regard were not allayed over the course of the assessment procedure. Additionally, given that the candidates have had several months in which to prepare for their hearing, conduct research into EU law, and reflect on the case-law and missions of the courts of the Union, the panel is especially mindful of candidates' shortcomings with regard to these. In this context, a candidate who manifests serious inadequacies in knowledge or reasoning stands at a clear disadvantage. That said, the panel has in certain cases stated a positive opinion even where the candidate did not answer a very specific technical question but did exhibit general reasoning ability that led its members to conclude that the candidate possessed potential to perform the duties required.[*94]

In contrast, no candidate nominated for re-election to either the Court of Justice or the General Court (i.e., a judge already in office) has been rejected. It is worth noting that a candidate for re-election does not get heard orally. This principle is laid down in the rules governing the operation of the panel[*95], and it is likewise noteworthy that there is no direct legal basis for such a distinction in the TFEU, since its articles 253–255 do not provide for any exceptions connected with re-election.

Correspondingly, the panel's reasoning for re-election opinions takes a briefer form.[*96] One factor might be that, as literature specifically focused on this matter states, if the panel deciding on the quality or continuation of judges' work gives a negative assessment to a judge whom they initially recommended, this might be tantamount to acknowledging that it was mistaken in its original view.[*97] However, the panel has explicitly stated when reporting on its activities that it does not rule out the possibility that, in certain particular circumstances, it may conclude that a judge put forward for re-election is not or is no longer capable of carrying out the functions of a judge to the necessary high or very high standard and, therefore, does not meet the requirements of Article 255 TFEU. It has clarified that, should the detailed written material prove insufficient and if doubts arise, it may choose to pose questions to the candidate put forward for re-election, if necessary by hearing that individual (in the event that the panel's examination of a candidate's activity leads it to question the individual's capacity to keep performing the requisite duties, it will ask the candidate for any explanations that said person wishes to provide, which may be done in the context of a hearing). [*98]

When examining re-election cases, the panel shall request that the relevant government submit the candidate's CV, in the harmonised form defined by the panel, listing in particular published writings by

92 Ibid 19.

93 See also Sauvé (n 2) 643.

94 Seventh Activity Report (n 54) 20.

95 According to the operating rules of the panel (n 63) 7, unless the proposal is for the reappointment of a judge or an Advocate General, the panel shall hear the nominee in closed session.

96 Also Sauvé (n 2) 644.

97 S Cheruvu and others, 'How Do Merit Commissions Affect Judicial Behaviour? Evidence from the Court of Justice of the European Union' (2 October 2022) 2 <https://www.joshuafjelstul.com/Fjelstul-merit-commissions.pdf> accessed 15 August 2023.

98 Seventh Activity Report (n 54) 14–15.

the candidate, and shall ask the President of the Court of Justice or the General Court, as the case may be, to send the panel a list of the cases in which the candidate for re-election has participated as a judge. This list of closed cases must distinguish between judgements and orders, and it must indicate the size of the formation, the subject matter involved, and the time taken to resolve the case. The panel takes into account also the list of pending cases for which the candidates are rapporteurs. Similarly, for candidates for the office of Advocate General of the Court of Justice, the panel examines the list of cases in which the individual has delivered an opinion, again distinguishing between particular formations of the court.[*99]

While an assessment of productivity may well be necessary, a metric for this is by no means easy to implement: given how many things, of varying volume and complexity, judges handle, measuring and comparing productivity in a fair manner is no easy task.[*100] The panel considers it necessary to obtain additional data, therefore, to reveal how productive candidates are in comparison with other judges. For example, from 2021 onward, the panel has compared the processing time for the candidate's decisions with estimates of time spent on comparable cases, where the latter are based on indicative deadlines set by the court itself.[*101] In this context, it is of the utmost importance that the Court of Justice and the General Court be co-operative in sharing information with the panel.

In the past, when an ECtHR judge was appointed for a term of six years and could be re-elected, the individual had to go through re-nomination alongside two new candidates from the same country; now, ever since the entry into force of the 14th Protocol to the ECHR (on 1 June 2010), the term of office of an ECtHR judge is nine years without the possibility of re-election.[*102] A judge can still be re-elected to the CJEU, however, and this in itself creates problems of independence.[*103] Still, reshaping the situation would require a change in the TFEU, which, in turn, is managed by the member states of the European Union.[*104]

Re-election brings with it several issues related to the possibility of political influence. Unfortunately, the Article 255 TFEU panel has already encountered some of these. For example, in the event of a change of government, some Member States have sought without good reason to replace serving judges. On one memorable occasion, the time interval involved was extremely short – the judge appointed had been in office for only a few months when the government set out to attempt replacement. The Article 255 panel articulated the potential threats to Member States with regard to judicial independence. In response, the newly proposed candidate withdrew from consideration, and the incumbent judge continued.[*105]

At this point, we can return to Sauvé's discussion of shortcomings. At the root of one of the most serious problems with the selection process is that the Member States submit only one candidate to the panel, while the equivalent procedure for ECtHR nominees obliges Member States, in accordance with the ECHR, to put forward three candidates[*106] and, among other things, as discussed above, to respect gender equality in their submission of candidates.[*107] The treaties of the European Union do not specify the number of candidates for any such positions. The single-candidate method leaves the Article 255 panel no point of comparison in the hearing of the candidate. Even though several candidates may be heard on the same day,

99 Ibid 14–15.

100 Fjelstul and Gabel (n 4), who have provided a new productivity index to measure the work done by CJEU judges.

101 Seventh Activity Report (n 54) 14–15.

102 Article 23(1) of the ECHR.

103 For analysis of problems related to the re-election of judges to international courts, see also, for example, AF Tatham, 'Reappointment to International Courts and the Case of the EFTA Court' (2021) 20(1) The Law & Practice of International Courts and Tribunals 119. – DOI: https://doi.org/10.1163/15718034-12341441.

104 Articles 253 and 254 TFEU provide that, upon ending, the term of office of a judge of the Court of Justice or of the General Court may be renewed.

105 For more information, consult Lord Mance (n 60) 183–84.

106 Article 22 of the ECHR, 'Election of Judges', states: 'The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.'

107 National selection procedures must, by a general rule, result in a list of three candidates, including at least one male and one female. A list comprising members of only one sex is acceptable if the candidates' sex is under-represented in the ECtHR (i.e., the one accounting for under 40% of the judges as of the date on which the Secretary-General of the Council of Europe invites the Government to submit a list and informs it of the current gender balance of the judges). In exceptional cases, where the government has taken all necessary and appropriate measures to ensure that the list includes candidates of both sexes, PACE may decide to consider a single-sex list even if the candidates are not of the under-represented sex (a two-thirds majority is required). See also 'Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights' CM (29 March 2012) 40 final <https://rm.coe.int/16805cb1ac#_ftn1> accessed 15 August 2023.

they are not comparable – there is one candidate for each seat, with each country submitting a single one. The panel, then, in the words of Lord Mance, 'must therefore evaluate candidates, one by one, not knowing, if it rejects a candidate, whether the State in question weill [*sic*] even be able to present a better candidate the next time'.*[108] The panel therefore stresses in each of its reports that, fundamentally, responsibility for appointing the CJEU judges and advocates general lies with the Member States.*[109]

Regrettably, the panel's hands do not extend far enough to assess the Member States' choices, although that is where the whole process begins and not rarely is where central problems lie. The level of other possible candidates in the country and why they were not deemed worthy of selection may never be known to the Art 255 panel. The Article 255 TFEU panel is confined to either accepting or rejecting the sole candidate proposed by the Member State. That said, the panel does urge the Member States to remember that national selection must be open, transparent, and rigorous, meeting the requirements of independence, impartiality, and objectivity. National-level evaluation of candidates should be led by an independent and impartial panel, which should be composed of highly qualified persons – in particular, members of national supreme courts or former members of the CJEU.*[110] Professional criteria must function as the basis for the assessment. Such a procedure presupposes organisation of an open competition (open call) in the relevant Member State.*[111]

If the selection procedure in a Member State does not comply precisely with the principles set out by the Article 255 panel, it is for that state to ascertain whether its selection procedure affords at least equivalent guarantees – e.g., ensuring that, even if no open call was held, the candidate is an experienced and independent judge of the highest court of that Member State. If the panel does not have information on the procedure followed in the Member State, it can request it, in accordance with point 6 of its rules of operation. The panel is interested in the conclusions from the selection procedure carried out within the Member State, where such outputs exist. The panel therefore encourages each state 'to share with it the ranking of the successful candidates in the final stage of the procedure from among whom the government made its choice, including the identity of those candidates'. Finally, it has stated that it attaches the greatest importance to Member States' compliance with national rules, where they have been put in place, for the selection of candidates put forth to serve as a judge of the European or international courts.*[112]

The panel has taken care to note that the absence of an independent and objective procedure at Member State level shall not lead to unfavourable treatment of any candidate proposed, since the national selection is the sole responsibility of the Member States and, by the same token, even a very extensive and credible national selection mechanism cannot guarantee a candidate whom the panel deems suitably qualified. Still, a proper and fair national selection procedure can help the panel overcome doubts that may arise in the course of evaluating a candidate, so it can work in the candidate's favour.*[113]

It thus becomes evident that the independence of a panel of independent experts is limited to the competence of the Member States to pre-select their own candidate, put forth a candidate, and ultimately approve the candidate. The panel's competence does not extend to these tasks. After all, also the members of the panel ultimately are officially confirmed by the representatives of the same Member States, although it is crucial for both the President of the Court of Justice and the European Parliament to have a say in proposing the composition of the panel.

Several problematic aspects have been noted above, such as the dilemma of whether the selection of judges should have greater legitimacy in addition to the opinion of experts, the possibly disproportionate influence of the Member States in the submission and validation of a given candidate, and the restrictions imposed by the panel's own way of operating (criticised for such elements as the denial of public access to the opinions and the failure to hear candidates for re-election).

A further issue raised in the legal literature, alluded to just above, is whether the Article 255 panel has enough freedom and independence. For instance, can it appropriately examine whether any legal basis before the Court of Justice exists for handling the vacancy that the Member States are rushing to fill – in

108 Lord Mance (n 60) 181.

109 See, for instance, the Seventh Activity Report (n 54) 11.

110 Ibid.

111 The panel notes that, from 2016 onwards, 17 Member States are conducting open competitions and in 10 countries candidates are being examined by commissions with a majority of independent and qualified members; see the Seventh Activity Report (n 54) 11.

112 Ibid.

113 Ibid.

other words, when the Council of the European Union has supplied the panel with a Member State's proposal for a candidate on the basis of Article 255 TFEU (e.g., a nominee for the post of Advocate General), whether the panel is obliged to evaluate that candidate in any and all circumstances or is free to decide instead that there is no basis for nominating a candidate.[*114] Some jurists have concluded that the panel being able to operate in this way would contribute an essential safeguard for judicial independence and the rule of law – i.e., the principle of irremovability of judges protecting their office.[*115]

Brexit ushered in a special, hitherto unique situation of this nature. Without elaboration on the host of legal issues raised by the withdrawal of the United Kingdom from the European Union, it may be noted relatively simply that at the heart of the matter was the Declaration of the Representatives of the Governments of the Member States on the consequences of the UK's withdrawal for the position of Advocate General of the Court of Justice (adopted on 29 January 2020)[*116] and whether the British Advocate General, who is not directly linked to a Member State by the TFEU, had to resign immediately, with a Greek candidate put forward in that individual's place, or was instead entitled to work at the Court of Justice until the formal end of the term of office envisioned at the time of the appointment (on 6 October 2021). The Article 255 TFEU panel did not weigh in on that issue; it just assessed the substantive relevance of the application submitted to it on behalf of the Greek candidate for the post. This matter ultimately was resolved when the Court of Justice declared inadmissible the appeal brought by the former British Advocate General against the General Court judgement that had rejected the action for annulling the EU Council decision to appoint a new Advocate General.[*117]

On the other hand, it is an indisputable fact that the Article 255 panel has gone much further in guaranteeing the independence of the judiciary than the Member States could have predicted when establishing the panel: The panel has created the ideal of a European super-judge, in the development of the criteria for which it has established itself *vis-à-vis* the Member States. It has also made demands of the Member States with regard to the national selection procedure, *inter alia* having formulated the condition that, in the ideal scenario, an open competition with independent selection procedure should be held for finding a candidate. Finally, the panel has dared to produce a significant number of opinions oriented toward rejecting unsuitable candidates.[*118]

The Article 255 TFEU panel has carried out its tasks effectively and comprehensively. Analysing the first experiences, both on the basis of the reports on the panel's activities and in light of some solid legal literature[*119], one can be satisfied with the result.

Certainly, the panel is a success story of sorts – although no-one has directly investigated what any super-judges found by the panel have accomplished in the CJEU (while this can be assessed to some extent in the context of validation connected with re-election of judges, there are associated problems, identified above).

The literature presents arguments that the panel has contributed to improving the selection process in the Member States, to efforts to optimise the level of judicial independence, to more responsible operation of the courts, and perhaps also to fair representation. One thing is beyond doubt, though: the selection of judges with the necessary qualifications has certainly helped to strike a balance in the seeming contradiction between independence of the judiciary and accountability of the judiciary, where fair appointment mechanisms are important.[*120]

It has also served as a model for organs related to other international courts. The above-mentioned advisory panel of experts,[*121] set up in November 2010 after the Article 255 TFEU panel had already begun

114 DV Kochenov and G Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2021) 27(1–3) European Law Journal 262–96. – DOI: https://doi.org/10.1111/eulj.12434.

115 Ibid.

116 'Declaration by the Conference of the Representatives of the Governments of the Member States on the Consequences of the Withdrawal of the United Kingdom from the European Union for the Advocates General of the Court of Justice of the European Union' XT 21018/20 (29 January 2020) <https://data.consilium.europa.eu/doc/document/XT-21018-2020-INIT/en/pdf> accessed 15 August 2023.

117 *Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member States* (Order of the Court) (16 June 2021) C-685/20 P, ECLI:EU:C:2021:485.

118 De S.-O.-l'E Lasser (n 7) 23.

119 See, for instance, F Battaglia, 'The Role of the Panel Established under Article 255 TFEU' in PP de Albuquerque and K Wojtyczek (eds), *Judicial Power in a Globalized World: Liber Amicorum Vincent De Gaetano* (Springer 2019) 33. – DOI: https://doi.org/10.1007/978-3-030-20744-1_2.

120 O Larsson and others, 'Selection and Appointment in International Adjudication: Insights from Political Science' (2023) 14(2) Journal of International Dispute Settlement 134, 146. – DOI: https://doi.org/10.1093/jnlids/idac014.

121 On 10 November 2010, the EC Committee of Ministers adopted CM Res (2010) 26 on the establishment of an Advisory Panel of Experts on Candidates for Election As the ECHR Judge; see 'The Advisory Panel' <https://www.coe.int/en/web/dlapil/

its work (on 1 March of that year), is one example. Another involves the European Free Trade Association Surveillance Authority, which had to resolve a case related to alleged failure by the European Economic Area's EFTA states to establish an 'Article 255 TFEU panel' in the EFTA pillar for the EEA. The complainants asserted that, by not creating an equivalent to the Article 255 TFEU panel, the states were in breach of certain principles of EEA law – namely, those of homogeneity, reciprocity, and loyalty, alongside protection of individual and fundamental rights. In essence the complainants submitted that, without an equivalent to the Article 255 panel, there is no guarantee that the people appointed as EFTA Court judges are sufficiently independent and possess the professional qualifications required for their roles as members of that court. The surveillance authority concluded the complaint on these grounds to be unfounded, though, taking the stance that it must be for the contracting parties to create a legal basis for the establishment of an equivalent to the Article 255 panel in the EFTA pillar, that the EEA-law principles highlighted in the complaint cannot of themselves impose a specific and positive obligation on those parties, and that the current EEA legal framework comprises several institutional safeguards to EFTA Court judges' sufficient independence and qualification for their office.[*122]

The work performed under Article 255 TFEU and by the panel set up on the basis thereof is one small, albeit essential, part of a large whole for a brighter future for the administration of justice in Europe and its Member States in these difficult times, in pursuit of ensuring impeccable protection of human rights and access to an independent, impartial, high-quality court anywhere in Europe. Hopes remain strong that the success story of the Article 255 panel will continue and that Europe will long find its competent super-judges.

If, however, a genie in the bottle were to fulfil three wishes for making current practice even more effective, a wisher not at all officially representing the Article 255 TFEU panel might informally express a desire for a few changes.

Firstly, one could wish that, instead of a single candidate, the Member States would put forward several candidates for each CJEU seat, so that there would be a genuine choice before the Article 255 panel beyond 'take or leave it'. The panel could dream of choosing the best.

Linked to the same issue is the hope that a fair procedure at Member State level could be established to find members for the CJEU. While this is rather non-binding wishful thinking by the Article 255 TFEU panel at present and does not play a decisive role, the harmonisation of certain rules would certainly ensure better justice for the candidates and higher-quality administration of justice as a whole. For example, perhaps 'small Article 255 TFEU panels', which could include not only local but also external experts, might be able to play a decisive role in national choice, for greater assurance of objectivity, especially in smaller or apparently problem-laden countries.

Secondly, one might wish to review the regulation on re-election. Again, this is a matter for the Member States and requires a change in the TFEU, but serious consideration ought to be given to whether, for example, extending the term of office while making it non-renewable would be a more effective way to guarantee the independence of the members of the CJEU[*123]. Another option, for the meantime, is to improve the Article 255 TFEU panel's control over re-election, so that it is not a rubber stamp and neither appears to be nor truly is caught up in the political maelstrom.

I leave the third wish hanging in the air so that it can come true later as the work on Article 255 develops further in the course of time. This might be linked either to the strengthening of legitimacy and transparency in the selection process generally or, in a more forward-looking approach, to the role of a panel of the Article 255 TFEU type in scenarios such as the European Union's accession to the ECHR, which would entail the selection of candidates for the position of ECtHR judge representing the European Union itself. In particular, there is already a need to analyse how the three candidates to be put forward for that post should be selected and what conditions should be met in the event of the Union's accession, as provided for in Article 6(2) of the Treaty on European Union. Another matter is how, if necessary, to appoint an *ad hoc* European Union judge to the ECtHR and, of course, what role the TFEU's Article 255 could play here, so that a European Union super-judge will also reach the ECtHR domain, where there are already super-judges waiting in the wings.

advisory-panel> accessed 15 August 2023.

122 See the EFTA Surveillance Authority decision of 17 December 2021 closing a complaint case pertaining to an alleged failure by the European Economic Area's EFTA States to establish an 'Article 255 TFEU panel' in the EFTA pillar of the EEA (Decision 285/21/COL, on case 86579) <https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Decision%20to%20close%20complaint%20Case%20876579%20regarding%20an%20alleged%20failure%20by%20the%20EEA%20EFTA%20States%20to%20establish%20an%20Article.pdf> accessed 15 August 2023.

123 Sauvé, for example, has written that this term could be 12 years without re-election; see Sauvé (n 2) 646.

https://doi.org/10.12697/JI.2023.32.12

Corrigendum to Article 'A Paradigm Shift in the Role of Courts? Disappearance of Judicial Review through Mutual Trust and other Neofunctionalist Tenets of EU Law'

Anneli Albi

Published in: *Juridica International*, 31/2022, pp. 3–47.
https://www.juridicainternational.eu/article_full.php?uri=2022_31_a_paradigm_shift_in_the_role_of_courts_disappearance_of_judicial_review_through_mutual_trust
/DOI:https://doi.org/10.12697/JI.2022.31.01/

The author has made the following correction to the above article. On page 35, line 3, 'measure' has been replaced by 'directive'. Thus, the corrected sentence reads as follows:

> 'The widely contested EU Data Retention Directive was only the second ever directive to be annulled by the CJEU – in 2014 – on fundamental rights grounds; this came in a second challenge following extensive national constitutional contestation.'

The article has been updated to reflect this.

The author apologises for the error.