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Dear reader,

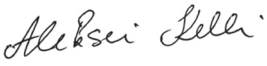
Back in 1996, the foreword to the first issue of *Juridica International* conceptualised JI as a special edition of *Juridica*, the Estonian-language law journal published by the Faculty of Law of the University of Tartu. The purpose of the international edition was articulated as 'providing an overview of the Estonian legal system and reporting on developments in legal reform'.

The concept and aim of *Juridica International* have evolved considerably since. Over the years, JI has developed into a well-established international law journal. Many globally renowned scholars and jurists have published pieces in *Juridica International*. This forum continues to provide insight into developments cultivated in Estonia's legal system, thereby maintaining its *de facto* position as one of the most reliable sources of information on the Estonian legal order for an international audience. However, most of the works published in today's *Juridica International* are analytical articles that clearly meet international research standards.

Juridica International's core aspects have remained unchanged over time. Faculty of Law members still are expected to publish quality papers in *Juridica International*. Doctoral students and other early-career researchers find publication in this journal to be both a key ambition and a worthy challenge on their path as scholars. While *Juridica International* is open to submissions from young researchers, it offers them no concessions; in fact, the peer-review process involved is often more stringent than that applied to their senior colleagues internationally. Furthermore, the noteworthy standing of the Faculty of Law's doctoral students – who are typically leading legal practitioners in their respective fields – renders their contributions particularly compelling and inspiring. For their senior colleagues with the faculty, publishing research in *Juridica International* is a matter of professional pride. Consequently, one can justifiably conclude that JI has become an essential part of the institutional identity. In other words, it serves as a *conditio sine qua non* for the University of Tartu's Faculty of Law.

The volume you are now perusing continues to follow the journal's solidly established direction. The articles range from legal analysis and case studies to interdisciplinary empirical research, with topics encompassing both traditional legal matters and various emerging challenges posed by technological advances. Some cover both. For instance, the pages of this issue provide an overview of empirical data on today's handling of education-related exceptions to copyright protections. Additionally, readers will find two articles focusing directly on intellectual property, specifically the patent system and the author's right to integrity in public contracts. Constitutional and human-rights issues are explored in connection with constitutions' preambles and in discussion of the global garment industry. Several of the articles address highly pressing contemporary challenges, among them data-driven public administration and electronic signatures. Another prominent facet is EU law, particularly with regard to criminal liability and competition. In addition, the papers grapple with the complexities of soft law in the financial sector and public procurement. Drawing together several threads encompassed by this issue's discussion, one article declares in its title that there are more questions than answers.

That is a significant observation indeed. Often, identifying the problems, delineating them properly, and asking the right questions proves more difficult than offering technically correct answers. As Voltaire suggested, we should judge people by their questions rather than their answers. *Juridica International* No. 33 certainly raises many important and thought-provoking questions.



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Contents

Aleksei Kelli, Margus Pedaste, Äli Leijen	An Empirical View of the Extent of Exercising the Education Exception to Copyright in Cultural Heritage Institutions	3
Kristel Urke	A Comparative Approach to Amendments to Constitutional Preambles: Questions of Amendability, Substance, and Reasons	22
Stina-Maria Lusti	Protection of Human Rights in the Global Garment Industry	41
Monika Mikiver, Nele Siitam	Data-driven Public Administration and the GDPR: Seeing the Court of Justice's Judgement in Case C-175/20 in a Broader Context	52
Laura Kask	Time of Signing: Legal Requirements and Technical Options for Hand-written and Electronic Signatures	62
Lisette Põld	Preserving Secrecy within the Patent System to Safeguard Western Countries' Technological Innovation	77
Priit Pikamäe, Markus Kärner	The Effect of European Union Law on the Criminal and Quasi-Criminal Liability of Legal Persons in Estonia	89
Siim Tammer	The Triumph of Soft Law in the Financial Sector: Can Non-binding Law Have Binding Domestic Legal Effects?	102
Natalia Mäekivi	The Interplay between EU Competition Law and Professional Sports: Recent Developments and Their Potential Impact on Small States	111
Mari-Liis Viirsalu	Alternatives to Public Procurement: Free Choice in Marketised Social Services – Legal Challenges Illustrated via Long-Term Care	121
Pilleriin Peedosk	Life after *Irgita* (C-285/18) – More Questions Than Answers	133
Gerli Helene Gritsenko	The Author's Right of Integrity in Public Contracts in Estonia Based on Architectural Work	144

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An Empirical View of the Extent of Exercising the Education Exception to Copyright in Cultural Heritage Institutions

Abstract. The article presents findings from a study funded by the Estonian Ministry of Justice titled 'Extent of Use of Educational Exceptions of Copyright in Cultural Heritage Institutions'. The impetus for this work came from the fact that rights-holders, who are not compensated for the use of copyrighted works and material covered by related rights under the educational exception, desire compensation for such use yet data pertaining to the practices of educators conducting education programmes in cultural heritage institutions are scarce. The study's results are important for the holders of the rights but also for policymakers and for those providing professional-development courses to the educators such that their practices could be fully aligned with the education exception to copyright. A 105-respondent questionnaire – adapted from an instrument used in a similar study that focused on educators in pre-school education, basic schools, upper secondary schools, vocational-education institutions, institutions for professional higher education, universities, 'hobby schools', and continuing-education institutions – among educators who are not copyright experts helped answer the question 'What is the extent of exercising the education exception to copyright in cultural heritage institutions in Estonia?'. The paper explains the quantitative results further in light of focus-group interviews with seven representatives of cultural heritage institutions, of several types. Also, the results of this study are compared with the findings from the earlier one. The results, which shed light on copyright awareness, the form and extent of copying, etc. in relation to literary and reference works, photographs, musical works, and audiovisual works, indicate that Estonian cultural heritage institutions' reliance on the education exception is in accordance with copyright law and, therefore, significant changes in related policy are unnecessary. However, responses to the survey and interview questions revealed aspects that could be addressed in designing guidelines and professional-development activities for educators in cultural heritage institutions.

Keywords: copyright, educational exception, cultural heritage institution

1. Introduction

This article examines the key findings from a study commissioned by the Estonian Ministry of Justice, the final report from which, whose title translates to 'The Extent of the Use of the Educational Exception to Copyright in Cultural Heritage Institutions', was published in 2023[*1]. In essence, both are continuations of prior work investigating application of the education exception[*2] in practice, the main results of which were similarly published in *Juridica International*.[*3] The study was guided by the following research question: 'What is the extent of exercising the education exception to copyright in cultural heritage institutions in Estonia?'

In the development of the follow-up study, the central objective was that the methodology and the interpretation of results remain the same as in the previous endeavour, irrespective of the fact that there are significantly more teachers than there are cultural-heritage-institution-affiliated education workers. Otherwise, the two studies would not be comparable, and the results of the follow-up study would not assist in clarifying the situation and informing legal-policy decisions. Interpretation of the results reported upon here should take into account the findings from the previous study, for a holistic perspective taking advantage of the broader-based project.

The main difference between the teacher-related study and the later work lies in the target respondents. Where the first study centred on teachers' use of protected material (works and objects of related rights) across all education levels, the follow-up one focused on cultural heritage institutions. According to Estonia's Copyright Act[*4] (CA), this category encompasses publicly accessible libraries and museums, archive institutions, and film and audio-heritage institutions.[*5] In their work, the researchers sought to understand the degree to which educational and cultural heritage institutions utilise protected materials and to evaluate the compatibility of such use with the educational exception.

The term 'educational exception' refers to a broad category of copyright exceptions that permit the use of protected materials for education-related purposes without infringement being deemed to occur. Given that the concept of the educational exception has been extensively analysed in previous research articles[*6], such analysis is not undertaken in this paper.

It is crucial to recognise that valid invocation of the educational exception is more constrained for cultural heritage institutions than for educational institutions. Most articulations of copyright exceptions incorporating an education-linked component specifically identify the latter as the intended beneficiaries of the exception.[*7]

The copyright exception for educational purposes, as specified in Section 19 (1), clause 2 of the CA, is formulated on the basis of purpose rather than with regard to specific beneficiaries.[*8] This implies that everyone, not excluding cultural heritage institutions, is entitled to rely on it for the educational activities undertaken. Cultural heritage institutions may rely also on the right to quote, the exception granted for on-site consultation, the exception for advertising of exhibitions, and the exception for personal use.

1 This paper is based on that report, 'Hariduserandi kasutamise ulatus kultuuripärandiasutustes', which is freely available from the ministry via <https://www.just.ee/uuringud> accessed on 27 February 2024.

2 A Kelli, Ä Leijen, and M Pedaste (2022), 'Autoriõiguse hariduserandite kasutamise ulatus. Küsitluse tulemused ja metoodikaraport [Extent of Use of Education-based Exceptions to Copyright: Survey Results and Methodology Report]', report 1–52 commissioned by the Ministry of Justice.

3 A Kelli, M Pedaste, and Ä Leijen, 'An Empirical View of the Extent of the Use of the Education Exception to Copyright' (2023) 32 Juridica International 74. – DOI: https://doi.org/10.12697/ji.2023.32.07.

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

5 Copyright Act, s 17^1(3).

6 See A Kelli, M Pedaste, and Ä Leijen (n 3); K Nemvalts and A Kelli, 'Hariduserand autoriõiguses [The Educational Exception in Copyright Law]' (2021) 10 Juridica 705; A Kelli and others, 'Üliõpilane ja autoriõigus [Students and Copyright]' (2020) 5 Juridica 378.

7 See the CA's s 19(1), cls 3 and 3^2, and its s 22.

8 The clause reads, in translation: '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: … use of a lawfully published work for the purpose of illustration for teaching and scientific research to the extent justified by the purpose and on condition that said use not be carried out for commercial purposes.' The exception is applicable for objects of related rights as well (per the CA, s 75(1), cl 6).

In the initial work to translate content of the report that served as the starting point for this article from Estonian into English, the authors utilised the ChatGPT-4 model. Preparation of the final paper attended closely to verifying preservation of the intended meaning throughout.

2. Methodology behind the study

2.1. The study design and sample

The study's design differentiated between a quantitative phase and qualitative enquiry conducted after that. In the quantitative phase of the study, a questionnaire-based survey was administered in the LimeSurvey electronic research environment, hosted on a University of Tartu server. The study covered individuals identified as employees of Estonia-based cultural heritage institutions – libraries, museums, and archive maintainers (including institutions dealing with the preservation of audio and film heritage) who had conducted education programmes. The qualitative part of the study employed focus-group interviews to deepen understanding of the data collected in the quantitative phase. Employees from all three categories of cultural heritage institution participated in this process.

For a complete, representative sample, the aim was the broadest possible coverage of all cultural heritage institutions in Estonia. Therefore, the effort began with approaching the leaders of the Estonian Librarians' Association, the Estonian Museum Association, and the Estonian Association of Archivists with a request to distribute a set invitation to participate in the survey throughout their respective communities. A week later, the researchers distributed a follow-up invitation directly to a set of contacts that covered all national libraries, Estonia's university libraries, 15 county libraries, three major city libraries (Tallinn Central Library, Tartu City Library, and Narva Central Library), museums that publicly available information indicated had run at least one educational programme in 2021 (168 institutions in all), other museums for which contact details accessible to the public at large were found, and various archives (identified from searching for contact details online via registries such as the Estonian Research Information System's database of collection and holdings compilers). Thus, the sample was designed to target all educators who worked at cultural heritage institutions in Estonia, thereby permitting country-level generalisations to be drawn validly. It is important also that recruitment of participants did not specifically target any group known for (or likely to express) a particular stance on copyright issues. This further assures of the representativeness of the sample. In addition, collection of data from such a sample allows for comparison between distinct target groups, since recruitment of participants was in no way biased – all three groups of institutions were approached in line with a single overarching scheme. In addition to the research team's initial general invitation and the reminder invitation, both sent by email, the researchers made use of social-media channels for their recruitment of informants.

The goal was for 60–70 participants at minimum. In total, 263 individuals started filling in the questionnaire form, but only 105 answered at least some of the questions related to education-linked exceptions (the questionnaire began with various background questions, without the answers to which it would be impossible to address the research question). Sixty-eight respondents were representatives of libraries, 25 museum workers, and 12 personnel of archives. The analysis presented here includes all of these respondents. Ninety-two people completed the questionnaire in its entirety.

Characterisation of the sample and the background characteristics of the participants involved referring to questions in four main sets:

1) ones addressing the main cultural heritage institution where education activities were being conducted (answers to subsequent questions referred back to this);
2) items probing for how many years the respondent had been involved in conducting educational programmes at cultural heritage institutions;
3) questions about the respondent's role/position at this particular cultural heritage institution (support specialist, management-team member, programme director, curriculum director, or some other position);
4) items requesting data on the participant's gender and age.

Most of the respondents (87 individuals) had one role at the cultural heritage institution, but some (18) held additional ones. Namely, 23 respondents were involved in the institution's management, 23 were

support specialists, 11 acted as programme director, four were curriculum directors, and 46 fulfilled other roles. Among the roles specified under 'other', that of librarian featured 16 times, museum educator / educator / archive educator eight times, and department head thrice. The number of respondents having other job titles, of various sorts, was smaller. Clearly, then, the participants in the study had a broader range of experience than solely work in conducting educational programmes. On average, they had amassed 11 years of experience in the latter area (ranging from less than a year to as much as 50 years' experience).

In addition to completing the questionnaire, participants in this portion of the study were invited to take part in the focus-group interviews held later. Three library employees, two museum workers, and two archive personnel participated in these interviews.

2.2. The questionnaire

The Copyright Act (§ 4) defines a work by listing characteristics and includes a sample list of works. Regarding the context of the educational exception, the research teams regarded literature, art, music, and audio-visual works as relevant. Also examined were related rights such as performance and recording rights. Programmes' education process may employ materials subject to any of several legal regimes. For the purpose of compiling the survey for the study reported upon here, protected content was divided into three general categories:

1) material not subject to copyright (this category may include works whose term of protection has expired, official documents, etc.);
2) material whose use stems directly or indirectly from the consent of the rights-holder (e.g., for example, under licenses, subscriptions, etc.);
3) material whose use is justified by the educational exception (this involves situations wherein the person/institution conducting the education programme does not have the consent of the rights-holder to use protected material and relies on a restriction to copyright protections).

In this study, we focused specifically on identifying uses grounded in the educational exception. To enhance comparability with other studies (including the similar study conducted among teachers and university lecturers), we based our collection of background information on the OECD TALIS 2018 study[*9], which focused on researching the activities of teachers.

Our questionnaire predominantly used multiple-choice questions. Open-ended items were utilised solely for specifying the reasons for choosing the option 'other' in answers to various questions. Since an analogous questionnaire had already been piloted with three subjects in the education field – a teacher with experience in general-education school management and as a primary-school teacher, a kindergarten teacher having experience as a university lecturer, and a senior-level teacher in a general-education setting – and we wished to maintain comparability, it was not deemed necessary to conduct piloting specific to employees of cultural heritage institutions; however, the questionnaire's content and its items' wording were still examined in case there was a risk of seeming irrelevance alienating respondents and increasing the dropout rate.

2.3. The focus groups

The interviews were conducted in the Zoom environment and recorded with the consent of all participants, in full adherence to data-protection requirements and good research practice. There were two group interviews, and we carried out a third interview also, with a single individual, since the group-interview times were not suitable for that participant. Confidentiality was guaranteed to all participants. These semi-structured interviews featured clarifying questions centred on the main topics of the questionnaire, with the interviews' primary aim being to collect examples of the various materials' usage. The interviews were conducted by two of the researchers, who served, respectively, as discussion facilitator and a clarifier of questions related to the educational exception.

[9] OECD Directorate for Education and Skills, material on the Teaching and Learning International Survey (2018), available via <https://www.oecd.org/education/talis/> accessed on 29 February 2024.

2.4. Data analysis

Analysis of the questionnaire responses began with generation of descriptive statistics. We considered both findings specific to each of the groups studied (those conducting educational programmes with libraries, museums, and archival institutions) and patterns across all respondents. To flesh out the picture, we examined responses to the open-ended questions so as to elucidate the situations behind exercising the option 'other' (the presentation of results below offers illustrative examples).

All interviews were transcribed, and the associated data analysis applied the principles of thematic analysis as outlined by Braun and Clarke.[*10] This analysis highlighted major themes and subsidiary themes, and it also entailed comparing responses across separate target groups. The results from this analysis are presented as a complement to the discussion of quantitative findings. This approach ensures comprehensive understanding of the data by integrating the breadth of the statistical analysis with the depth of the qualitative insight.

3. Findings from the study

Respondents assessed their knowledge of copyright matters as average, both with regard to copyright in general terms and, more specifically, regarding licenses. The three groups examined did not differ statistically significantly from each other in their self-reported knowledge of copyright. Also, the level of knowledge reported by employees of cultural heritage institutions did not show divergence relative to the results among teachers and lecturers (from the previous study of the extent of application of the educational exception[*11]). Furthermore, the answers to the first question in the interviews verified that the knowledge possessed by cultural heritage institutions' employees in this area seems generally good. The responses revealed that being informed about copyright issues formed a part of the respondents' work.

One of the core substantive questions was related to the form of copying (physical copies on paper or digital copying). Use of paper-based materials (presented in Figure 1, below) differed slightly across cultural heritage institutions: these were used most commonly in museums and almost as much in library settings (no statistically significant difference was visible), while use of paper materials was noticeably less frequent in archive settings. As for their use in cultural heritage institutions overall as compared with educational institutions, no statistically significant differences were evident[*12], although there were significant differences with various categories of educational institution. They were used less in higher education and in vocational education than in libraries' and museums' education programmes.

Copies were made slightly more often in archival institutions' education efforts, although the number of copies made varied considerably even in this case and the average number of copies made within any respondent group does not show statistically significant differences from the other groups' (as the figure shows). Generally, fewer copies were made in cultural heritage institutions than in any of primary, general, vocational, or higher education[*13], and the difference from hobby-related education was particularly strong. However, the data available do not allow for good comparison in the case of the archive-institution group, because relatively few respondents represented this class of institution, and their responses displayed extensive variability.

10 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.

11 A Kelli, Ä Leijen, and M Pedaste (n 2).

12 Ibid.

13 Ibid.

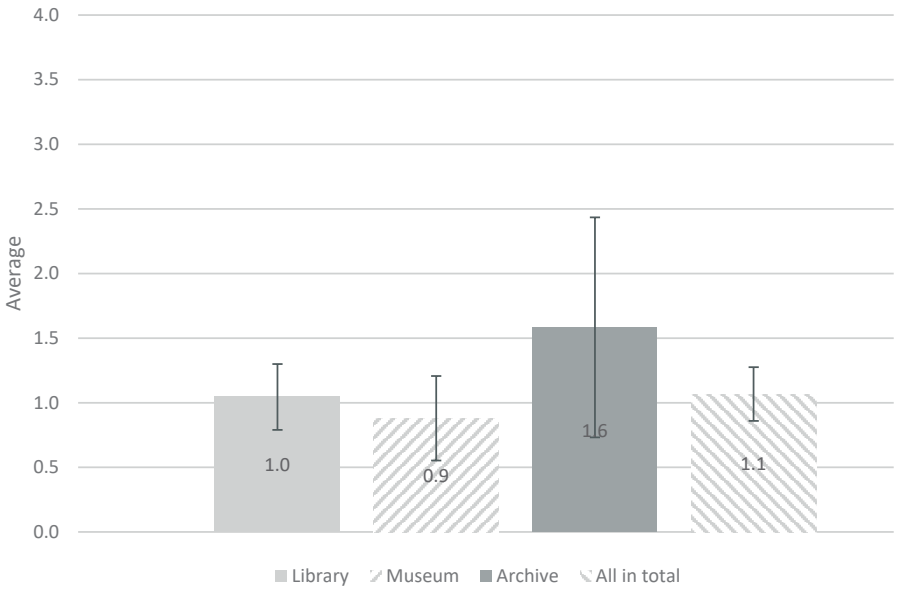

Figure 1. Prompted to think about the last month in which they were conducting an education programme, respondents were asked about how many distinct works (textbooks, workbooks, music pieces and lyrics, films, photographs, games) they had engaged in copying, either partial or of the entire work, whether digital (e.g., scanning of written material, downloading of digital files from the Internet, or sharing of a file on a USB stick with a learner) or in paper form for education-related purposes (scale: 0 = none, 1 = 1–5, 2 = 6–10, 3 = 11–15, 4 = 16 or more)

Participants were asked to what extent their use of relevant materials in the most recent month of conducting an education programme, as considered for this study, differed from previous periods'. Most frequently, employees of cultural heritage institutions did not feel able to draw a conclusion (35%); however, respondents did state fairly often that they used such materials in the same volume (see Figure 2).

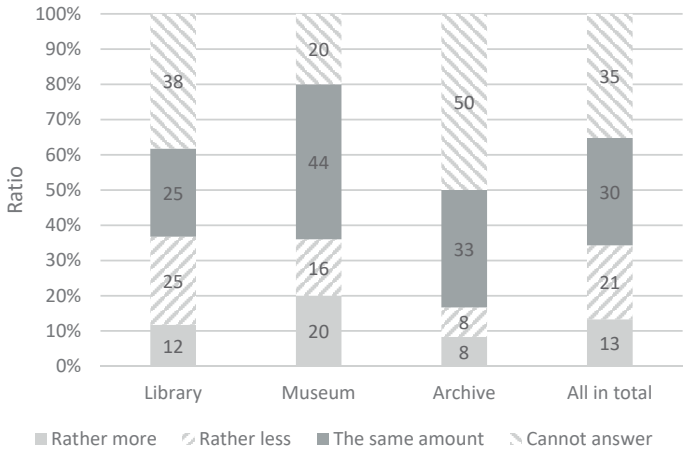

Figure 2. Respondents were asked to compare the last month in which they had been in charge of an education programme with an average month in the year prior with regard to copying of works or portions thereof. They had the options '1', for more copying in that recent month; '2', for less; '3', for no change; and '4', denoting inability or unwillingness to answer

When materials were copied, this very rarely entailed copying entire works, according to the respondents. Archive entities constituted an exception: here too, these respondents' assessments displayed quite a large amount of variability (as Figure 3 attests). In this respect, educators in archive settings were rather similar to teachers at 'hobby schools', special school providing systematic hobby education, while those responsible for education programmes in libraries and museums were similar to other teachers and lecturers.*[14]

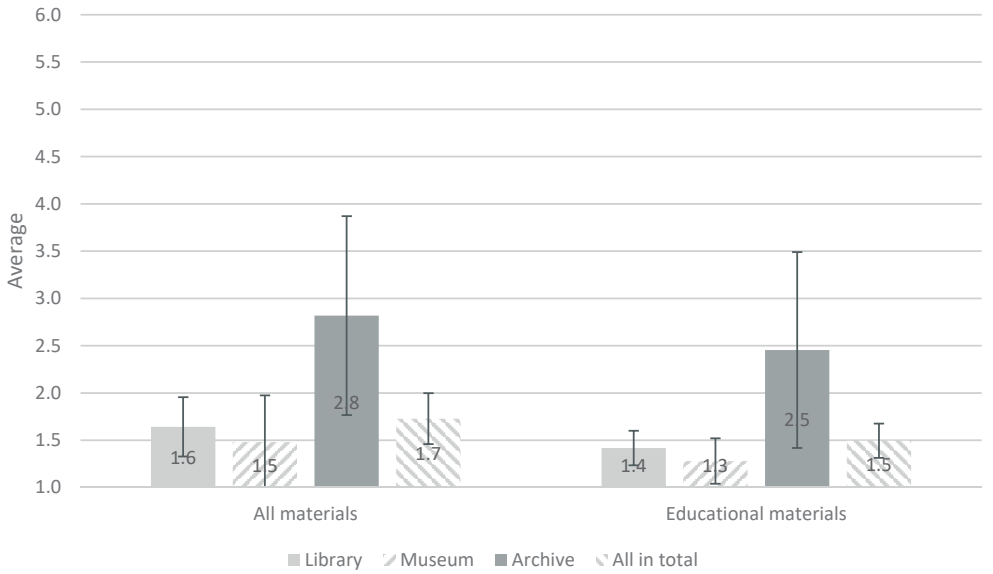

Figure 3. The survey asked respondents to assess the statement 'For conducting an education programme, I have usually copied an entire work (regardless of whether it was intended for educational *versus* non-educational purposes) – e.g., an entire book, workbook, or music piece – and have not limited myself to excerpts (such as a chapter or a few pages)' on a Likert scale with 6 denoting full agreement and 1 indicating complete disagreement. The image also captures their responses to the item 'For education purposes, I have copied materials created for educational purposes (textbooks, workbooks, etc.) in their entirety (a whole book) and have not limited myself to excerpts (such as a chapter or a few pages)' on the same scale

Verifying a pattern that emerged from the questionnaire results, the interviews attested that copying of entire works was very rare. There was one general exception – photographs. Although respondents identified instances of using fragments/details from photographs, said images typically functioned in their entirety in presentations and worksheets for cultural heritage institutions' educational programmes. One library worker highlighted another exception. Discussing books intended for children, she explained that 'we narrate the work in our own words and then try to get people to read it, but one major concern for us is with young[er] children. They come with children's books that are short, and they often ask how it ends – they want us to read along with them; they want those "story mornings". So those are like a point for us where we see that it actually serves educational purposes, at which we encourage them to read, we teach them to read, and afterward we discuss the topic; so to say, we teach them to think. We see it as an educational purpose'. Hence, with a small children's book 'it often is an entire work'. The institutions' education programmes most commonly make use of excerpts, however.

The interview data bear this out. For example, a library employee mentioned: 'We made copies of newspaper articles, and these were small pieces, illustrative examples […] [T]he learners had the task of comparing separate pieces and recognising which one is machine-generated, which is real, and which is joke text.' Another example came from an informant representing an archive maintainer, who described an archive-based lesson presenting a portion of a film showing how new school buildings were constructed in the 1930s. Another example was a segment from a longer Soviet-era newsreel showing first-year children going to school and taking part in a ceremony held for their first day there. Additionally, a museum worker cited the use of excerpts from memoirs, 'which are then reprinted […] from books of memories, and there

[14] Ibid.

are always references below'. That interviewee emphasised this technique's prominence – 'even in the most recent museum lesson I created, I wrote a condensed biography, together with references below, indicating where I compiled this biography from, whether it was a book or there were also newspaper articles'.

Copying of literary and reference works was slightly more widespread in libraries and museums than in archive institutions (although the responses from archive employees again show substantial variability), and no group studied differed statistically significantly from the others. Figure 4 presents the relevant data. The findings show a parallel with the previous study's: similarly to teachers and lecturers, these respondents very rarely copied entire works of this kind.*[15]

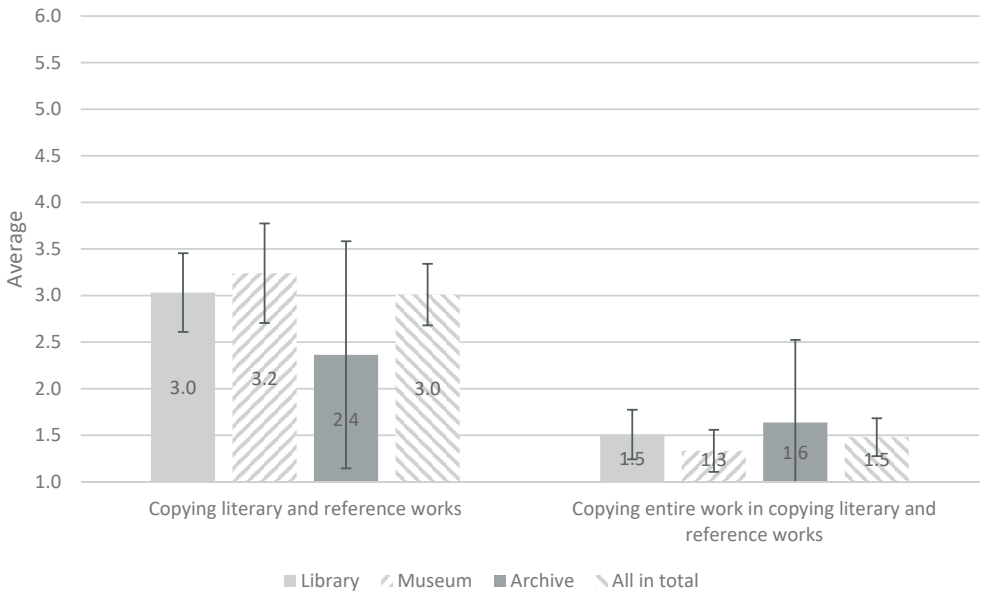

Figure 4. The survey asked whether the education programme in question involved copying of literary material, reference works, and other such written content (books/articles, drawings, illustrations, and diagrams), again with a follow-up question asking whether any such copying had entailed copying the entire work rather than excerpts only (a chapter, a few pages, a couple of illustrations/diagrams), on the above-mentioned 6-to-1 Likert scale

Libraries stood apart from other cultural heritage institutions in their use of literary works. One library worker explained that 'in library sessions, we actually use works from our own collection, so this also falls under the introduction of the collection*[16], which libraries are allowed to do'.

Copying of literary and reference works in cultural heritage institutions is split relatively equally between paper and digital formats (see Figure 5). The overall prevalence of these copying methods is similar to that in teachers' and lecturers' practices.*[17]

15 Ibid.

16 The CA's s 20(3) provides that a 'cultural heritage institution has the right to use a work included in their collection without the authorisation of its author and without payment of remuneration for the purposes of an exhibition or the promotion of the collection to the extent justified by the purpose'.

17 See A Kelli, Ä Leijen, and M Pedaste (n 2).

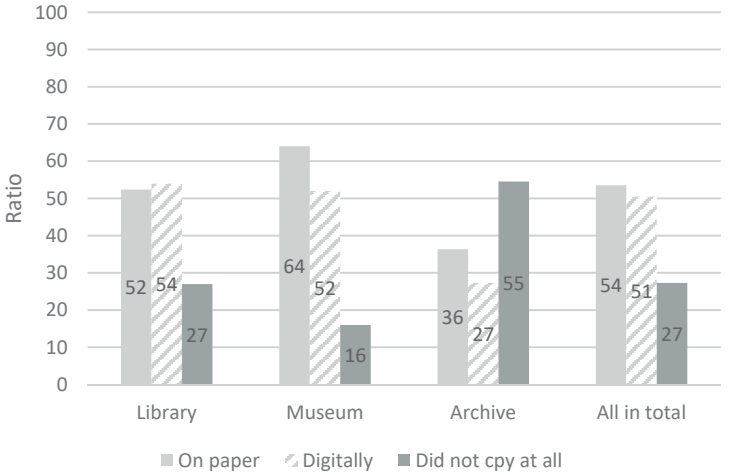

Figure 5. Asked about formats for copying of materials, respondents could mark any of the following that applied: copying on paper, digital copying (from scanning of written material, downloading of digital files from the Internet, or upload- or USB-based sharing of a file with learners), and no copying at all

In settings of educational programmes, copies were shared relatively infrequently (see Figure 6), with libraries' and archives' figures being slightly higher though the differences are not statistically significant. The practices of cultural heritage institutions in sharing copies of literary and reference works do not seem to differ significantly from those of teachers and lecturers.*[18]

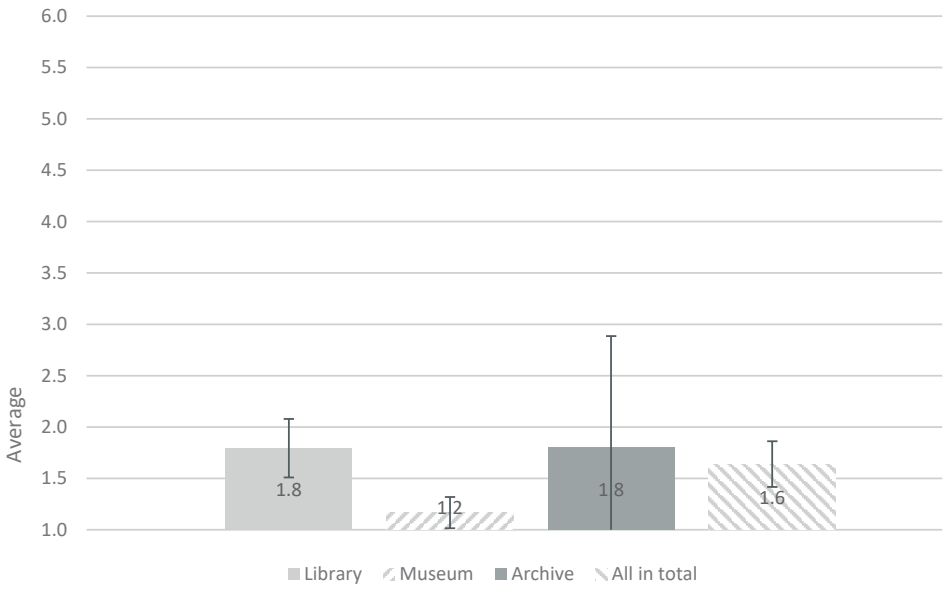

Figure 6. Scores on the specified scale for the item 'I shared copies of literary and reference works with participants in the education programme for home study', where 1 = 'not at all' and 6 = 'very frequently'

When the cultural heritage institutions shared literary and reference works with participants in their education programmes, what they shared was seldom a copy of the entire work or even a part of it, and they almost never cited the name of the work. Other forms of sharing, discussed below, were relatively commonplace. The interviews backed up the questionnaire results in this regard: it was quite apparent that copies were shared rather infrequently by those conducting educational programmes in cultural

[18] Ibid.

heritage institutions. This pattern, shown in Figure 7, differs from that visible among teachers and lecturers.*[19] In addition to their somewhat larger proportion of other methods of sharing, cultural heritage institutions produced a larger share of responses indicating that they had not shared literary and reference works at all.

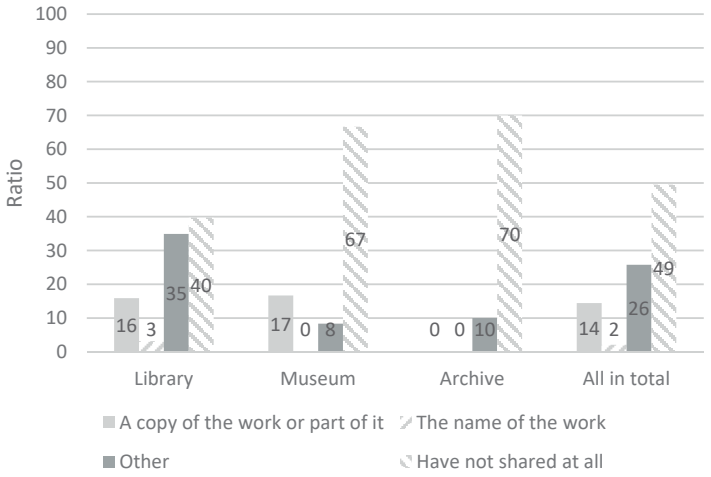

Figure 7. Responses for the item 'In sharing of literary and reference works with participants in the education programme, I most commonly made available to them a copy of the work or part of it (1); the name of the work, such that the learners could study it independently (2); or other details/material (3)'. Respondents could mark '4' if not having shared such content at all

Eight respondents elaborated on other methods of sharing. Their open-ended responses mentioned the following methods/materials: teaching of digital literacy, where 'material' in this context refers to online environments and computer programs, with direct use of works not being applicable; excerpts or parts of a work presented alongside guidelines for independent exploration of the rest; information from publicly accessible Web sites; books reviewed on-site; teaching that is 'based on a curriculum and teaching materials I developed myself, which are evidence-based and properly cited'; primarily not sharing materials but conducting inclusive programmes wherein the learner creates meanings; reprography, or 'repro'; methods applied through the creation of a Web-based cultural heritage environment; and presentations with a slideshow available for later viewing on the institution's Web site.

As for copying of photos, our comparison across categories (education programmes of libraries, museums, and archive maintainers) revealed no statistically significant differences (see Figure 8). Copying of this nature proved slightly more prominent among the practitioners in cultural heritage institutions than among teachers and lecturers.*[20] As for explicit sharing of photos (likewise presented in the figure), sharing occurred relatively rarely in the education programmes of cultural heritage institutions, which displayed a similarity to the findings for teachers and lecturers in this respect*[21]. Between the two studies, no group-specific statistically significant differences emerged.

19 Ibid.

20 Ibid.

21 Ibid.

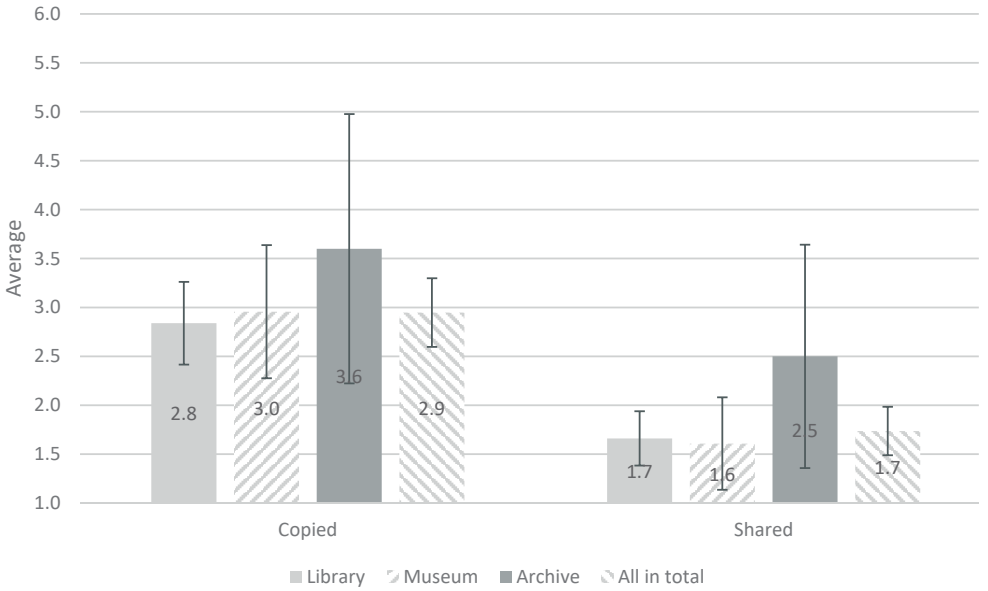

Figure 8. Responses to probing for the extent of use of photographic material in the education programme in question: 'I have copied other people's photos, whether on paper or digitally (individual images or, for example, material in presentation context)' and to the item 'I shared copies of photos with participants in the education programme and did not limit myself to just showing them', both on a scale with 1 = 'not at all' and 6 = 'very often'

In the interviews, representatives of archive institutions and museums highlighted their use of photos to illustrate various topics, more frequently than library personnel did. For instance, one museum worker interviewed stressed that 'I predominantly use photos of our museum objects. These photos are often taken by us; they are our own scans', mentioning also that I [might] use a copy of some document that has been donated to our museum', an institution that 'is very much based on personal stories, meaning we work with people and then I always want to add a photo to their story, so that the student can see who this Ants is'. Similarly, an archive worker explained: 'We usually introduce our collections or illustrate them specifically, either through our database or literally by taking an album from storage and looking at it', with examples being glass negatives and works by famous photographers.

The method for sharing of photos with participants in education programmes depended slightly on the type of cultural heritage institution, as Figure 9 clarifies. For libraries, sharing of copies and of links to content on the Web proved almost equally common, while the sharing of copies clearly predominated among museums and sharing of Web links was more commonplace in archive settings.

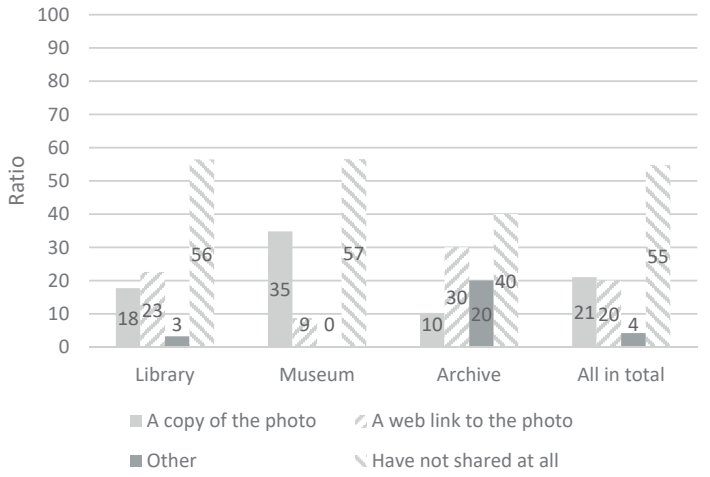

Figure 9. Responses for 'When sharing photos with participants in the education programme, I mostly made available to them a copy of the photo, physical or digital (1); a link to the photo online (2); or other relevant information/content (3)'. Alternatively, respondents could mark '4' if not having engaged in such sharing at all

Four respondents mentioned sharing by other means. Three of them elaborated on these methods: sharing details of the data source, sharing through a Web-based environment, and making a slideshow interface available (for reviewing the material via the institution's Web site).

The various categories of cultural heritage institution were similar in their use of photos of works of art; no group differed from any others to a statistically significant extent. Likewise, sharing of such photos was very rare across the board. That said, responses from both museums and archive maintainers exhibited rather extensive variability in relation to these two practices. Figure 10 covers both relevant items. No statistically significant differences from teachers and lecturers[*22] emerged in either regard.

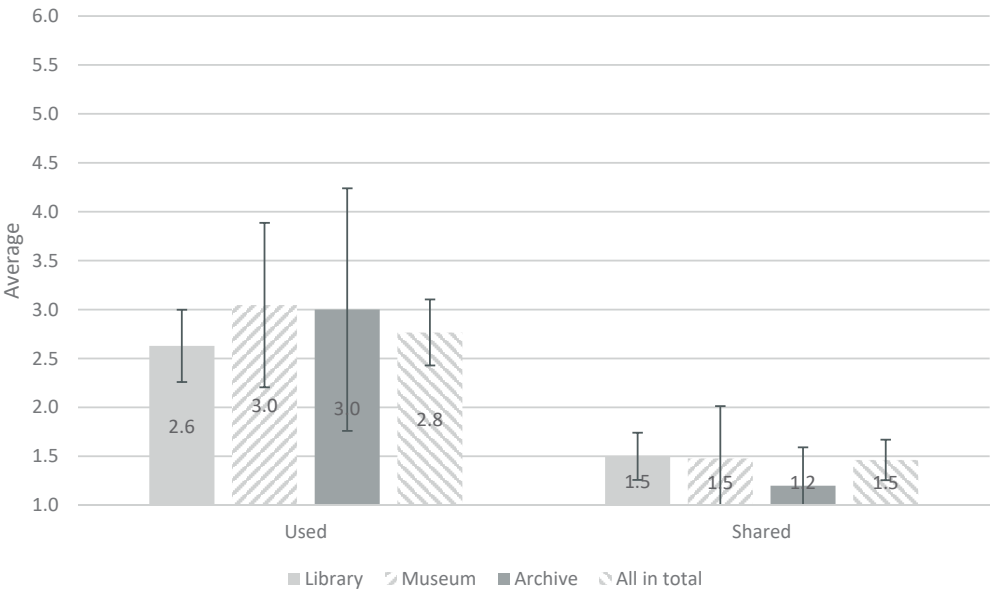

Figure 10. The survey asked respondents to use a 1 to 6 Likert scale (1 = 'not at all' … 6 = 'very often') to indicate the extent of their use of photos of work of art (e.g., paintings, graphic works, and sculptures), whether their own or taken by others and whether individual photos or photos used, for example, in the context of a presentation, in the education programme. Using the same scale, they reported how much they had 'shared copies of photos of works of art with participants in the education programme for home review'

[22] Ibid.

Few examples of use of photos of artwork were given, except by personnel of institutions connected with the art sector that use these in their education projects. An employee of one such institution highlighted a factor with considerable relevance in this regard and more broadly – 'it has generally been made quite difficult for schools to use such works as illustrative material. So reproductions of Estonian art, which are publicly available… I think for a teacher to make a presentation to talk about an artist's life is an absolute nuisance. Inevitably, there isn't a better word, because they are […] in low resolution and then when you show them they are blurry […]. This is all related to copyright'.

When photos of artwork did get shared in educational programmes, libraries and archive entities engaged in this practice mainly by means of links to materials on the Web while museums tended to prefer sharing copies of photos directly (see Figure 11). In general, both sharing copies of photos and using links to online materials seem slightly more commonplace among those conducting education programmes in cultural heritage institutions than among teachers and lecturers.*[23]

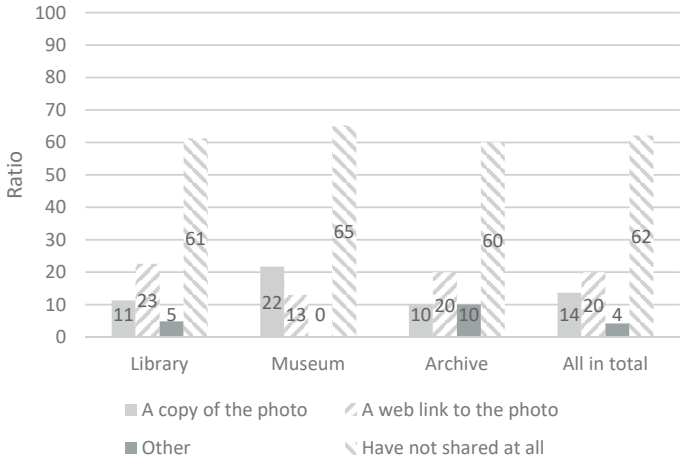

Figure 11. Responses related to forms of sharing of photos of works of art with participants in the education programme: 'I have mostly made available to them a copy of the photo (in paper or digital form) (1), a link to the photo as available on the Web (2), other relevant material/details (3), or no such material or information at all (4)'

Four respondents mentioned sharing by other means. They cited the following methods: sharing at an exhibition, sharing the data source, and making a slideshow available for review via an application interface on the institution's Web site. One respondent elaborated further: 'In presentations, I have sometimes used photos and the like, and professional associations have sometimes requested a presentation; it cannot be ruled out that a photo has included a work of art (painting, sculpture, etc.); today, I generally no longer use photos in presentations, but, of course, it cannot be excluded – photos make the presentation more lively. We have, for example, paintings deposited on the walls of libraries, and sometimes these have also appeared in pictures. But I was definitely bolder in the past than I am today, now that I am more aware of the rights of the author and various associations'.

Musical works were used quite infrequently in cultural heritage institutions, which display a pattern similar to general-education schools, vocational schools, and higher-education institutions in this respect*[24]. No statistically significant differences across libraries, museums, and archive entities were evident in this regard as (see Figure 12).

[23] Ibid.

[24] Ibid.

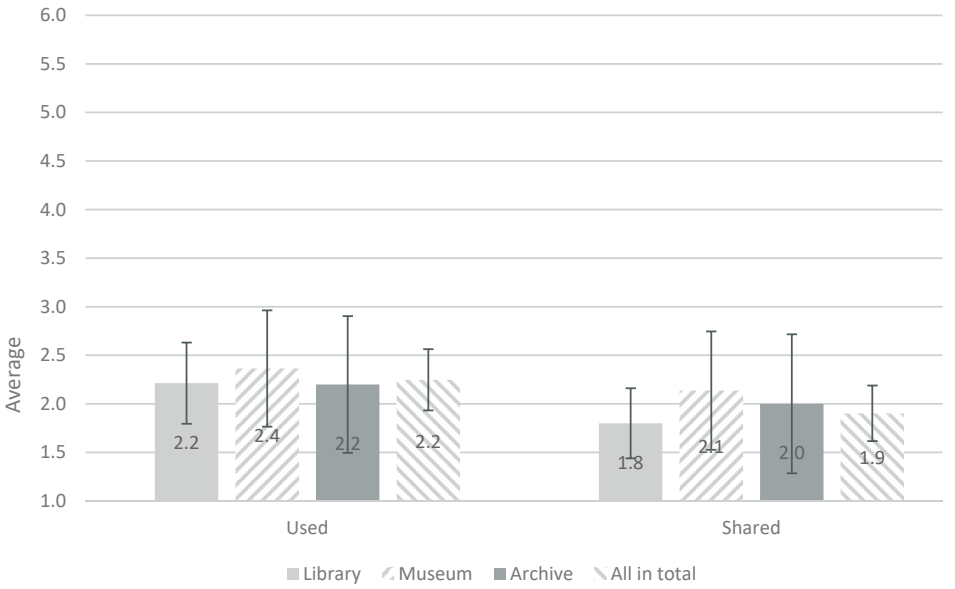

Figure 12. Respondents indicated how much they used musical works – e.g., lyrics; music recordings, with or without words; and/or music videos – for the implementation of the education programme, on a scale of 1–6 (for 'not at all' to 'very often'). They used the same scale for the item 'In using a musical work, I have used the complete work and have not limited myself to excerpts (e.g., a part of the musical work)'

Characterising the use of musical works in education programmes, a library employee highlighted in the group-interview setting that '[o]ur library has a music and film hall, and we also organise musical library lessons where we actually play sound excerpts. The musical library lessons are largely aimed at schools, kindergartens, or educational institutions'. A museum worker added that she had never used music in educational programmes but then explained: 'We have an audio guide, and in this audio guide we have used various archival materials for which we have obtained a licence for use with the exhibition's audio guide. And then I have had students listen to it out loud, so they can hear someone's memory excerpt, and there was also a small piece of melody somewhere.' An archive worker confirmed the infrequent use of music, saying the following about her archive lessons: 'Sometimes, when we have the lesson on the symbols in the Estonian state coat of arms, I play the anthem somewhere.'

When musical works were used in educational programmes, the most common practice across the three groups of cultural heritage institution was to play music found online without overtly copying it (see Figure 13). Other methods of use listed in the survey item were reported very rarely, with use of performances presented via a physical medium being slightly more frequent.

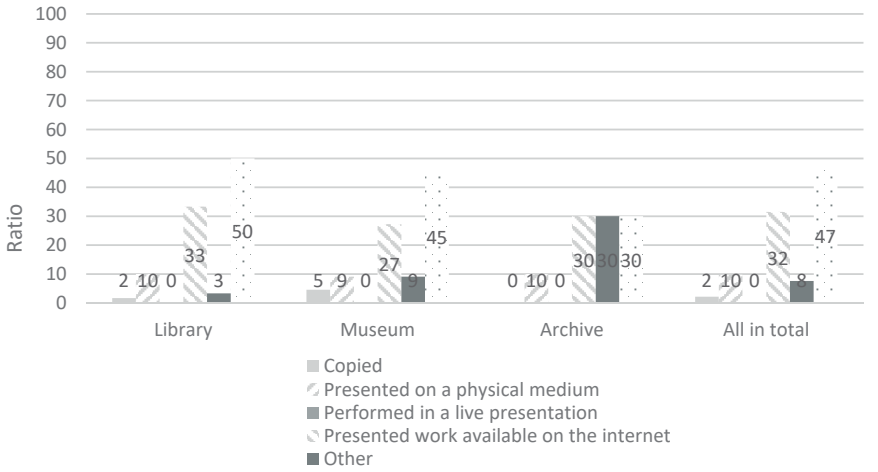

Figure 13. With regard to use of musical works in the education programme, responses to the item 'I have mostly copied the musical work to then present in the education programme (1), presented a musical work in the programme by means of a physical medium (e.g., a CD, DVD, or Blu-ray disc) (2), performed the musical work live (3), presented participants in the education programme with a musical work available on the Internet without making an overt copy of it (e.g., playing music from YouTube or Spotify during the lesson) (4), applied some other technique (5), or not used such resources at all (6)'

Other methods of sharing were cited by seven respondents. One clarified that 'I have copied works onto a disc for listening at an exhibition, presented songs from Web links for listening in class, played music from a CD in class, and also sung myself and asked participants to sing along'. Other clarifications explained that the music was recorded as a commissioned work, the respondent had engaged in live performance and playing directly from online sources equally, the source was the archive's database, the programme had used the National Archives (Rahvusarhiiv) database MEDIATEEK, and that played had been handled via a Web-based platform.

Reflecting on home listening, facilitators of educational programmes at cultural heritage institutions reported engaging in practically no sharing of musical works at all – none of the museum or archive workers participating in the study reported having done such sharing, and only seven out of the 59 library workers who answered the corresponding question had. However, it turns out that some respondents might not have fully understood this question, in that several who denied sharing went on to report on the manner in which they had made musical works available to participants in the programme – a full 34 responses fall into this class. Sharing of names was commonplace, with use of links being less frequent. Figure 14 presents the relevant results.

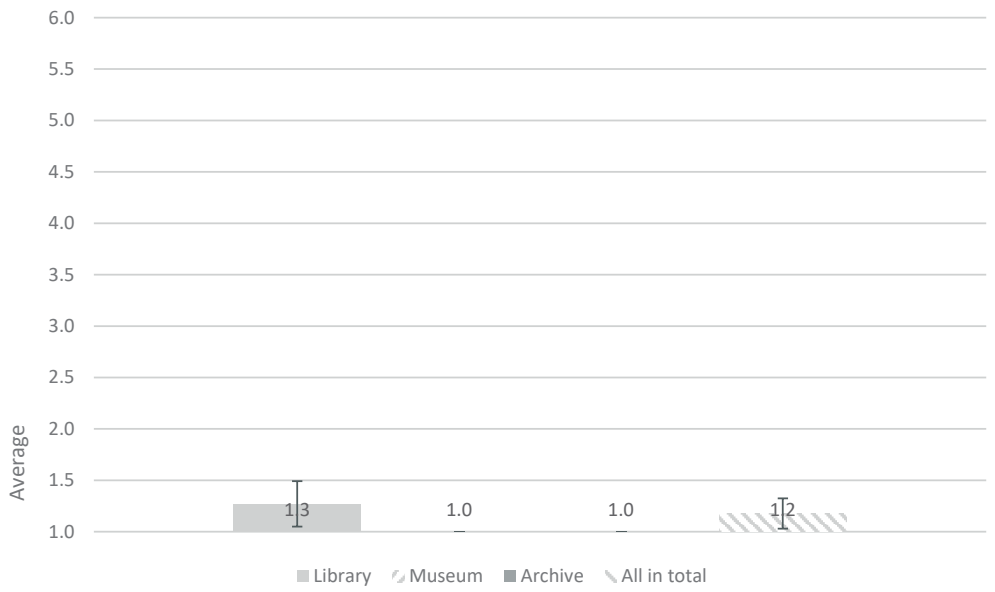

Figure 14. The nature of any sharing of musical works with learners, as reported by respondents, where 1 = having most commonly made available to them a copy of the musical work; 2 = having typically named the musical work, such that learners could explore it independently; 3 = sharing a Web link to the musical work (e.g., for environments such as YouTube, Spotify, etc.); 4 = usually engaging in some other form of sharing; and 5 = not sharing such resources at all

Five respondents reported other methods of sharing. They described these as the following: 'on a server, in a separate media catalogue'; 'citing the work's name, to enable independent exploration or directing people toward borrowing or to using library databases'; 'played from a phone or tape-player'; 'media library'; and 'presentation available for review on the institution's Web site'.

Audio-visual works were most commonly used by archival entities, although the extensive variability of responses rendered the average from this respondent group not statistically significantly different from that of library- or museum-based implementers of education programmes (see Figure 15). A similar pattern was evident for the use of complete works. The figure reflects this too. Generally, use of audio-visual works is less prevalent in cultural heritage institutions than in teachers' practices and its extent more closely resembles that among university lecturers.[*25]

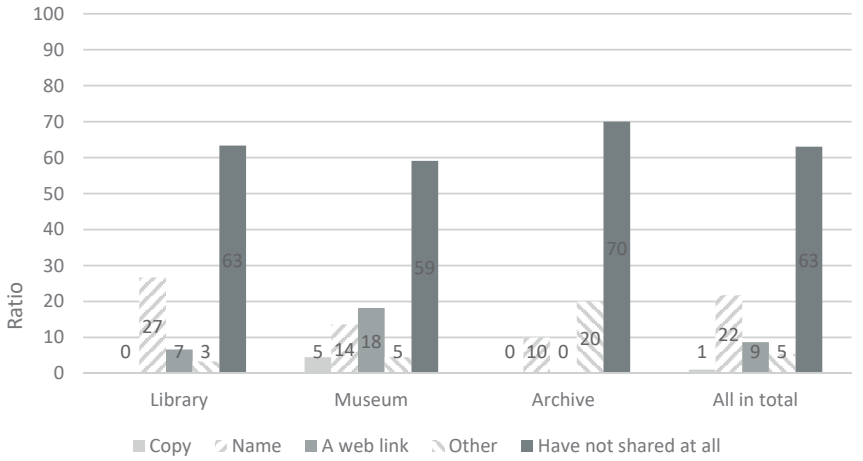

Figure 15. With regard to the educational programme considered, respondents indicated the degree to which they used audio-visual works: telefilm, video film, documentaries, etc. They also addressed whether any such use involved the complete work as opposed to excerpts (portions of the audio-visual works). Responses were on the above-mentioned 1–6 scale

[25] Ibid.

From analysis based on the interviews, it emerged that audio-visual materials serve more frequently in the educational programmes of archive institutions than in the other cultural heritage institutions studied. An archive worker pointed out: 'In some ways, we fulfil the orders of the archive pedagogues, so if they need something like a film programme or to compile a series of photos, or […] are indeed in our building, then yes' and, in addition, 'when school groups visit in a similar manner, they also have various desires, whether someone wants examples of propaganda or is interested in a specific operator, be it Andres Sööt or whoever. So, in that sense, it's easy for us because we really show in our own house that we have digitalised. But really, if you are now talking about schools and teachers, then this is the point where they use what we have publicly put into the database. So they can illustrate directly through our database'.

When respondents used audio-visual works, they did so most commonly in viewing with participants in the programme in a television, YouTube/Vimeo, or streaming environment (see Figure 16).

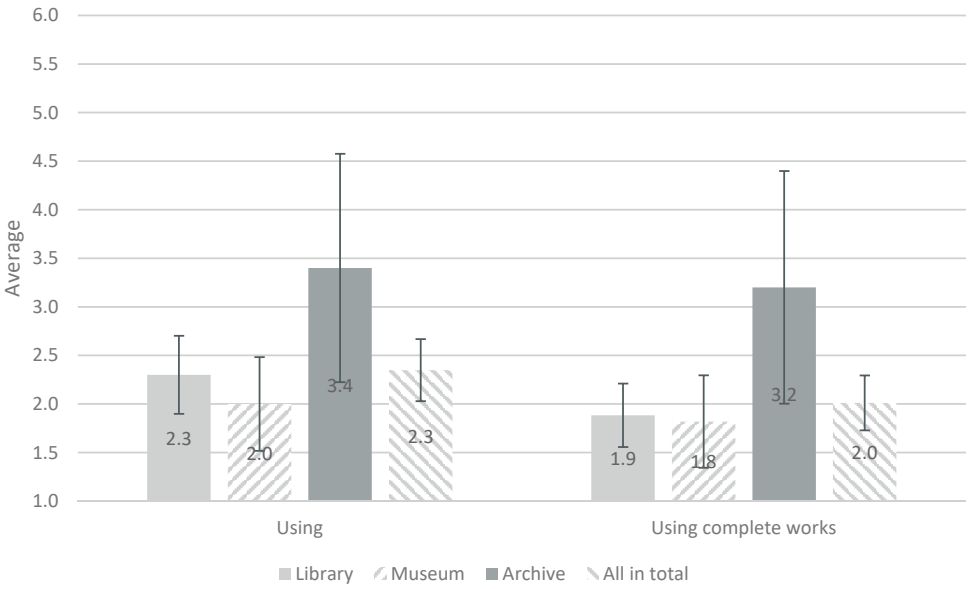

Figure 16. The nature of respondents' reported use of audio-visual works for education-programme purposes: 'I have mostly copied the audio-visual work (1); presented the audio-visual work to participants in the education programme on a physical data carrier (e.g., CD, DVD, or Blu-ray disc) (2); watched it with education-programme participants in a cinema setting (3); watched it with participants on television or via a medium such as YouTube, Vimeo, or a streaming service (4); used some other method (5); or not engaged in such use at all (6)'

Other methods of sharing featured in responses from six respondents. The following sharing methods were cited: relying on a server, involving a separate media catalogue; directing learners to borrow the materials or refer to library databases; presenting the material from a phone or a cassette-player; making use of a media library; and making a presentation available for review on the institution's Web site.

The providers of education programmes very rarely reported sharing audio-visual works for participants to watch at home (see Figure 17). When they did share them, the most typical mechanism was to make a Web link available to participants, with other methods of sharing trailing far behind this (see Figure 18).

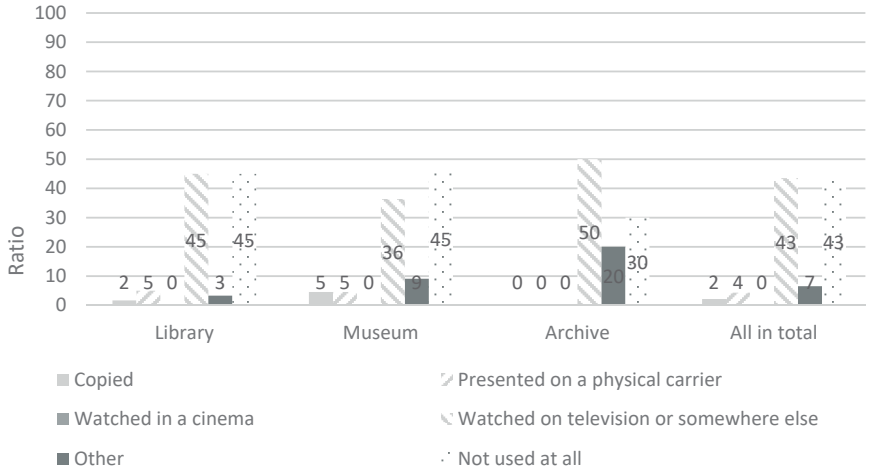

Figure 17. Responses for the item 'I have shared audio-visual works for learners to watch at home', where scores are on a 1–6 Likert scale for 'not at all' to 'very often'

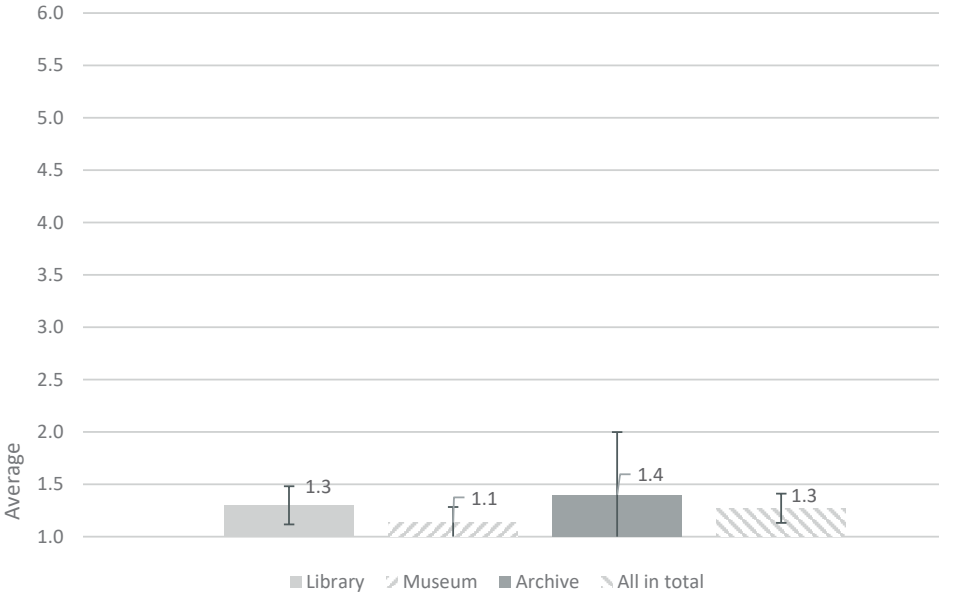

Figure 18. Respondents' reporting on the main form of sharing of audio-visual works with participants in the education programme in question, where '1' refers to a copy of the audio-visual work, '2' denotes provision of a Web link to the audio-visual work (e.g., on YouTube), '3' = citing of the audio-visual work such that participants in the programme could familiarise themselves with it, and '4' = no sharing whatsoever

4. Conclusions

The 105 implementers of education programmes who had answered at least one question related to copyright in the questionnaire portion of the survey can be broken down by institution category thus: 68 representatives of libraries, 25 workers with museums, and 12 archives personnel.

Whereas the preceding portion of the article dealt with question-specific responses in detail, we now synthesise the findings into a general summary covering the answers to the questionnaire's copyright questions, which is enriched with input from the focus-group interviews.

First of all, the general questions related to copyright competence and to the volume and form of copying were illuminating.

While respondents assessed their knowledge in the field of copyright as average, the interviews and subsequent copyright-related training revealed some uncertainty and needs for additional training and guidance materials. In addition to issues related to educational materials, there is a need to raise awareness of other matters, through thematically organised training.

The researchers ascertained that copying gets performed both on paper and digitally, with a slight preference for digital formats. The use of paper-based materials varies somewhat by institution category. Museums used them the most, with libraries utilising them nearly as much (there was no statistically significant difference). Archives' education programmes employed printed materials considerably less frequently. Overall, the extent of these materials' use did not differ between cultural heritage institutions and educational institutions in a statistical sense.

The extent of copying constitutes a crucial question from the standpoint of implementing the education exception. When materials were copied, copying of complete works was very rarely the choice, with archive institutions being a clear exception: respondents' estimates revealed relatively extensive variability among archive maintainers.

Copying of literary and reference works proved slightly more commonplace among libraries and museums than in archive institutions' programmes, but, again, the responses from archive staff manifested extensive variation, and none of the groups studied differed significantly from the others in a statistical sense.

Comparison between the two studies' datasets revealed that copying of photographs appears slightly more frequent among implementers of education programmes in cultural heritage institutions than among teachers and university lecturers. In comparisons among the three categories of institution in this study, no statistically significant differences emerged. Sharing of photographs was similar in profile between cultural heritage institutions' education programmes and the sharing reported by teachers and university lecturers.

Music works proved relatively rarely used in cultural heritage institutions, thereby manifesting a pattern similar to that of general-education, vocational, and higher-education institutions.

Audio-visual works were used most commonly by the archive maintainers, although their considerable variability in responses rendered the average for this (relatively small) respondent group not statistically significantly different from that of the implementers of library- or museum-based education programmes.

Proceeding from both the survey data and our interviews, one can conclude that, generally, Estonian cultural heritage institutions' reliance on the education exception is in accordance with copyright law. Additionally, other copyright exceptions that extend to cultural heritage institutions must be taken into account. The findings of the study could be further applied not only in policymaking related to the education-based exception to copyright but also in preparing guidelines and professional-development activities aimed at educators working in cultural heritage institutions. Partly to gauge the results of these, further research could apply this study's questionnaire design so as to facilitate monitoring of longitudinal changes in the practices of using copyrighted materials among those who handle and execute education programmes in the country's cultural heritage institutions.

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A Comparative Approach to Amendments to Constitutional Preambles:

Questions of Amendability, Substance, and Reasons[*1]

Abstract. Preambles of constitutions tend to express general principles, overarching values, and aspirational ideas that underpin the whole constitution. Whether they are deemed legally binding or not, their special character seems to suggest that constitutional preambles should be difficult to amend and that amendment of them should occur only rarely. Attention seldom extends beyond this, however: there is a distinct lack of comprehensive comparative analysis of amendments to constitutional preambles, with these preambles remaining the least researched part of constitutions. The paper represents an effort to fill this void by presenting a comparative empirical analysis of amendments to constitutional preambles around the world. After providing an overview of what sets constitutional preambles apart from the main body of constitutions and analysing their overall amendability, it reports specific results from empirical research into amendments to constitutional preambles, which identified 55 constitutional events occurring since 1949 that have resulted in some change in a constitutional preamble. The paper offers a typology of those amendments, from 42 countries, which involves 20 general characteristic elements of preambles, of which amendments related to political movements, ideology, or ideologues / political leaders were identified as most frequent. Lastly, it directs focus to the socio-political and other factors that lead to amendments in constitutional preambles.

Keywords: comparative constitutional law, constitutional preamble, amendment to a constitutional preamble, justiciability of a constitution's preamble, empirical research

[1] This article is based on a seminar paper written for the Colloquium on Comparative Constitutional Law and Politics held at the University of Texas at Austin. The author thanks professors Richard Albert, Zachary Elkins, and Ran Hirschl for their valuable guidance and offers special thanks to Prof. Elkins for granting access to the Comparative Constitutions Project's repository.

1. Introduction to the setting

Preambles of constitutions tend to articulate general principles, supreme values, and aspirational ideas[*2] that underpin the entire constitution. This would suggest that preambles should be difficult to amend and be rarely amended in practice. Yet a lack of comprehensive comparative analysis of amendments to constitutional preambles is clearly evident, and preambles remain the least researched part of constitutions to this day. The paper presents a comparative empirical study of amendments to preambles of constitutions, from around the world, informed by data from the Comparative Constitutions Project[*3] (CCP).

The study reported upon analysed all amendments occurring: importantly, it was not limited to those constitutions currently in force or to a specific span of time, apart from that for which records are available. The aim behind this paper is a fourfold one:

1) to ascertain whether preambles are legitimately amendable;
2) to provide an overview of amendments made to constitutions' preambles;
3) to explain the similarities and differences among the amendments made;
4) to undertake to identify the reasons for adopting amendments to constitutional preambles.

For the purposes of the study, a preamble, whether separated out specifically as a preamble or not, is understood as a preface or introductory part of a constitution that follows the title of the constitution and precedes the constitution's first substantive paragraph. In essence, the paper focuses on preambles **of** constitutions, which are deemed to be integral to a constitution, not merely preambles **to** constitutions, elements that cannot be regarded as fundamental parts of a constitution, e.g, mere general introductory words or statements preceding the main body of a constitution are not taken into account. The delimitation of focus confines the scope also to the preambles of main constitutional documents – that is, the work did not include analysis of preambles of other constitutional acts or of acts amending a constitution. All amendments analysed were made to constitutions through a formal amendment procedure; in contrast, instances wherein adjustment to a preamble or the addition/repeal of one occurred in the process of a constitutional replacement and cases of a supreme court publishing a novel interpretation to certain provisions of the preamble are not considered here. It is worth mentioning, however, that in the course of conducting the study it was evident that states in quite a few cases have adopted a new constitution while applying the preamble from a previous constitution verbatim[*4]. This phenomenon and the reasons behind it could be an interesting topic for future studies.

The first major section of this paper provides a framework for understanding the distinguishing character of constitutional preambles and examining their amendability. In pursuit of this aim, the discussion considers prior studies and analyses of constitutional preambles, just as much as supreme courts' and constitutional courts' decisions, from around the globe. Then, Section 3 provides an overview and analysis of the empirical data covering amendments to preambles as collected for the purposes of this paper. That discussion is followed by an effort to explain what brings about these amendments: the reasons behind amending a constitutional preamble. Finally, the conclusion provides the key 'take-aways' from the paper.

2. The role of constitutional preambles

2.1. The importance and common elements of constitutional preambles

Although the preambles of constitutions remain the least analysed part of constitutions, there do exist some reports on in-depth comparative studies conducted to classify constitutional preambles into distinct types and to identify common elements of preambles and their significance in constitutions. Some of the more comprehensive comparative research into the nature and elements of preambles has been undertaken

2 Wim Voermans, Maarten Stremler, and Paul Cliteur, *Constitutional Preambles: A Comparative Analysis* (Edward Elgar 2017) 80. – DOI: https://doi.org/10.4337/9781785368158.00010.

3 Comparative Constitutions Project, 'Informing Constitutional Design' <https://comparativeconstitutionsproject.org/> accessed on 30 June 2024.

4 This phenomenon has received brief analysis from Heino Nyyssönen and Jussi Metsälä, 'Highlights of National History? Constitutional Memory and the Preambles of Post-Communist Constitutions' (2020) 21(3) European Politics and Society 323, with regard to some Eastern European countries that adopted a new constitution after the collapse of the Soviet Union but used the preamble of the constitution that was in force before the occupation verbatim. – DOI: https://doi.org/10.1080/23745118.2019.1645425.

by Voermans, Stremler, and Cliteur[*5]; Justin Frosini[*6]; Ginsburg, Foti, and Rockmore[*7]; Ummareddy and Alam[*8]; and Liav Orgad[*9]. A look at their studies helps illustrate the special character of constitutional preambles, what distinguishes them from the body of constitutions.

The study by Voermans et al., which analysed 190 constitutions, identified 158 that have preambles[*10], which suggests that it is quite common for constitutions to feature a preamble. Per the report on these scholars' study, the likelihood of a constitution having a preamble is connected to the year in which the constitution was enacted. Most constitutions that have a preamble were put in place in the time since the beginning of the 20th century, and the highest number of constitutions with preambles comes from the period between 1990 and 1999[*11]. Frosini has pointed out that one of the justifications for having preambles is to isolate the main body of the constitution from expression of certain – often overarching – political, philosophical, and social principles[*12]. Relative to the body of the constitution, preambles indeed tend to articulate broader principles, values, philosophical ideas, ideologies, etc. This sense was confirmed in the study by Voermans et al., who found that preambles usually set out the values of the state considered supreme and refer to aspirations that typically lack precision[*13]. In further characterisation, Frosini and Lapa pointed out that 'the constitutional preamble is an essential part of the Constitution which establishes the historical moment of [the] Constitution's adoption and serves as a tool for interpretation for key issues related to the nation itself'[*14].

Scholars of comparative constitutional studies have endeavoured to classify constitutions by type through distinct characteristics of preambles. One of the most commonly employed approaches is to consider the length of the preamble – i.e., to group preambles into long and short ones (and sometimes also preambles of 'in-between' extent).[*15] This manner of distinction does not allow any ready conclusions with regard to the actual substance of the preamble, though.

The most typical substantive elements of preambles have been found to be references to the constituent power, national sovereignty, the rule of law, democracy, human dignity, fundamental rights and freedoms, equality, national history, ideology, and religion or secularism[*16]. Sometimes, constitutional preambles refer to historical or religious figures also (as in the cases of Brunei, China, Fiji, and Greece) or make foreign-policy statements (with Brunei's and Iraq's exemplifying this)[*17], with the latter often including promises of resolving conflicts by peaceful means[*18]. Other countries refer to instruments of international law (specifically, human-rights instruments) (e.g., Cameroon and Congo), declarations of independence (e.g., Armenia, Haiti, Ukraine, and Vietnam), other domestic law (e.g., Bahrain), territorial identity/integrity (e.g., Estonia), and/or the form of the state and form of government[*19]. Some of the most fascinating declarations present in preambles, however, are the ones involving explanations of some national creed; aspirations for the future; and the society's supreme goals, which might be related to justice, fraternity, economic aims, or

5 Voermans, Stremler, and Cliteur (n 2).

6 Justin Orlando Frosini, *Constitutional Preambles: At a Crossroads between Politics and Law* (Maggioli 2012) (*At a Crossroads*); Justin Orlando Frosini, 'Constitutional Preambles: More Than Just a Narration of History' (2017) 2 University of Illinois L Rev 603. – DOI: https://doi.org/10.2139/ssrn.3516805.

7 Tom Ginsburg, Nick Foti, and Daniel Rockmore, '"We the Peoples": The Global Origins of Constitutional Preambles' (2014) 46 George Washington Intl L Rev 305. – DOI: https://doi.org/10.2139/ssrn.2360725.

8 Neha Ummareddy and Aliket Alam, 'What Do Preambles Do? A Study of Constitutional Intent and Reality' (2021) 9 Studies in Indian Politics 221. – DOI: https://doi.org/10.1177/23210230211042990.

9 Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 Intl J of Constitutional L 714. – DOI: https://doi.org/10.1093/icon/mor010.

10 Voermans, Stremler, and Cliteur (n 2) 13.

11 Ibid 17–19.

12 *At a Crossroads* (n 6) 23.

13 Voermans, Stremler, and Cliteur (n 2) 80.

14 Justin Orlando Frosini and Viktoriia Lapa, 'The Historical and Legal Significance of Constitutional Preambles: A Case Study on the Ukrainian Constitution of 1996' in Francesco Biagi, Justin O Frosini, and Jason Mazzone (eds), *Comparative Constitutional History, Volume 1: Principles, Developments, Challenges* (Brill 2020) 85. – DOI: https://doi.org/10.1163/9789004435315_005.

15 See, for example, Voermans, Stremler, and Cliteur (n 2) 22–24; *At a Crossroads* (n 6) 29–31; Ginsburg, Foti, and Rockmore (n 7) 314–15.

16 Voermans, Stremler, and Cliteur (n 2) 26–29.

17 Ginsburg, Foti, and Rockmore (n 7) 315, 317.

18 Orgad (n 9) 717.

19 *At a Crossroads* (n 6) 31–33.

even objectives related to happiness and well-being[*20]. These can convey great insight revealing something of the core philosophy of the country. When compared to the main body of a constitution, preambles manifest a plain, solemn, ceremonial, and timeless character[*21] that is oftentimes intended to inspire the country's subjects[*22]. Sometimes preambles point to or recount extraordinary circumstances in which the constitution came into being (Cambodia, Congo, and Portugal offer examples)[*23].

Considering what a preamble of a constitution does, Orgad identified four key functions: educational (and, indeed, preambles frequently get cited in educational and public arenas), explanatory (setting forth reasons for the constitution's enactment), formative (both explanation and formation of national identity), and legal purpose[*24]. Orgad also offered a classification of preambles into the ceremonial-symbolic (preambles that are persuasive, symbolic, and general rather than holding legal force), interpretative (those designed for guiding interpretation of the body of the constitution whenever doubts arise), and substantive (legally binding sources of rights and obligations)[*25]. According to the report on Orgad's study, a preamble might exert either integrative or disintegrative force – i.e., it could hold power to unite a society or could drive it apart[*26].

In the realm of ceremonial-symbolic constitutions, the Constitution of the United States (U.S.) is commonly cited for its example of unenforceable declarative constitutional preambles. Joseph Story[*27] has observed with regard to the U.S. Constitution that the preamble was adopted not as a mere formulary but for solemn promulgation of a fundamental fact, vital to the character and operations of the government. Its aim, accordingly, is to expound the nature, extent, and application of the powers conferred by the body of the Constitution but not substantially to create such powers[*28]. For examples of substantive constitutional preambles, in contrast, one can turn to the French and Estonian constitutions. The classification into enforceable and unenforceable constitutional preambles is further examined below.

2.2. Justiciability of constitutional preambles

Probably the most clear-cut distinction among types of preambles entails classifying them by their justiciability or independent legal value. While the legal value of the 'main body' of a constitution is indisputable, the question of the legal value of a constitutional preamble is nowhere near as self-evident.

Sanford Levinson has pointed out that 'the easiest way to demonstrate the difference between preambles and the main bodies of constitutions, at least in the United States, is by reference to their very different legal statuses'.[*29] It has additionally been suggested that preambles presumably lack 'the same kind of point that would be attributed to the main body of a written constitution'.[*30] Although this is true with respect to the Constitution of the U.S. (along with several other countries), some of the world's supreme courts have referred to preambles to national constitutions as sources of law. Among these are the French[*31] and the Estonian Constitution. One of the reasons for which the preamble of the French Constitution is regarded as justiciable might be that it makes a reference to the Declaration of the Rights of Man and of the Citizen of 1789[*32] and to the preamble of the French Constitution of 1946[*33], both of which feature lists of civil rights

20 Orgad (n 9) 717.

21 Voermans, Stremler, and Cliteur (n 2) 83–84.

22 Ginsburg, Foti, and Rockmore (n 7) 318.

23 Voermans, Stremler, and Cliteur (n 2) 84.

24 Orgad (n 9) 722.

25 Ibid 722–31.

26 Ibid 731.

27 Joseph L Story, *Commentaries on the Constitution of the United States, Volume I* (Hilliard, Gray, and Company 1833).

28 Ibid 445.

29 Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* (OUP 2012) 57. – DOI: https://doi.org/10.1093/acprof:osobl/9780199890750.001.0001.

30 Ibid.

31 Ibid 61.

32 'La Déclaration des Droits de l'Homme et du Citoyen' <https://www.elysee.fr/la-presidence/la-declaration-des-droits-de-l-homme-et-du-citoyen> accessed on 3 July 2024.

33 'Préambule de la Constitution du 27 octobre 1946' <https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/preambule-de-la-constitution-du-27-octobre-1946> accessed on 30 June 2024.

and liberties, alongside some social rights. As rights-related provisions are by nature more justiciable, perhaps it should not come as a surprise that the preamble of the French Constitution is among those preambles deemed justiciable. The justiciability of the preamble of the French Constitution has formed the subject for several in-depth studies by legal scholars[*34]. Complementing their work, this paper presents more detailed analysis of the justiciability of the preamble of the Estonian Constitution.

Though quite short, the preamble of the Estonian Constitution[*35] makes mention of several substantial principles and aspirational notions, among them the principles of sovereignty, liberty, and the rule of law; aims connected with ensuring peace; and the importance of preservation of Estonian culture and of contributing to the welfare of both present and future generations. What is more, the preamble of the Estonian Constitution is of interest in that it is one of the preambles that have been amended[*36]. This history shows us how the Estonian Supreme Court has – on several occasions – applied the constitutional preamble when deciding on the constitutionality of legal acts enacted by Parliament.

The provision of the preamble most commonly appealed to by the Supreme Court of Estonia has been the state's duty to ensure preservation of the Estonian nation and culture. The most frequent context for the Supreme Court's analysis of the duty to preserve these has been *vis-à-vis* the Aliens Act. In this connection, the court found with regard to various fundamental rights arising from the Aliens Act (the right to immigrate to Estonia, a right to permanent residence, etc.) that interference may be justified by the legitimate aim of protecting the values expressed in the preamble of the Constitution.[*37] In addition, the Supreme Court has stated that the protection of national identity may serve as justification for interfering with a right to choose a 'foreign-sounding' name[*38].

Furthermore, the Supreme Court employed the preamble of the Constitution for underpinnings when analysing the constitutionality of the European Stability Mechanism in 2012. In that instance, the court paid special attention to the principle of sovereignty and the duty to protect fundamental rights as provided for in the preamble, stating that the obligations arising from the preamble are highly significant[*39].

One of the most unique situations of resorting to that preamble arose in 2020 when the Supreme Court adjudicated a constitutional-review case cohering around the constitutionality of mandatory pension-scheme reform[*40]. In that case, the court interpreted future generations' right to social progress and general welfare provided for in the preamble. This marked the first time that the Supreme Court declared explicitly that

> the preamble to the Constitution, similarly to other parts of the Constitution, is legally binding and may give rise to direct duties of public authority. One of the functions of the preamble to the Constitution is to determine the main goals of the state.[*41]

It is noteworthy that, although the Supreme Court has thus acknowledged that the preamble sets forth the goals of the state and that the preamble is legally binding, the country's highest court is yet to decide a case on the basis of solely the preamble. The preamble of the Constitution has always been applied in conjunction with other articulations of rights, obligations, or principles from the Constitution, although there seems to be nothing to prevent the Supreme Court from basing a judgement on the preamble alone. That said, the preamble as a source of law appears to be taken so far as a complementary and overarching source, rather than a stand-alone legal act. This would seem to run counter to the general statement made by Edmund Randolph (when arguing in support of the position that the preamble to the U.S. Constitution should not be deemed legally binding) that 'the Preamble if it be operative is a full constitution of itself; and the body of the

34 For instance, see Frosini's *At a Crossroads* (n 6).

35 That is, the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*) as adopted on 28 June 1992 (RT I, 15.05.2015, 2).

36 See annexes 1 and 3 to this article.

37 RKÜKo 5-18-5, 21.6.2019, para 67, with a translation into English available at <https://www.riigikohus.ee/en/constitutional-judgment-5-18-5> accessed on 29 March 2024; RKPJK 5-21-4, 28.9.2021, para 44.

38 RKPJKo 3-4-1-6-01, 3.5.2001, para 18. Version in English available at <https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-6-01> accessed on 29 March 2024.

39 RKÜKo 3-4-1-6-12, 12.7.2012, para 198. An English-language translation is available at <https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-6-12> accessed on 29 March 2024.

40 RKÜKo 5-20-3, 20.10.2020, available in English translation at <https://www.riigikohus.ee/en/constitutional-judgment-5-20-3> accessed on 29 March 2024.

41 Ibid para 60.

Constitution is useless'.[*42] Indeed, if the example of Estonia is anything to go by, a preamble being legally binding should only strengthen the body of the constitution, grant greater legitimacy to court judgments, and render it easier for the courts to ensure that the aims behind the constitution truly get protected.

The U.S. Constitution is usually cited as an example of countries whose preamble has no independent legal value. Throughout its existence, the Supreme Court of the U.S. has referred to the preamble to the Constitution in its decisions, as have the supreme courts of several U.S. states.[*43] The only U.S. Supreme Court case wherein the preamble was deemed to constitute grounds for establishing that an individual's rights had been violated was *Jacobson v. Commonwealth of Massachusetts*[*44]. From more detail-oriented analysis of court judgements that refer to the preamble of the U.S. Constitution, Frosini found that the U.S. Supreme Court 'appears to use the "cherry-on-the cake" technique', wherein 'the substance of the decision is handed down on the bases of other provisions of the constitution (the "cake"), but then to render its reasoning more convincing it makes reference to the preamble'. He concluded that the preamble 'is never used by the Federal Supreme Court as a parameter in judicial review of the constitutionality of statute law' though 'it often uses the preamble as a way of reinforcing its decisions'.[*45]

The Supreme Court of India has undergone an interesting development in the way it understands the role and enforceability of the preamble of the national constitution. In 1960, the Supreme Court of India stated in the *Berubari* case[*46] that the preamble is not actually integral to the Constitution and hence is not enforceable in a court of law[*47]. Later, however, the Supreme Court of India overruled the *Berubari*-case conclusion, finding in 1973 in the *Kesavananda* case[*48] that the preamble may be used for interpretation of ambiguous facets to the Constitution where differing interpretations present themselves. In 1995, that court reaffirmed that the preamble of the Constitution is an integral component of the Constitution, in the case *Union Government vs LIC of India*[*49].

It appears from the foregoing considerations that, while countries differ in the legal value they accord to their constitutional preambles, both legally binding constitutional preambles and preambles not regarded as legally binding get used to strengthen the reasoning of court decisions. Also, as is visible from the example of India, it is possible that a supreme court might change course in this regard as needs dictate, deeming a constitutional preamble non-binding but subsequently altering its view and applying the preamble as binding law.

2.3. Amendability of constitutional preambles

On account of the special role of constitutional preambles and their elements identified by legal scholars, the question of whether preambles are or should be amendable arises naturally. Analysis of constitutional provisions that regulate the procedure for amending the constitution (whether as a whole or individual provisions of it) indicates that constitutions can, all in all, be classified into three categories with regard to how they approach the matter of amending the preamble of the constitution.

Firstly, a constitution may be silent on the question of whether the preamble is amendable or what the amendment procedure might be. The corresponding category covers most of the world's constitutions that have a preamble (e.g., those of Estonia, Germany, India, and the U.S.). If a constitution does not speak to the issue of the amendment procedure connected with the preamble, the procedure accepted is usually the same as that for the main body of the constitution, unless the supreme court of the relevant country has concluded that the preamble of the constitution is non-amendable[*50]. Secondly, a constitution might explicitly prohibit amendment of the preamble of the constitution. The only known example of this kind of constitution is the Constitution of Bangladesh, which provides the following:

42 Levinson (n 29) 60.

43 See, for example, *Oxley v Department of Military Affairs*, 460 Mich 536, 597 NW2d 89 (1999).

44 *Jacobson v Commonwealth of Massachusetts*, 197 US 11 (1905).

45 *At a Crossroads* (n 6) 64.

46 *The Berubari Union & Exchange of Enclaves v Unknown* (1960) 3 SCR 250.

47 Ibid para 31.

48 *Kesavananda Bharati Sripadagalvaru & Ors v State of Kerala & Anr* (1973) 4 SCC 225.

49 *LIC of India v Consumer Education and Research Centre* (1995) 5 SCC 482.

50 This was the case with India in 1960–73, as discussed further on in the paper.

> Notwithstanding anything contained in article 142 of the Constitution, the preamble [...] and the provisions of articles relating to the basic structures of the Constitution [...] shall not be amendable by way of insertion, modification, substitution, repeal or [...] any other means.*[51]

Curiously, the preamble of the Bangladeshi Constitution was amended in 1976 by the administrator of martial law, with the country's parliament later validating this change as the fifth amendment to the Constitution*[52]. The third option is for a constitution to include a special provision regulating the details of the amendment procedure applicable to the preamble. Examples from this group of constitutions are the constitutions of Gabon and North Macedonia. The Constitution of North Macedonia is especially interesting in this regard for several reasons. Firstly, the provision pertaining to the procedure for amending the preamble was itself added to the Constitution via a constitutional amendment. Also, said provision was incorporated into the Constitution at the same time as the changes to its preamble. Thirdly, that provision sets forth rules whereby an amendment to the preamble requires the support of a two-thirds majority of the total number of representatives, where the majority of those voting in favour must be representatives who belong to communities not corresponding with most of the population of North Macedonia.*[53] Hence, the North Macedonian Constitution gives a special role to minority groups in conditions of potentially amending the preamble. That said, this is perhaps a less surprising phenomenon when one factors in the background to the concomitant amending of the preamble of the Constitution of North Macedonia, discussed in more detail in Section 4 of the paper.

While case law addressing the amendability of preambles is scarce, there are supreme courts that have quite prominently analysed the question of amendability of a given constitutional preamble. The Supreme Court of India is one of these. When that court ruled in 1960 that the preamble of the Constitution is not part of the Constitution*[54] (as discussed above), it produced an interpretation whereby the preamble of the Constitution of India was not amendable. In the follow-up case 13 years later, the Supreme Court noted initially that

> [t]he stand taken up on behalf of the respondents that even the preamble can be varied, altered or repealed, is an extraordinary one. It may be true about ordinary statutes but it cannot possibly be sustained in the light of the historical background, the Objectives Resolution which formed the basis of the preamble and the fundamental position which the preamble occupies in our Constitution. It constitutes a landmark in India's history and sets out as a matter of historical fact what the people of India resolved to do for moulding their future destiny. It is unthinkable that the Constitution makers ever conceived of a stage when it would be claimed that even the preamble could be abrogated or wiped out.*[55]

However, the Supreme Court's opinion in the *Kesavananda* case goes on to examine the possibilities for amendment of the preamble, then presents the conclusion that it all boils down to whether 'by virtue of the amending power the Constitution can be made to suffer a complete loss of identity or the basic elements on which the Constitutional structure has been erected [...] can be eroded or taken away'.*[56] The Supreme Court thus eloquently articulated the central question that can be deemed to underlie any proposed amendment of a preamble of a constitution: taking into account the special role of preambles in constitutions. It brings to the fore the question of whether it is possible or even allowed to amend the preamble substantively in a way that changes the very fundaments of the state as set forth in the preamble. The Supreme Court of India stated:

> The first thing [...] the people of India resolved to do was to constitute their country into a Sovereign Democratic Republic [...]. The question which immediately arises is whether [...] the amending body [has the power] to take away any of these three fundamental and basic characteristics of our polity. Can it be said or even suggested that the amending body can make institutions created by our Constitution undemocratic as opposed to democratic; or abolish the office of the President and,

51 Constitution of Bangladesh (*Bangladesher Sambidhāna*) adopted on 16 December 1972, art 7B.

52 A. Z. M. Arman Habib, 'Primacy and Efficacy of Preamble Propositions in India and Bangladesh: A Comparative Understanding of Interpretative Constitutionalism' (2016) 58 Intl Journal of Law and Management 660, 665. See also Annex 1 to this article. – DOI: https://doi.org/10.1108/ijlma-08-2015-0047.

53 Constitution of North Macedonia (*Устав на Република Северна Македонија*) adopted on 17 November 1991, amendment XVIII.

54 *Berubari* (n 46) para 31.

55 In the *Kesavananda* case (n 48) para 553.

56 Ibid para 554.

> instead, have some other head of the State who would not fit into the conception of a "Republic"? The breadth to the power claimed on behalf of the respondents has such large dimension that even the above part of the preamble can be wiped out[,] from which it would follow that India can cease to be a Sovereign Democratic Republic and can have a polity denuded of sovereignty, democracy and Republican character.*[57]

Indian jurist Nani Palkhivala presented an opinion in this case that the preamble should be treated as permanent and unamendable. This would be justified by the fact that the preamble sets out the objectives behind the Constitution and, therefore, any tampering with that expression of objectives would destroy the identity of the Constitution*[58].

In the end, the Supreme Court of India found that the parliament holds the power to amend the Constitution but not in such a way as to cause damaging or destruction of the structure and identity of the Constitution. In ruling thus, the Supreme Court indicated that Parliament has an implicitly limited amendment power whereby it is precluded from undermining the identity of the Constitution or any of its basic structure, inclusive of that provided for in the preamble – in fact, especially the latter. That view was further confirmed in the *Minerva Mills* case*[59].

As is explicated below*[60], the preamble of the Constitution of India was amended three years after handing down of the above-mentioned ruling. That amendment, which added the words 'socialist', 'secular', and 'integrity' to the preamble, was highly controversial, as some jurists found these changes to alter the Constitution's basic structure, which had been declared non-amendable in the *Kesavananda* case.*[61] However, the Indian Supreme Court has not judged the constitutionality of this adjustment to the preamble, and it has remained in force.

Similarly to the Supreme Court of India, the Supreme Court of Ukraine addressed the question of amendability of the preamble when analysing the constitutionality of amending the preamble of the Ukrainian Constitution in 2018. The Supreme Court deemed the main question to be about whether the amendments proposed compass abolition or restriction of human and citizens' rights and freedoms, are oriented toward the liquidation of Ukraine's independence, or violate the territorial indivisibility of Ukraine.*[62] The court found no such violations, and Parliament adopted the amendment at issue. However, six judges did pen opinions separate from the majority judgement, with Judge Oleksandr Lytvynov stating:

> Since the preamble also mentions the main values of the constitutional order of Ukraine, it could be considered […] an element of the constitutional order. [C]hange of the constitutional order of Ukraine could be done only by the people of Ukraine and cannot be usurped by its state bodies. Moreover, […] amendments to the parts of the Constitution which change the constitutional order should be approved by […] Ukrainian referendum. Therefore, the constitutional preamble could be changed only following […] approval by […] all-Ukrainian referendum.*[63]

Judge Mykola Melnyk, in turn, stated in his separate opinion that the preamble of the Constitution fixed a particular historical moment at its adoption and that Parliament by amending the preamble would be meddling with history. He also concluded that amendment inherently reduces the preamble's role and influence, in that the preamble is employed in Constitution-interpretation work, particularly for understanding the originally intended meaning of the Constitution*[64]. Amongst the Supreme Court judges of Ukraine, views on whether the preamble is part of the Constitution and by which means, if any, its

57 Ibid para 555.

58 Ibid para 1351.

59 *Minerva Mills Ltd & Ors v Union of India & Ors* (1980) 1 SCR 206.

60 See Section 3 and also Annex 1 to this article.

61 Kakoli Nath, '42nd Amendment of Indian Constitution' (*Finology Blog*, 3 January 2023) <https://blog.finology.in/Legal-news/42nd-amendment-of-indian-constituion> accessed on 29 March 2024.

62 Opinion of the Constitutional Court of Ukraine in a Case Initiated by the Verkhovna Rada of Ukraine As to Providing an Opinion with Regard to the Compliance of the Bill on Amendments to the Constitution of Ukraine (As to the Strategic Course of the State in Acquiring Full-Time Membership of Ukraine in the European Union and NATO) with Articles 157 and 158 of the Constitution of Ukraine' no 3-v/2018 (22 November 2018) <http://www.ccu.gov.ua/sites/default/files/docs/3_v_2018.pdf> accessed on 29 March 2024.

63 In case 3-v/2018, separate opinion of Constitutional Court Judge OM Lytvynov, para 1 <https://zakon.rada.gov.ua/laws/show/nf03d710-18/print> accessed on 29 March 2024.

64 In case 3-v/2018, separate opinion of Constitutional Court Judge MI Melnyk, para 2 <http://www.ccu.gov.ua/sites/default/files/docs/3_v_2018_2.pdf> accessed on 29 March 2024.

emendation should be permitted clearly diverged*[65]. Most did, however, find the preamble of the country's Constitution to be amendable, though on condition of several limitations, mentioned above.

3. Data on amendments to constitutional preambles

3.1. The data collected, in a nutshell

The CCP data provided a solid starting point for examining distinct elements of amendments to constitutional preambles. Still, it must be noted that these data might not offer a complete picture of all amendments made to preambles, throughout history in all the countries of the world.

Pulling data by using the variables used by the CCP to track elements of constitutions yielded an overview of instances wherein a particular variable was detected in one year but, after amendment to a constitution took place, not in another. According to the dataset analysed, 55 constitutional events since 1949, in 42 countries, have resulted in some sort of change in a constitutional preamble. As Figure 1, below, illustrates, the analysis identified five ways in which a constitutional amendment might bring about a change in the preamble:

1) an existing preamble may be repealed;
2) the pre-existing preamble may be replaced;
3) merely formal or technical amendments are made to an existing preamble;
4) there are substantive amendments to an existing preamble; or
5) a preamble is added to a constitution that had none prior to the amendment.

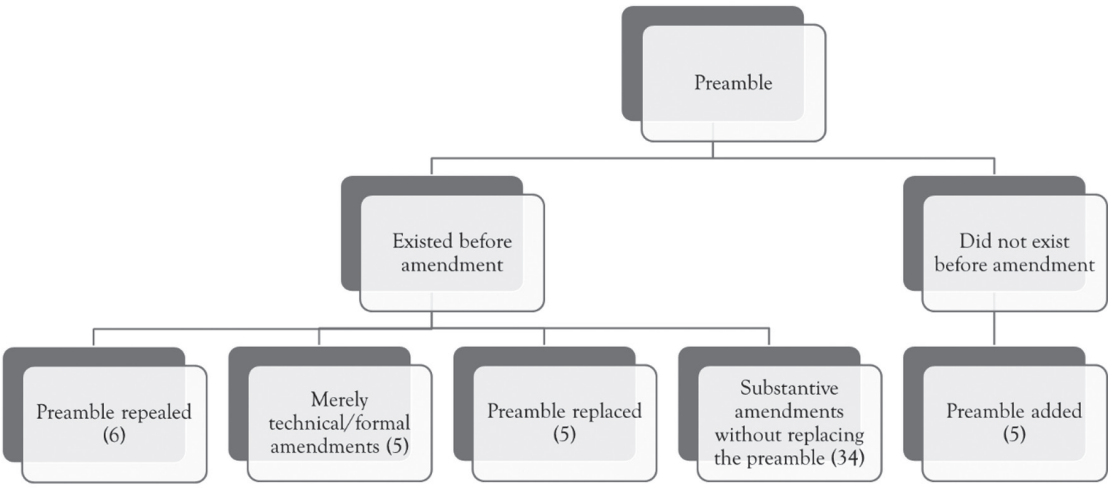

Figure 1. Means of amending a constitutional preamble (the typology and the numbers come from the author's analysis of preambles)

From taking into account that there are 195 sovereign countries recognised by the United Nations (UN) at the moment*[66] and only 42 of these have ever amended their constitutional preambles (in total, 55 times), it can be concluded that amendments to preambles are rare. The rarity of such amendments is cast into even sharper relief by comparison with changes to the larger constitution – e.g., Brazil experienced 105 amendments to its Constitution between 1988 and 2018*[67], and India's Constitution was amended 105 times between 1951 and 2021*[68], with only one of the latter constitution's amendments including any adjustment to the preamble.*[69]

65 See also Frosini and Lapa (n 14) 83.

66 There are 193 UN member states and are two entities with Observer State status (Palestine and Vatican City). See United Nations, 'Member States' <https://www.un.org/en/about-us/member-states> and 'Non-Member-States' <https://www.un.org/en/about-us/non-member-states> both accessed on 29 March 2024.

67 Juliano Zaiden Benvindo, 'Brazil's Frenetic Pace of Constitutional Change under Bolsonaro: Why and What Next?' (ConstitutionNet, 26 August 2022) <https://constitutionnet.org/news/brazils-frenetic-pace-constitutional-change-under-bolsonaro-why-and-what-next> accessed on 29 March 2024.

68 Wikipedia, 'List of Amendments of the Constitution of India' <https://en.wikipedia.org/wiki/List_of_amendments_of_the_Constitution_of_India> accessed on 29 March 2024.

69 See Annex 1 to this article.

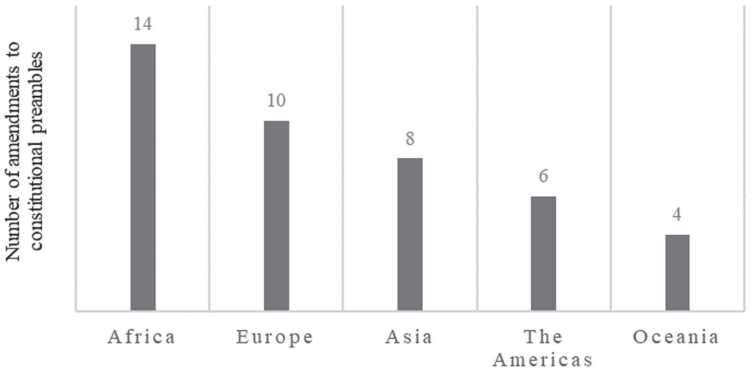

Figure 2. Amendments to constitutional preambles from 1949–2023, broken down by region, from data retrieved from the CCP's repository

Figure 2 shows that most of the amendments to preambles have been carried out in Africa, where 14 countries have amended their constitutional preambles (namely, Burkina Faso, Burundi, Cameroon, Cape Verde, the Central African Republic, Côte d'Ivoire, the Democratic Republic of Congo, Djibouti, Egypt, Gabon, Madagascar, Mozambique, Tanzania, and Togo), followed by Europe, with 10 countries (Bulgaria, Estonia, Finland, France, the German Democratic Republic, Germany, Latvia, North Macedonia, Turkey, and Ukraine); Asia, with eight (Bangladesh, China, India, Iran, Lebanon, Nepal, North Korea, and Pakistan); the Americas, with six countries (Argentina, Belize, Cuba, Haiti, Nicaragua, and Panama); and Oceania, with four (the Marshall Islands, New Zealand, Samoa, and Tonga).

Annex 1 to this paper provides the full table of data on substantive amendments to constitutional preambles. The table in Annex 1 (and subsequently tables in Annexes 2 and 3) does not include data on cases of amendments by which the preamble was simply repealed, a preamble was added for the first time, or merely technical or formal alterations were made (such as a change in the name of the state, an example of which would be the amendment made to the preamble of the Constitution of Samoa in 1997). It does, however, consider instances in which the preamble was replaced in its entirety (from Burundi, Cape Verde, Latvia, Tanzania, and Turkey in 1987)[*70]: analysis of preamble replacements attests that, even when the preamble was completely replaced, some elements remained the same as in the previous preamble. These cases hence provide room for comparisons between the superseded and new preambles.

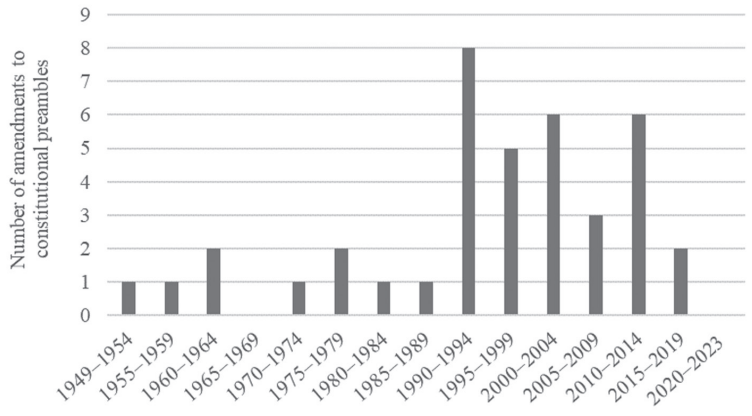

Figure 3. A temporal breakdown of substantive amendments to constitutional preambles and preamble replacements from 1949–2023, using source data from the CCP's repository

In all, 29 states have amended the preamble to their constitution substantively or completely replaced it, in connection with 38 constitutional events. When one excludes replacement of preambles from consideration, 25 states have implemented substantive amendments to their constitutional preamble, in 33 instances.

[70] See this paper's Table 1.

According to the data available, the first substantive amendment to a constitution's preamble was adopted in 1949, in Argentina. As Figure 3 shows graphically, there were relatively few substantive preamble amendments or replacements – only nine – to preambles prior to the 1990s. The years since 1990 have seen a total of 29 substantive preamble amendments or replacements. Most of those occurred between 1990 and 1994. These statistics are consistent with the trends identified by Voermans et al., according to whom there were relatively few constitutions with preambles prior to 1940 and most constitutions with preambles were enacted between 1990 and 1999*[71]. The latest preamble amendment identified from the data took place in 2019 in Ukraine.

The analysis revealed that those states having amended their constitutional preamble are more likely to amend it again. This conclusion is supported by the fact that, out of the 42 countries that have amended the preamble to their constitution, eight have done so repeatedly (namely, Argentina, Burkina Faso, China, Gabon, Germany, Panama, Turkey, and Ukraine).*[72] The state manifesting the most amendments to its constitutional preamble is China, with a total of four amendments, followed by Burkina Faso with three.

Table 1. Instances of non-substantive amendments to constitutional preambles in the data

Country	Preamble repealed (6)	Preamble added (6)	Preamble replaced (5)	Merely technical/formal changes made (5)
Bulgaria, 1990	+			
Burundi, 1996			+	
Cape Verde, 1992			+	
Djibouti, 2010		+		
Egypt, 1980		+		
Finland*	+			
Iran, 1989	+			
German Democratic Republic, 1974	+			
Germany, 1976				+
Latvia, 2014			+	
Lebanon, 1990		+		
Mozambique, 1980		+		
Nicaragua, 1995				+
North Korea, 1998		+		
Panama, 1978				+
Panama, 1983	+			
Panama, 1994		+		
Samoa, 1997				+
Tanzania, 1984			+	
Tonga, 1988				+
Turkey, 1987			+	
Ukraine, 1991	+			

* The preamble was repealed between 1933 and 1991 but the exact year could not be identified based on the available data

Table 1 presents data on constitutional events in conjunction with which the preamble was repealed or one was added to the constitution, along with clarification of constitutional events in the course of which the preamble was replaced or amendments of a merely technical or formal nature were made. In six instances, the preamble was repealed while the rest of the constitution (either amended or not) remained in force

71 Voermans, Stremler, and Cliteur (n 2) 18.

72 See both Table 1 and Annex 1 to this article.

(these occurred in Bulgaria, Finland, the German Democratic Republic, Iran, Panama, and Ukraine); a preamble was added to the constitution in six cases (in Djibouti, Egypt, Lebanon, Mozambique, North Korea, and Panama); there were five instances wherein a preamble was replaced (in Burundi, Cape Verde, Latvia, Tanzania, and Turkey); and five instances of implementing technical or formal amendments were found (affecting Germany, Nicaragua, Panama, Samoa, and Tonga). The last of these phenomena (technical/formal amendments) occurs in, for instance, scenarios of the preamble getting restructured (e.g., in Germany in 1976), dates of constitutional amendments being added to the preamble (as in Tonga), or a change in the country's name meriting amendments to the preamble (seen in Samoa).

There are no clearly identifiable characteristics shared by the constitutional preambles that have experienced amendments. In some cases, a short preamble was replaced by a long or intermediate-length preamble (one could cite Latvia as an example), while in others a substantive preamble was replaced by a purely descriptive preamble focusing mainly on the history of the state or the circumstances that led to the adoption of the constitution (visible in Cape Verde's case). In some instances, the preamble amended was part of a relatively new constitution; for example, the Constitution of Burkina Faso was adopted in 1991 and its preamble was amended in 1997, in what was the first amendment to that country's constitution. In other instances, it was part of an older constitution (the preamble of the 1987 Constitution of Haiti was amended in 2012, a preamble was added to the 1926 Constitution of Lebanon in 1990, etc.). There have been cases wherein replacement of the entire constitution followed swiftly on the heels of amendments to the preamble (e.g., the preamble of the Constitution of Madagascar was amended in 1970, an interim constitution entered force in 1972, and in 1975 a new Constitution of Madagascar was adopted). In one country – Panama – the preamble of the Constitution was repealed (in 1983) but a preamble was later made part of the Constitution once again (in 1993)[*73]. There was also a case of amendments to the constitutional preamble not 'sticking': because of political changes from 1940s–1950s Argentina, the earlier Constitution, with the corresponding preamble, was reinstated seven years after changes were implemented. This illustrates well that, even in the context of a single constitution, repealing or amending the preamble need not have a 'permanent' effect.

3.2. Elements subject to substantive amendments

Annex 1 provides a detailed picture of substantive amendments to constitutional preambles. Since every preamble has a wording and style all its own, translations from languages different from the language of the constitutional analysis differ, and further factors preclude set phrasings, the study clustered amendments to preambles into 20 categories with broad wording. As the annex illustrates, the element most frequently subject to amendment is text related to political movements, ideologies, or ideologists / political leaders. Most amendments of these elements involve references to certain liberation movements, socialism, liberalism, or specific ideologues or leaders (such as Marx or Mao Zedong). The research pinpointed 13 such amendments to constitutional preambles. Examples of this class of amendment are an amendment made to the preamble of the Indian Constitution in 1976 whereby a reference to socialism was added and all of the amendments to the Chinese Constitution, the most recent of which was in 2018, when the following phrase was added to the preamble: 'Scientific Outlook on Development, and the Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era.' Amendments of this sort are usually closely related to amendments regarding past events that contributed to the shaping of the nation or that led to the adoption of its constitution. Amendments connected with past events of such a nature are rather frequent, with the analysis identifying nine of them (e.g., by Burundi, Latvia, and Turkey).

Annex 2 gives a breakdown of amendments related to customs, culture, and values. Language pertaining to these has been subject to amendment in connection with 11 constitutional events. This class of elements exhibits several noteworthy aspects. Most of the amendments entail only references to general cultural and spiritual values (e.g., in Belize, Côte d'Ivoire, and North Macedonia) or general moral values and ethics (e.g., in Burkina Faso and Turkey), but the amendment to the Estonian Constitution in 2007 and the 2014 preamble replacement for the Latvian Constitution featured more specific references to protection of the national language. Latvia is especially noteworthy with regard to references to cultural and other such values, in that Latvia's single replacement of the preamble, in 2014, managed to add distinguishable references to

[73] See Table 1.

no fewer than five distinct aspects of culture or values to the preamble. Also, as Annex 2 clarifies, with two constitutional events, Argentina added a reference to the protection of culture and later decided to remove that reference.

The data showed also that amendments to constitutional preambles frequently add or remove mention of specific rights, liberties, obligations, or guarantees. Analysis identified 10 such instances. As is evident from Annex 3 to this paper, which presents a breakdown of these rights, most instances of a preamble amendment pertaining to rights, liberties, or other guarantees consisted of amendments made with regard to a right to life, identity, dignity, integrity, or humane treatment (as witnessed in the cases of Belize, Burkina Faso, Cameroon, Côte d'Ivoire, and Tanzania). In only one instance was an element of this type removed from the preamble; in all other cases, it was added to the preamble.

With the same frequency, amendments to statements about rights and liberties made in the preamble have dealt with non-discrimination and equality of treatment, usually giving special emphasis to gender equality and protection of women. The study identified five such instances. An example is visible in the 2012 amendment to the preamble of the Constitution of Haiti, which added a reference to gender equality while also amending said preamble and the rest of the Constitution such that references in the third person employ both the pronoun 'he' and 'she'. Similarly, Burkina Faso added the following to the preamble of its constitution in 2012: 'RECOGNIZING that the promotion of gender is a factor for realization of the equality of law between men and women of Burkina Faso' (capitalisation in the original). It is noteworthy also that nearly all of the 11 states that have made rights-related amendments to their preamble are African countries. This is most likely indicative of the state of developing democracies in that region. Other amendments connected with rights and liberties have been centred on issues such as indigenous and other minority rights (visible in Belize, Cameroon, and Latvia), the right to education (explicated in Belize and Cameroon), and the right to gainful employment (articulated in Belize, Madagascar, and Tanzania), but mentions of newly recognised rights such as a right to a healthy environment have emerged too (at least in Cameroon).

In a parallel with rights and liberties, there have been 10 instances wherein an amendment to a constitutional preamble has involved some reference to specific nationalities living in the territory of the state; a list of the territories held by the state; or integration of regions, territorial integrity, or unity. A good example from this group of amendments is the amendments implemented for the preamble of the German Constitution in 1990 and 1992, when the unification of Germany required changes to the list of *Länder* set forth in the preamble of the Constitution.

References to independence, Independence Day, sovereignty, self-determination, and the like have been subject to amendment nine times. An example is the Central African Republic's adjustment of its constitutional preamble in 1960, with which the only amendment consisted of adding the date of independence to the preamble. References to liberty, justice, and equality of the specific nation and other peoples of the world have also been the stuff of amendments to constitutional preambles, on nine occasions.

Several other elements have been addressed in amendments of constitutional preambles over the years: references to the peaceful resolution of conflict and international co-operation, national defence, the environment, liberal democracy, pluralism, general welfare and the social welfare state, separation of powers, the rule of law, religious affiliations/denominations or secularism, future generations, further development of the state, and the authority with competence to adopt the constitution.

4. How to explain the phenomenon – a look behind the scenes

It is apparent from the analysis conducted that amendments to constitutional preambles are not commonplace. Where amendments to preambles do get made, they tend to be brought about for reasons that – when the amendments to constitutional preambles analysed in this study are situated in a broader historical context – can be classified into four categories:

1) political (leadership) change in the relevant country;
2) a transformative event having occurred that has shaken the society's foundations;
3) emergence of a value that merits affording of special protection;
4) technical/legal requirements necessitating an amendment to the preamble.

4.1. Political change – new directions to leadership

Probably the most frequent reason for amending a constitutional preamble is change in the political leadership of a country that results in broader ideological and/or organisational changes in that country. This is consistent with the fact that most amendments to preambles have referred to ideology, mentions of political leaders, etc.

Often, amendments to preambles are adopted in order to promote democracy. A good example of this is the 1992 amendment to the 1980 Constitution of Cape Verde. That year witnessed amendment to the preamble of the Constitution as part of the country's transition from a one-party autocracy to a multi-party democracy[*74]. This amendment changed the preamble from a substantive one into a completely descriptive preamble that explains the need for and background to implementing a multi-party system in Cape Verde. Another example comes from the change made in 1996 to the preamble of the Constitution of Cameroon, which was adopted at a time when the country appeared to be transitioning from autocracy to embracing constitutional democracy[*75]. The amendment entailed various references to democratic principles, from the protection of minority rights, due process, and equality to the right to a healthy environment.

Amendments to preambles have functioned for an alternative purpose too: stirring a country from democracy toward autocracy. In 2002, Togo amended its constitution to abolish presidential term limits and alter the presidential-election process[*76]. One of the various changes was removal of a paragraph from the preamble that referred to the country's past struggles with a monolithic, totalitarian regime, replacing this with a reference to creating a path toward progress.

In 1976, Indira Gandhi's majority approved a controversial amendment to the preamble of the Constitution of India so as to insert, alongside the notions of the 'secular' and 'unity', the expression 'socialist' into the preamble, thereby providing a legal basis for the pursuance of the leader's left-wing economic reforms[*77]. The explanatory memorandum to the act of amendment explained that the addition was to 'spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles'.[*78] This amendment sparked debate because it was implemented in a time of emergency, extended also to the main body of the Constitution to such an extent that it has been called a mini-constitution, and was argued to have touched the basic structures of the Constitution[*79] – which were deemed non-amendable per the Supreme Court decision in the *Kesavananda* case (as discussed above). Some scholars, on the other hand, have found that the amendment was focused merely on 'playing politics'; after all, the Constitution was socialist and secular already, before the amendments[*80].

Among the other cases one could cite as examples of constitutional preamble amendments due to political change are the alterations brought to the preamble of the Constitution of Argentina in 1949 and 1956. Early in his first presidential term, Juan Perón strongly advocated constitutional change, a goal he ultimately reached in 1949[*81]. The Constitution of Argentina was substantially amended then, with amendments to the preamble being among the alterations implemented. These amendments incorporated references to national defence and to protection of culture but also to a 'socially just' and 'economically free'

74 Princeton Constitution Writing & Conflict Resolution project, 'Country Reports, Cape Verde' <https://pcwcr.princeton.edu/reports/capeverde1992.html> accessed on 29 March 2024.

75 Laura-Stella Enonchong, 'The Paradox of Constitutional Transformation under the 1996 Constitution of Cameroon' (IACL-AIDC Blog, 4 October 2021) <https://blog-iacl-aidc.org/2021-posts/2021/10/4/the-paradox-of-constitutional-transformation-under-the-1996-constitution-of-cameroon> accessed on 29 March 2024.

76 Kangnikoé Bado, 'Togo's Popular Protests and Demands for Constitutional Reform' (*ConstitutionNet*, 25 September 2017) <https://constitutionnet.org/news/togos-popular-protests-and-demands-constitutional-reform> accessed on 29 March 2024.

77 *At a Crossroads* (n 6) 139.

78 'A Needless Controversy' (*The Hindu*, 2 February 2015, updated 16 November 2021) <https://www.thehindu.com/opinion/editorial/Editorial-A-needless-controversy/article59784410.ece> accessed on 29 March 2024.

79 Nath (n 61).

80 Krishnadas Rajagopal, 'Debates Show Why the Preamble's Original Text Left Out the Two Words' (*The Hindu*, 29 January 2015, updated 16 November 2021) <https://www.thehindu.com/news/national/Debates-show-why-Preamble%E2%80%99s-original-text-left-out-the-two-words/article60332943.ece> accessed on 29 March 2024.

81 Lucretia L Ilsley, 'The Argentine Constitutional Revision of 1949' (1952) 14 The Journal of Politics 224, 225. – DOI: https://doi.org/10.2307/2126520.

country*[82]. However, the Constitution of 1853 was re-established by the military after the ousting of Perón in 1955*[83]. Hence, in 1956 the preamble, with the prior wording, was reinstated.

From taking those examples into account, it can be concluded that those amendments to preambles that are brought about in connection with political changes in the country are generally applied to start transforming the nation-state and steer people's behaviours in a certain direction. Amendments of this type seldom codify a new social reality brought into being; rather, they articulate aspirations for the new reality sought.

4.2. Transformative events

The second driving force behind amendments to constitutional preambles, transformative events, could arise in association with the end of a civil war or insurgency, the total collapse of some previous regime, accession to an influential international organisation, etc. One finds examples of this in the 1990 and 1992 amendments to the German Constitution due to the reunification of Germany from 1989–1991. These amendments were ushered in through the need to modify the above-mentioned list of German federal states, or *Länder*, each of which was named in the preamble. Similarly, once Ukraine had regained independence after the collapse of the Soviet Union, it repealed the preamble of its 1978 Constitution, at the heart of which was exclusively the idea of Ukraine being part of the Soviet Union. This change came swiftly in 1991.

In more recent years, the 2019 amendment to the preamble of the 1996 Ukrainian Constitution was drafted and adopted in light of the aim of the country's president, who was near the end of his tenure, to form a constitutional framework that should allow Ukraine to join the EU and NATO*[84]. Becoming a member of such large-scale, influential international organisations can definitely be deemed transformative events in the process of a country's development and history. For creation of a constitutional framework that decisively enabled Ukraine to join the two organisations, it was deemed necessary to express the European identity of Ukrainians and the 'irreversibility of the European and Euro-Atlantic course of Ukraine'*[85]. Although the proposed amendments to the preamble were indeed adopted, Ukraine has not yet become a member of those organisations. Therefore, the preamble changes carried out can be viewed as preparation for a transformative event, laying the groundwork for steering the country in a desired direction.

Among other instances of constitutional preamble amendments clearly stemming from transformative events are North Macedonia and Lebanon. The former amended the preamble of its Constitution in 2001 after the conclusion of the Ohrid Agreement*[86], which brought an end to an armed conflict between the Albanian National Liberation Army and the security forces of North Macedonia. The aim for this amendment was to grant, in compliance with the Ohrid Agreement, greater constitutional recognition and protection to Albanian minorities living in North Macedonia. Lebanon's addition of a preamble to its constitution in 1990 had a similar purpose. Prepared in the wake of the end to the Lebanese civil war and conclusion of the Taif Accords*[87], the preamble set in place then emphasised democratic principles and non-segregation among people.

All in all, amendments of constitutional preambles that have their roots in transformative events seem generally to be prompted by a need to form constitutional underpinnings to frame a certain change in society: one that has already taken place or is clearly desired as the course for the future.

82 Ibid.

83 Mugambi Jouet, 'The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History' (2008) 39(3) University of Miami Inter-American Law Review 409, 434.

84 Frosini and Lapa (n 14) 81–82.

85 Constitution of Ukraine (*Конституція України*) as adopted on 28 June 1996, preamble.

86 Framework Agreement (Ohrid Agreement) (13 August 2001) <https://peacemaker.un.org/fyrom-ohridagreement2001> accessed on 29 March 2024.

87 Taif Accords (22 October 1989) available via <https://peacemaker.un.org/lebanon-taifaccords89> accessed on 29 March 2024.

4.3. Values that merit greater constitutional protection

In other cases, amendments to constitutional preambles represent an outgrowth of the aim to give a particular value stronger legal protection. Good examples are evident in amendments made to the preamble of the Estonian and the French Constitution. These amendments, made in 2007 and 2005, respectively, both added only one specific thing to the preamble. In the case of Estonia, it was a reference to the protection of the Estonian language. The explanatory memorandum linked to the legal act amending the Estonian Constitution explains the need for the amendment in the following words:

> The importance of the Estonian language as a manifester of Estonian culture and national identity is invaluable […]. Our care for our beautiful language needs a considerably stronger symbolic and legal guarantee. The constitutional appreciation for the Estonian language would significantly increase the prestige of learning the national language and of its daily use among Estonian residents whose mother tongue is another language.*[88]

Before the amendment, Section 6 of the Constitution of Estonia already provided for Estonian being the official language of Estonia. However, for the above-mentioned reasons it was considered necessary to afford the language even more constitutional protection. Jurists concluded that enshrining this in the preamble of the Constitution should afford Estonian the greatest protection in that sense.

As for the amendment to the preamble of the Constitution of France, it added a reference to the French Charter for the Environment of 2004. The objective with this amendment, implemented in 2005, was to give that charter constitutional status*[89]. The specificity of preamble amendments anchored in the aim of granting a particular value constitutional protection is highlighted even more strongly by the fact that, three years later, a special committee analysing the French Constitution's preamble found it advisable not to amend the preamble but to exploit the richness of the existing preamble text*[90]. It could be argued in this light that a country approaching its constitutional preamble in such a manner would amend the preamble only in those truly exceptional cases wherein the current preamble does not address a specific right, value, etc. that absolutely needs constitutional protection.

Both of these amendments were guided by a decision to, as the country paves the way forward, pay greater attention to and better protect something vital – the official language of the country in one case and the environment in the other. Accordingly, those amendments established the legal basis for future policy decisions and were necessary for influencing the actions of people living in the respective country.

4.4. Technical–legal reasons

In some instances, constitutional preambles have been amended for what seem to be merely technical legal reasons. For example, in 1997 Samoa amended the preamble of its national constitution (and the main body of the Constitution) in response to the fact that the country had borne the official name 'Western Samoa'; the Constitution needed to be amended in such a way as to omit the word 'Western' preceding 'Samoa', throughout the document. Similarly, the Central African Republic amended the preamble of its Constitution in 1960 simply to add a reference to the national Independence Day there.

In some cases, such as those of Gabon in 1997 and Germany in 1976, preambles of constitutions have been amended for what seem to be entirely structural reasons. There are no substantive changes, and the alterations apparently involve purely rearranging textual elements. That is, paragraphs are restructured, some elements of the preamble are rephrased, etc. There is no clearly identifiable broader need for such amendments.

88 Amending Act of the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseaduse muutmise seadus*) 974 SE, 1.

89 Voermans, Stremler, and Cliteur (n 2) 115.

90 Ibid.

5. Conclusions

Previous research into constitutional preambles shows that those consisting of more than declarative or technical prefaces express supreme values and guiding principles for the Constitution and for the country. Therefore, it is far from surprising that the data analysed in the course of this study revealed that amendments to constitutional preambles are infrequent. The study pinpointed, in all, only 55 constitutional events in which some element(s) of the preamble of a constitution experienced change, of whatever sort.

Classifying amendment of preambles into five categories – cases in which a preamble was repealed, one was added to the Constitution, an existing preamble was replaced, merely technical or formal changes to the preamble were made, and cases wherein substantive amendments were made – enabled finer-grained analysis. So did temporal analysis, which revealed that most of the amendments to preambles have been made since the 1990s (which is consistent with the fact that most constitutions with a preamble have been adopted since 1990) and – interestingly – that if a state has amended its constitutional preamble, it is more likely to perform such amendment in future than other countries are.

Another key finding from the analysis is that the element most commonly subject to change in constitutional preambles is related to ideology, political movements, and political leaders or ideologists, while the class of element subject to amendment second most frequently is linked to customs, traditions, culture, and values, followed by elements related to rights, guarantees, and obligations. Also frequently changed are elements related to specific/other nationalities living in the territory of the country, specification of the country's territories or regions, and its integrity.

As for more overarching patterns, on the basis of the preambles analysed in the course of this research, no clearly identifiable common characteristics of the constitutional preambles that have been subject to amendments were distinguishable. Analysis of amendments to constitutional preambles did reveal several general patterns, though. Firstly, many amendments are closely related to changes in the society and its leadership: most commonly, amendments to preambles of constitutions are brought about by a leadership change intended to rouse the country politically and/or ideologically for new directions.

Some countries' history has brought large-scale transformative events into play that have culminated in a need to amend the constitutional preamble. Sometimes, a very specific amendment is made to the preamble of a constitution, when this is deemed necessary for giving more protection or attention to a singular value (as in the example of the national language of Estonia and of France's attention to the environment). The study found that it is possible also for an amendment to a preamble to arise from some technically related legal factor.

Among the most important findings is that in the instances of transformative events and amendments anchored in technical-legal reasons, amendments to constitutional preambles tend to codify the socio-political changes already wrought in the society. In contrast, in circumstances wherein amendments are brought about by leadership change or newly recognised values that merit greater constitutional protection, the aim for the amendment is usually to inspire actions by the society and guide political decisions in a particular direction.

Annex 1. Substantive amendments to constitutional preambles

Country	Reference to specific nationalities or territories, integration of regions, territorial integrity and unity, or federalism (10)	Reference to a specific political movement, ideology, or leader (13)	Reference to international human-rights instruments or other international agreements (3)	Reference to historical events (9)	Reference to the authority to adopt the constitution (4)	Development of the state or the future course of the state (4)	Reference to independence, Independence Day, freedom, sovereignty, self-determination, or the republic (9)	Reference to liberty, justice, equality, and sovereignty of states or peoples (9)	Peace, international co-operation, and peaceful settlement of disputes among states (5)	(Liberal) democracy (3)	Reference to God or a specific religious affiliation or secularism	Reference to posterity or future generations (4)	The environment (3)	National defence (2)	Pluralism or a multi-party system (3)	Separation of powers, institutions' stability, and good governance (2)	The rule of law (3)	Rights and obligations, liberties, and guarantees (10)	Protection of culture, language, the nation-state, traditions, and moral and spiritual values (11)	General welfare; health, and the social welfare state (3)
Argentina, 1949							+	+											+	
Argentina, 1956							-	-											-	
Bangladesh, 1976				+/-			+/-	+			+/-									
Belize, 2001																		+	+	+
Burkina Faso, 1997		-		-				-	-		-							+		-
Burkina Faso, 2000								+	+											
Burkina Faso, 2012																		+	+	
Burundi, 1996	+	+		+					+			-			-	+				
Cameroon, 1996			+				+						+	+				+		
Cape Verde, 1992		+ / -		+ / -				-	-						+	+		+		
Central African Republic, 1960							+													
China, 1993		+													+					
China, 1999		+																		
China, 2004		+				+														
China, 2018	+	+				+			+								+		+	
Côte d'Ivoire, 2012																		+	+	
Cuba, 1992		+ / -																		
Democratic Republic of Congo, 1990		-	+	-				+				+								
Estonia, 2007																			+	
France, 2005													+							
India, 1976	+	+									+									
Gabon, 1997																				
Gabon, 2000											+									
Germany, 1990	+																			
Germany, 1992	+																			
Haiti, 2012																		+		
Latvia, 2014	+			+	+	+	+	+		+	+	+	+	+			+	+	+	+
Madagascar, 1970	+																	+		
Marshall Islands, 1990	+						+													
Nepal, 2008	+						+			+										
New Zealand, 2013					+															
North Macedonia, 2001	+			+ / -								+							-	
Pakistan, 1964		+									+									
Tanzania, 1984			-		+		-											-		
Togo, 2002				-																
Turkey, 1987				+ /-													+		+	
Turkey, 2010		-			-			+		+										
Ukraine, 2019		+				+													+	

The table, created by the author from analysis of preambles retrieved from the CCP's repository, uses '+' for instances wherein an element was added, '-' to denote removal of one, and '+/-' for the element remaining in the constitution but with substantive changes. The year of the relevant amendment is indicated after the name of the country.

Annex 2. Amendments pertaining to customs, culture, and values

Country	Morality and ethics (2)	Customs and traditions (1)	Cultural and/or spiritual values (3)	Protection of culture (3)	Protection of language (2)	Harmony (2)	The nation-state (1)	Christian calues (1)	European culture (1)	European identity (1)
Argentina, 1949				+						
Argentina, 1956				-						
Belize, 2001			+							
Burkina Faso, 2012	+	+								
China, 2018						+				
Côte d'Ivoire, 2012			+							
Estonia, 2007					+					
Latvia, 2014				+	+		+	+	+	
North Macedonia, 2001			-							
Turkey, 1987	+									
Ukraine, 2019						+				+

The table is based on the author's analysis of preambles retrieved from the CCP's repository.

Annex 3. Amendments related to rights

Country	Protection of minorities and indigenous peoples (3)	The right to life, integrity, identity, dignity, and humane treatment (5)	Presumption of innocence, fair-trial / due process rights (1)	Equality of treatment, incl. women's protection and non-discrimination (5)	A right to education (2)	Reference to a set of revolutionary rights (1)	General reference to rights, liberties, and guarantees (3)	The right to vote (1)	A right or obligation to work (3)	Freedom of worship (2)	Freedom of opinion (1)	Freedom of assembly (1)	Freedom of travel (1)	A right to a healthy environment (1)
Belize, 2001	+	+		+	+			+	+					
Burkina Faso, 1997		+				-								
Burkina Faso, 2012				+										
Cameroon, 1996	+	+	+	+	+					+				+
Cape Verde, 1992							+							
Côte d'Ivoire, 2012							+							
Haiti, 2012				+										
Latvia, 2014	+	+					+							
Madagascar, 1970									+					
Tanzania, 1984		-		-					-	-	-	-	-	

The table presents analysis based on preambles retrieved from the CCP's repository.

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Protection of Human Rights in the Global Garment Industry[*1]

Abstract. Considerable expansion of the global garment industry, which in recent decades has become one of the largest employment sectors worldwide, has intensified scrutiny of states' and businesses' responsibilities, especially as production increasingly shifts to countries with less strict labour regulations. Analysis of the landscape reveals that, significant progress notwithstanding, world dialogue on business responsibilities has still not arrived at a solution. The complex network of stakeholders in the garment industry brings particular challenges to enforcing human-rights protection in this domain. The article explores the intersection of business practices and human rights within the garment sector, focusing on Bangladesh, India, and Pakistan, three countries which play a pivotal role in global fashion exports. Examining the legal obligations of state and non-state actors under various UN instruments by analysing the Universal Periodic Review mechanism and the concluding observations of the Committee on Economic, Social and Cultural Rights, it identifies critical issues in protecting human rights in these countries and briefly also reviews recent advances in the EU in the realm of business and human rights. The paper presents evidence that the growing influence of non-state actors calls for extending the obligations from traditional approaches', which have focused on state responsibilities. Among the solutions proposed are reforming wage systems and imposing direct human-rights requirements on corporations, supported by more vigorous enforcement.

Keywords: human rights, garment industry, work conditions, corporate diligence

1. Introduction

The global garment industry has experienced significant growth over the past decade and is currently the fifth-biggest industry by employment in the world.[*2] While economically significant, this growth has also heightened scrutiny of the responsibilities of both states and businesses, especially as garment production increasingly shifts to the so-called developing countries. Focused discourse on these responsibilities began in the 1990s when companies started ramping up outsourcing to regions with less stringent labour

1 The paper deepens work begun with a thesis on this topic for the University of Tartu's International Law and Human Rights master's programme (work supervised by Merilin Kiviorg, JD; defended in 2023; and earning *cum laude* distinction in 2024). While the thesis examined solely the UN regulations, the discussion is slightly widened here to address new relevant developments at EU level in relation to both business and human rights.

2 'The 10 Global Biggest Industries by Employment' (IBISWorld Industry Reports, 2024) <https://www.ibisworld.com/global/industry-trends/biggest-industries-by-employment/> accessed on 30 March 2024.

regulations.[*3] In 2024, notwithstanding considerable progress in both business law and international human-rights law, how business and human rights mesh in the garment industry, particularly in such South Asian countries as Bangladesh, India, and Pakistan, remains a critical concern.[*4] Understanding of these nations is vital to analysing this topic because of their substantial share in the export of fashion goods globally and the disproportionately high percentage of fashion goods in their total volumes of exports relative to other major garment-producing countries' figures.[*5]

Through analysis of a key inter-state co-operative mechanism called the Universal Periodic Review (UPR) and the 'concluding observations' that the Committee of Economic, Social and Cultural Rights[*6] has reported for the above-mentioned states, this paper pinpoints some vital facets of the issue, and deeper examination of the knot of issues is woven throughout the article. Primary focus is on the legal obligations of state and non-state actors that arise from the UN's various legally binding and non-binding instruments. The paper also offers a brief illustration of the advancements made in the EU in the domain of business and human rights.

In exploring these issues, the article addresses how businesses and states can better align their practices with human-rights obligations, particularly in the context of the garment industry's challenges. This examination will provide a comprehensive picture of the current state of business and human rights, offering insight as to the effectiveness of the frameworks currently in place and suggesting pathways for future improvements.

2. Evolving responsibilities

Traditionally, articulation of human-rights obligations has focused on states.[*7] Businesses, on the other hand, have been considered to have legally binding commitments only in jurisdictions where national laws explicitly dictate these.[*8] However, ongoing debate about extending obligations to non-state actors is gaining impetus.[*9] While some argue that the current human-rights treaties cannot be expanded to include companies directly, since they are directed at states, Louis Henkin wrote already in 1999 that legal persons too should adhere to the provisions of, for example, the Universal Declaration of Human Rights (UDHR) and strive for progressive measures in human-rights protection.[*10] Despite the UDHR not being a legally binding document, several other treaties have incorporated its principles, giving those principles legal force and influence in international law. Its terms have also become synthesised with national legal frameworks[*11],

3 'The UN "Protect, Respect and Remedy" Framework for Business and Human Rights' (Business & Human Rights Resource Centre, September 2010) <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf> accessed on 30 March 2024.

4 Iona Cismas and Sarah Macrory, 'The Business and Human Rights Regime under International Law: Remedy without Law' in Alex Gough and James Summers (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill 2018) 223. – DOI: https://doi.org/10.1163/9789004340251_013.

5 Antonella Teodoro and Luisa Rodriguez, 'Textile and Garment Supply Chains in Times of COVID-19: Challenges for Developing Countries' (UNCTAD Transport and Trade Facilitation Newsletter 86, 2020) <https://unctad.org/news/textile-and-garment-supply-chains-times-covid-19-challenges-developing-countries> accessed on 5 September 2023.

6 In articulating this two-pronged approach of identifying major human-rights issues in the business and human-rights domain in the countries focused upon and providing a comprehensive context-specific tool for identifying violations of human rights, the paper constitutes a contribution of original thought to the literature. The method, which involved analysing multiple distinct reporting mechanisms within the UN human-rights protection system, is rooted in the work behind the thesis project.

7 Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press 2021) 9. – DOI: https://doi.org/10.1017/9781108894784.

8 Office of the UN High Commissioner for Human Rights, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights* (United Nations 2014) 30 <https://www.ohchr.org/sites/default/files/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf> accessed on 5 September 2022; Jonathan Kolieb, 'Advancing the Business and Human Rights Treaty Project through International Criminal Law: Assessing the Options for Legally-Binding Corporate Human Rights Obligations' (2019) 50 Georgetown Journal of International Law 789, 813.

9 Monnheimer (n 7) 11.

10 Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res 217 A(III); Louis Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' (1999) 25 Brooklyn Journal of International Law 17, 25.

11 Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25(1) GJICL 287, 289.

just as much as with various codes of conduct and human-rights-related policies.[*12] Many of the UDHR's clauses have even been accepted as rules of customary international law, which carry legal obligations for all states.[*13] This means that states, regardless of treaty ratification, must uphold the corresponding rights, not excluding operations within the garment industry. Portions such as Article 20 (addressing the right to peaceful assembly and association), Article 21 (on economic, social, and cultural rights), Article 23 (pertaining to workers' rights), and Article 25 (dealing with the right to adequate standards of living) hold particular significance in the context explored by this article.

States assume human-rights obligations also from multilateral treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR). The latter is intended to protect, among other things, workers' well-being, dignity, and livelihood. In addition to ensuring that their people's rights as outlined in the covenant are safeguarded, states must report on their actions in this respect.[*14] Under the first clause of the ICESCR's Article 16, the state parties undertake to submit reports on the adoption of measures and progress related to the rights and obligations recognised in the covenant.[*15] In combination with the output from the UPR, which offers an opportunity to assess the human-rights developments of states through interactive dialogue between those states subject to review and other member states of the Human Rights Council, the reports produced include information on both the progress of the state parties and key difficulties they have faced in fulfilling their obligations.[*16] While these reports constitute tools for assessing the human-rights situation in specific countries, they also afford crucial awareness of how businesses operate within the given country's human-rights framework and highlight both positive contributions and areas that merit businesses' attention. For example, the 2018 UPR report on Bangladesh includes recommendations targeted at the garment industry, with emphasis on a need for improved labour conditions and corporate accountability for human-rights abuses.[*17]

One especially significant document in the context of business and human rights is the United Nations Guiding Principles on Business and Human Rights (UNGPs), adopted in 2011.[*18] While not legally binding, these principles give detailed instructions that all states and businesses, worldwide, are called upon to follow.[*19] The UNGP instrument emphasises states' responsibility to safeguard against violations of human rights occurring within their territorial boundaries or perpetrated by third parties under their jurisdiction.[*20] Furthermore, the UNGPs lay down foundational principles for corporate responsibility in the sphere of human rights.[*21] Under the principles' final clause on responsibility, for example, businesses in the garment industry should not only ensure that their own actions respect human rights but also guarantee that the companies along their supply chain – particularly the factories from which they source products – uphold the human rights of their workers. Corporate responsibility should be fulfilled autonomously and extends beyond mere compliance with the national laws and regulations designed for safeguarding human rights.[*22]

Since 2014, an open-ended intergovernmental working group considering transnational corporations and other business enterprises in relation to human rights, referred to below as the OEIGWG, has been working on the draft text for a treaty on business operations *cum* human rights.[*23] In the years since the

12 See, for example, Industria de Diseño Textil, 'Policy on Human Rights' (approved by the Inditex Board of Directors on 12 December 2016) <https://www.inditex.com/itxcomweb/api/media/7e50ddce-a4de-4d51-9ab0-f7c248d23656/inditex_policy_on_human_rights.pdf> accessed on 3 December 2023.

13 Hannum (n 11) 289.

14 International Covenant on Economic, Social and Cultural Rights (adopted on 19 December 1966) 993 UNTS 3, art 16.

15 Ibid.

16 Ibid art 17 cl. 2; 'The United Nations Human Rights Treaty System' (Fact Sheet 30, version 1, 1 August 2012) 44; Ionel Zamfir, 'The Universal Declaration of Human Rights and Its Relevance for the European Union' (European Parliamentary Research Service 2018) 2 <https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA(2018)628295_EN.pdf> accessed on 9 November 2023.

17 UN Human Rights Council, 'Universal Periodic Review – Bangladesh' (second cycle, April 2013) matrix of recommendations cl 22.

18 Office of the UN High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) ch IV (Guiding Principles).

19 Ibid.

20 Ibid 3.

21 Ibid 3–4.

22 Ibid 13.

23 Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises Concerning Human Rights (adopted in 2014) UNGA Res 26/9.

UN Human Rights Council established the OEIGWG, it has held nine sessions, progressing from initial deliberations on the content and scope of a future international instrument to regulate the activities of transnational corporations to discussing and revising successive drafts for a legally binding instrument.[*24] In the most recent of these development and progress-review sessions, which took place in October 2023, the OEIGWG discussed the next steps toward finalising the treaty while stressing the importance of balancing state obligations and corporate responsibilities.[*25] The updated draft legally binding instrument produced at the next session, due to take place in October 2024, will serve as the basis for the upcoming negotiations on the treaty in its final form.[*26]

The relationship between the UN's draft business and human-rights treaty, on one hand, and the UNGPs, on the other, is central to understanding the evolution and current state of the business and human-rights landscape on international level. An ongoing process of dialogue and negotiation is in place within the UN to harmonise these instruments and ensure that they function smoothly together to promote and protect human rights effectively in the business context.[*27] The draft treaty represents an effort to address gaps left by the UNGPs via provision of a stronger legal framework that includes preventing human-rights violations in business activities by establishing effective monitoring, enforcement, and accountability mechanisms. Additionally, its preparers strive to make sure that businesses adhere to their direct human-rights obligations at the state level.[*28] States shall, for example, adopt legal-liability measures under which it should be possible to hold a business accountable (whether through criminal, civil, or administrative liability) for its violations.[*29] Another portion of the draft treaty that deserves highlighting is Article 9.1 (c), which stipulates that states should establish jurisdiction over human-rights abuses committed by companies domiciled within their territory even when the abuses occur outside their borders.[*30] Doing so is crucial in connection with the garment industry because of Western companies' widespread practice of outsourcing production to 'developing countries', where labour standards, regulations, and related enforcement often are not as strict. In consequence, workers in these countries frequently encounter poor work conditions, low wages, and violations of their fundamental rights. Establishing clear jurisdiction guarantees that these companies can be held to account for human-rights abuses wherever they occur, thereby promoting more ethical and responsible business practices globally. Under the treaty as drafted, state parties would be expected to supply mutual assistance for the prevention and remedying of the rights-abuse problem and hold businesses liable.[*31] Just as with the ICESCR, states would submit reports on the measures they have taken. Per the proposed terms, such reports shall be submitted to the committee created under the treaty, which would be responsible for supervising and reviewing compliance with the treaty-imposed obligations, to render them more effective.[*32]

24 See materials from the UN Human Rights Council, 'Tenth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2024) <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session10> accessed on 5 August 2024 (Working Group Tenth Session).

25 UN Human Rights Council, 'Ninth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (26 December 2023) <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session9> accessed on 3 August 2024.

26 Working Group Tenth Session (n 24).

27 Office of the UN High Commissioner for Human Rights, 'Improving Accountability and Access to Remedy for Business and Human Rights Abuses: A Submission from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the Third Revised Draft of the Legally Binding Instrument (LBI) To Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (18 October 2021) 1 <https://www.ohchr.org/sites/default/files/2021-11/igwg-7th-ohchr-submission.pdf> accessed on 3 August 2024.

28 Updated Draft Legally Binding Instrument (Clean Version) To Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (2023) art 2 (b).

29 Ibid arts 8.1, 8.2.

30 Ibid art 9.1 (c).

31 Ibid art 12.1.

32 Ibid art 15.2.

3. The garment industry's greatest human-rights challenges

One possible avenue for identifying the greatest human-rights challenges involves systematic analysis of the various reporting mechanisms with which the countries engage, alongside the material produced via each distinct mechanism. The UPR is an inter-state co-operative mechanism that allows member states to assess human-rights developments through interactive dialogue in the Human Rights Council setting.[*33] During each reporting period, a state submits its report, which provides an overview of the country's human-rights situation and discusses its response to the recommendations received during the previous cycle of inter-state co-operation. Alongside the states, stakeholders such as NGOs, national human-rights organisations, and UN agencies submit information and participate in the review process.[*34]

Another way to assess how well countries have advanced in their human-rights policies is to look at the concluding observations compiled by relevant treaty bodies. It has been brought out in multiple venues that the UPR and the reporting system connected with those observations are intertwined with each other in the sense that the UPR has proved to have a positive effect on state reporting under the international human-rights treaties.[*35] In light of that synergy, this article attends specifically to the concluding observations by the Committee of Economic, Social and Cultural Rights (CESCR) by taking into consideration the periodic reports that states submit to the treaty body on their implementation of the rights outlined in the ICESCR.[*36] In addition to states' reporting, the concluding observations take into account information received from other stakeholders: UN agencies, academic institutions, national human-rights organisations, etc.[*37] The treaty body will both specify the positive steps taken by the given country to safeguard the rights provided for by the treaty and identify areas that need further work and development by the government.[*38] Moreover, the concluding observations offer guidance by giving the states practical advice on how to proceed toward fuller implementation of the rights laid down in the relevant treaty.[*39]

Analysing the UPR and concluding observations in parallel makes it possible to pinpoint the most significant worker-rights issues across the board, particularly with regard to the garment industry. Additionally, comparing the recommendations from the last two reporting periods aids in ascertaining whether the countries analysed have made progress in protection of human rights and in highlighting the main issues that persist. If the recommendations made by fellow member states or treaty bodies remain the same over the years, one may safely conclude that the government in question has not bettered the workers' human-rights situation and conditions in the interim. Hence, the approach represented here offers a comprehensive understanding of the most significant human-rights challenges in the garment industry in each of the countries considered.

Let us begin by looking at Bangladesh. In the wake of the second UPR reporting cycle, it received nearly 200 recommendations.[*40] It was recommended that the country continue protecting and promoting human rights, particularly economic, social, and cultural ones. Some member states also stressed the need for Bangladesh to work to reduce the number of people living in poverty by improving human living standards.[*41] There were recommendations specifically angled toward garment workers. One of these was to enforce international labour standards by adopting national laws that strengthen occupational health and workplace safety.[*42] Other suggestions were to provide better legal and professional protection for those employed in the garment sector and to enable stronger protection for freedom of association.[*43] Also, a need to enhance labour inspections was highlighted.[*44]

33 Zamfir (n 16).

34 'The United Nations Human Rights Treaty System' (n 16).

35 Ibid 40.

36 Ibid *passim*.

37 Ibid 27.

38 Ibid 28.

39 Ibid.

40 'Universal Periodic Review – Bangladesh' (n 17) matrix of recommendations, passim.

41 Ibid cls 19–21.

42 Ibid cl 22.

43 Ibid cls 17, 23.

44 Ibid cl 30.

Reviewing the concluding observations of the CESCR, in turn, reveals topics similar to those that the UPR found to be of concern – poverty in Bangladesh[*45], the matter of minimum wages[*46], health and safety of the workers[*47], support for just and favourable work conditions[*48], and the collective right to unionise[*49]. Additionally, the committee addressed the informal economy in Bangladesh, highlighting that nearly 90 per cent of the country's labour force is engaged solely in the informal economy, meaning that social and labour protections rarely cover real-world workers. The CESCR recommended that Bangladesh 'regularise' the informal economy to improve the protection of those working within it.[*50] While the conclusions do not cite the garment industry as a context wherein the informal economy poses problems, this question is worth further analysis.

With regard to India, the CESCR's concluding observations from 2008 – no report on India has been published in the years since then[*51] – likewise express concern about the informal labour market. They explicitly highlight the issue of women predominating among workers occupied within the informal economy.[*52] Even though none of the UPR recommendations have been directed expressly at the rights and protection of garment workers in India, various recommendations were given for occupational safety and the general strengthening of the labour laws in that regard.[*53] Also, attention must be drawn to a recommendation singled out in the matrix of recommendations for India under the business and human-rights theme: India should enact legislation to hold businesses accountable for meeting and/or violating international standards related to human rights, labour, and the environment; national standards for these; and other, related norms.[*54] The concluding observations articulate concerns also about the strict requirements imposed on unionising.[*55] The fact that this issue was highlighted in India's 2017 UPR results indicates that insufficient attention was paid to that recommendation over the nine intervening years.[*56] Furthermore, the CESCR noted that wages in India are inadequate for providing a decent living and pointed to a failure to enforce even the modest minimum-wage laws that apply nationwide.[*57] This issue too remains unresolved, with India's UPR recommendations still recommending improvements to living standards in 2022, a full 15 years later.[*58] The matters of occupational health and safety raised in the 2008 observations remain topics of concern likewise.[*59]

Pakistan, in turn, received nearly 300 recommendations from member states in the 2017 cycle of periodic review.[*60] Overall, the third cycle's UPR cycle yielded two general recommendations – for strengthening the economic, social, and cultural rights of the citizens of Pakistan and for dealing with the issue of poverty[*61] – and called attention specifically to child labour. but no recommendation other than these focused on the rights of workers or the garment industry, let alone explicitly.[*62] The CESCR brought out roughly 40 points of concern with regard to Pakistan.[*63] There was a general worry that Pakistan has not managed to incorporate the rights foreseen by the ICESCR into its domestic legal order, with the Constitution of

45 Office of the UN High Commissioner for Human Rights, 'Committee on Economic, Social and Cultural Rights: Concluding Observations on the Initial Report of Bangladesh' (18 April 2018) E/C.12/BGD/CO/1 1.

46 Ibid 5.

47 Ibid 6–7.

48 Ibid 5.

49 Ibid 7–8.

50 Ibid.

51 Office of the UN High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Initial Report of India' (8 August 2008) E/C.12/IND/5.

52 Ibid 4.

53 Ibid 1, 17.

54 Ibid 9.

55 Ibid 5.

56 UN Human Rights Council, 'Universal Periodic Review – India' (third cycle, May 2017) matrix of recommendations cls 43, 44.

57 Concluding Observations on India (n 51) 5.

58 'Universal Periodic Review – India' national report (fourth cycle, 2022) cl 27.

59 Concluding Observations on India (n 51) 10.

60 UN Human Rights Council, 'Universal Periodic Review – Pakistan' (third cycle, November 2017) matrix of recommendations, *passim*.

61 Ibid cls 16, 18–19.

62 Ibid 50.

63 Office of the UN High Commissioner for Human Rights, 'Committee on Economic, Social and Cultural Rights: Concluding Observations on the Initial Report of Pakistan' (20 July 2017) E/C.12/PAK/CO/1, *passim*.

Pakistan merely recognising those covenant-enshrined rights as policy guidelines.[*64] According to the treaty body, the country exhibits an ongoing problem with occupational health and safety measures also, as well as with the informal economy.[*65] Addressing the right to unionise, the committee stated that there are obvious shortcomings in the legislation pertaining to trade unions and the right to unionise, which manifest themselves in an extremely low number of unionised workers.[*66] Finally, the committee drew a direct connection between the poverty in the country and levels of Pakistan's minimum wages: it found that the wages are often too low to cover the workers' and their families' living expenses.[*67]

While Bangladesh has received recommendations directly concerning the garment industry, the recommendations given to India and Pakistan have remained more general or been directed toward other factors, such as how women are treated/protected in the society at large.[*68] Also, the recommendations for human-rights protection in Pakistan attended to the fight against terrorism as a more urgent issue.[*69] This by no means indicates that Pakistan and India do not have problems with protecting garment workers' human rights. Distinct points of focus are chosen for every country, precluding comparisons of such a nature. Irrespective of these differences in focus, though, it can still be concluded that the main problems in the garment industry for all three of these countries are lack of reasonable remuneration, poor workplace safety, impediments to collective labour, and the prevalence of informal arrangements in garment-related economic sectors.[*70]

Once the new treaty on business and human rights enters into force, it will layer another accountability mechanism atop those analysed above. The observations and resulting conclusions of the committee established under that treaty should prove to be an essential source of information for further research in the field of business and human rights.[*71]

4. Remedies against violations of human rights

4.1. Transformation of the wage systems

The minimum wages set in countries hosting outsourced operations can only rarely be classified as a living wage. With home-based workers in the informal folds of the garment industry suffering even more than most others from a lack of commensurate remuneration and from low unionisation,[*72] transition toward a wage system that protects all workers equally, regardless of their level of unionisation, their workplace (factories, the home, etc.), and whether they are engaged in the informal sector, is needed.

One suggestion emerging from the concluding observations is that the countries should impose a universal national minimum living wage for all workers.[*73] While India has passed laws for uniform minimum wages applying to all industries, Pakistan's and Bangladesh's wage policies vary by region and sector, leading to disparities in earnings.[*74] Clearly, this complex issue must be dealt with by many other stakeholders also, on multiple levels. At present, government entities and local factory managers alike are afraid that raising wages will create excessive pressure related to production costs and eventually impinge on

64 Ibid 1.

65 Ibid 6, 7.

66 Ibid 8.

67 Ibid 7.

68 Ibid 23–29, 49–50; 'Universal Periodic Review – India' (n 56) matrix of recommendations cl 17.

69 'Universal Periodic Review – Pakistan' (n 60) matrix of recommendations cl 38.

70 Not ordered here by importance.

71 Updated Draft LBI (n 28) art 15.2.

72 Siddharth Kara, 'Tainted Garments: The Exploitation of Women and Girls in India's Home-based Garment Sector' (Blum Center for Developing Economies, University of California 2019) 7 <https://blumcenter.berkeley.edu/wp-content/uploads/2019/01/Tainted-Garments-1.pdf> accessed on 3 December 2023.

73 Concluding Observations on Bangladesh (n 45) 6.

74 Reyad Hossain, 'New Wage Board for Garment Workers on Cards' *The Business Standard* (Bangladesh, 31 January 2023) <https://www.tbsnews.net/economy/rmg/new-wage-board-garment-workers-cards-577590> accessed on 14 January 2024; 'Universal Periodic Review – India' national report (n 58) cl 13; Concluding Observations on Pakistan (n 63) 7; Clean Clothes Campaign, 'Historic Victory on Minimum Wage Win for Workers in Pakistan's Sindh Province' (21 June 2022) <https://cleanclothes.org/news/2022/historic-victory-on-minimum-wage-win-for-workers-in-pakistans-sindh-province> accessed on 10 January 2023.

competitiveness in the international market.[*75] For this reason, the minimum wages often go untouched for long stretches of time.[*76] Research suggests that minimum wages should be reviewed at intervals no greater than every three years; however, none of the acts of law prescribes doing so.[*77] Providing a minimum wage consistent with the cost of living is fundamental to ensuring that workers can live in dignity and support their family.[*78] Additionally, there is strong evidence that rising wages contributes to the macroeconomic growth of a state.[*79]

External factors play a part in discouraging states and factories from guaranteeing a living wage. In an International Labour Organization survey, more than half of the apparel-suppliers reported that brand-owners not paying enough to cover production costs had led to low wages for workers.[*80] There are indications that brands can set positive social standards.[*81] For example, paying 10–20 cents more per T-shirt could double factory workers' salaries.[*82] However, companies that run factories argue against such practices, citing reluctance to pay more when other businesses obtaining goods from their factory fail to follow suit.[*83] Without collective action, individual buyers' efforts may fall short of motivating factories to increase worker wages.[*84] Capacity and willingness to influence wage policies hinges on the size of the purchasers and the associated revenues also. Buyers with significant influence on a factory occupy a better position to promote higher wages.[*85]

One tool that might hold value for tackling these challenges is integration of principles from the EU's recently enacted Corporate Sustainability Due Diligence Directive. Adopted in 2024, this directive emphasises stakeholder engagement, requiring companies to consult with directly affected stakeholders, including garment workers, to address their concerns and guarantee fair treatment.[*86] It also mandates that firms establish grievance mechanisms and take corrective actions to rectify problems such as inadequate wages and unsatisfactory work conditions.[*87] Implementing these principles could align with broader UN frameworks to address long-term challenges and make sure businesses are held accountable for their impact on wages and conditions in the workplace.

As a step to tackle precisely this issue, India has, according to its latest UPR report, been developing a national corporate-responsibility framework to create respect for fundamental human rights, among them fair pay for workers in the private sector.[*88] The Corporate Social Responsibility legislative mandate introduced in India in 2013 has indeed amplified the role of businesses in upholding human rights.[*89] However, enforcing such rules in cases of multinational companies operating across borders remains challenging.

In another positive development, which occurred in 2019, Pakistan's Sindh Assembly board for minimum wages included home-based workers in their minimum-wage catalogue for the first time.[*90] This

75 Hossain (n 74).

76 Shaikh Abdur Rahman, 'After Rana Plaza, How Far Has Bangladesh Come on Worker Safety?' *The Diplomat* (28 April 2022) <https://thediplomat.com/2022/04/after-rana-plaza-how-far-has-bangladesh-come-on-worker-safety/> accessed on 15 January 2023.

77 Ibid.

78 Mark Starmanns for the International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, 'Purchasing Practices and Low Wages in Global Supply Chains: Empirical Cases from the Garment Industry' (*Conditions of Work and Employment* no 86, 2017) 4 <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_561141.pdf> accessed 5 on October 2023.

79 Ibid.

80 International Labour Office, 'Bangladesh Move towards Employment Injury Insurance: The Legacy of Rana Plaza' 2 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_632364.pdf> accessed on 21 November 2022.

81 Starmanns (n 78).

82 Ibid 1.

83 Ibid 8.

84 Ibid 8.

85 Ibid.

86 European Parliament and Council Directive 2024/1760 of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] (Corporate Sustainability Due Diligence Directive) art 5 cl 1 (e), also art 13.

87 Ibid art 12.

88 'Universal Periodic Review – India' national report (n 58) cl 16.

89 Ibid cl 4.

90 Ibid.

opens a gate to further opportunities for fair compensation of people who work from home.[*91] India, too, offers an illustration of regulating the informal economy appropriately. In 2019, its Ministry of Labour and Employment launched the Pradhan Mantri Shram Yogi Maandhan national pension scheme[*92], which extends eligibility for a state pension to unorganised traders, shopkeepers, and self-employed persons.[*93]

Systems that prevent transnational businesses from cancelling orders and payments at the last minute could contribute further to garment workers always receiving sufficient wages: a permanent guarantee mechanism should be set up such that retailers cannot walk away after ordering from factories. During the SARS-CoV-2 pandemic, many garment workers lost their livelihood amid financial hardship sparked by order cancellations from Western clothing companies.[*94] Labour-rights organisations suggest that the purchasing businesses should pay higher prices in calmer times to ensure that workers are paid during crises.[*95] This would give factories room to invest in production, the safety of their workers, and the workforce generally without fearing a lack of resources for paying the workers in leaner times.[*96]

Another option is to implement a system wherein factories commence production only upon receiving pre-payment that covers at least production costs. Though not yet analysed in depth, this mechanism possesses potential to improve security by keeping large corporations from consistently exploiting workers. Among other possible solutions is businesses, as buyers, pre-financing the materials that the factory requires for their orders.[*97] Pre-financing promotes security by reducing vulnerability to volatile material prices while assuring the buyer of suitable materials' use. When factories can purchase the necessary material without taking out loans, workers are more likely to get paid as agreed.[*98] If the factories can be certain of having the means to purchase what is needed without having to appeal to outside lenders, the workers to gain greater security, of the amounts promised for doing the work promised.[*99] Such approaches to financing can reduce the adverse human-rights impacts of garment-industry practices.

4.2. Direct obligations for non-state actors

Work-hosting states such as Bangladesh, India, and Pakistan are often seen as weak links in the global garment industry. They do not hold the means and power to alter the standing of garment workers[*100], and their failure to enforce business and human-rights laws represents a significant legal gap in state practice. Those laws, in turn, crucially influence corporate behaviour[*101]. However, the states cannot fill this gap on their own.

The Office of the UN High Commissioner for Human Rights emphasises that influential brands must strengthen human-rights-linked due diligence so as to prevent and otherwise address business-related abuses of human rights through proper assessment and evaluation.[*102] Recent UPRs and CESCR observations pertaining to Bangladesh, Pakistan, and India highlight longstanding issues with labour conditions and workplace safety.[*103] Reports of hazardous work environments, such as H&M factories with

91 Ibid cl 101.

92 Ministry of Labour & Employment of the Government of India, 'Brief on [the] National Pension Scheme for Traders and Self-employed Persons (NPS-Traders) 2019' <https://labour.gov.in/nps-traders> accessed on 10 October 2023.

93 Ibid.

94 Georgia Bynum, 'The Impact of Fast Fashion in Bangladesh' (Borgen Project blog, 2021) <https://borgenproject.org/fast-fashion-in-bangladesh> accessed on 10 June 2022.

95 Rhys Davies and Jean Jenkins, 'Workers' Lives at Risk: How Brands Profit from Unsafe Factory Work in Pakistan' (report compiled by WISERD and Cardiff University researchers, 2022) 7 <https://respect.international/wp-content/uploads/2023/06/Report-%E2%80%93-Workers-lives-at-risk-how-brands-profit-from-unsafe-factory-work-in-Pakistan.pdf> accessed on 3 August 2024.

96 Ibid.

97 Starmanns (n 78).

98 Ibid.

99 Ibid.

100 Ibid 13–14.

101 Guiding Principles (n 18) 5.

102 Jenefa Jabbar, 'Protecting Human Rights at the Workplace: Observations for the RMG Industry' *Dhaka Tribune* (Bangladesh, 24 January 2022) <https://www.dhakatribune.com/business/2022/01/24/protecting-human-rights-at-the-workplace-observations-for-the-rmg-industry> accessed on 26 May 2024.

103 Concluding Observations on Pakistan (n 63) 47.

exposure to dangers from gas leaks and open fires, underscore the need for improved safety measures.[*104] Enhanced transparency through due diligence could provide a clearer picture of actual health and safety conditions, the standards followed, and unions' functioning.

Transparent due-diligence processes can improve health and safety oversight in garment factories and union operations partly by making it harder for purchasers to ignore what is going on. Currently, delegating all management to subcontractors lets brand-owners evade their responsibility for improving work conditions.[*105] While numerous legally binding regulations and soft-law instruments address these issues, responsibilities remain unclear. In this climate, transparency has to be strengthened: publicly available due-diligence reports can pressure companies to act responsibly.[*106] Also, with transparency facilitated through due-diligence procedures, unions and even individual workers can solve the mystery of which company someone is ultimately working for and, accordingly, against whom they should file any complaints about violations of human rights and other workplace-associated abuses.[*107]

The EU Corporate Sustainability Due Diligence Directive aligns well with meeting these needs in this context by mandating comprehensive due-diligence practices. Namely, the directive mandates that due-diligence reports be publicly available and also be disseminated to interested parties. This should aid in increasing transparency and accountability[*108] while, additionally, obliging companies to engage in corrective actions when rights violations are discovered and ensure that continual due diligence is maintained to prevent adverse impacts.[*109]

That said, companies are already required to conduct human-rights due diligence, report on it, and communicate about this under the UN Guiding Principles.[*110] The UNGPs thoroughly explain how due diligence for human rights ought to be conducted and how handling of the findings should be integrated across business-internal functions and throughout company actions. The reports should utilise internal and external expertise, be publicly accessible to the public, and communicate the findings to relevant parties.[*111] However, it is important to note once again that the UNGPs are not legally binding, whereas the terms of the EU directive and the forthcoming UN treaty on business and human rights are. While the UNGP framework supports identifying best practice, it lacks the enforcement mechanisms of legally binding regulations.[*112]

Another important element to note is that simply applying due diligence does not resolve the human-rights issues or absolve companies of liability. Per the UNGPs, if companies discover violations of human rights in their supply chain, they must take appropriate measures to minimise the negative consequences.[*113] In a telling example, had companies employed proper human-rights due-diligence processes during the pandemic, they should not have been deemed eligible to appeal to *force majeure* clauses for cancelling their orders, since such cancellations were having a highly evident severe rights impact on numerous workers in the factories.[*114]

For the companies to receive further outside pressure to comply with their due-diligence obligations, John Braithwaite's model of enforced self-regulation could be applied. Some scholars have even mooted that compliance managers could face criminal-law liability for failing to report non-adherence. Taking an approach similar to that of the French 2017 Duty of Vigilance Law could enhance the enforcement of due-diligence obligations by imposing well-defined civil penalties for non-compliance.[*115] Under that act of law,

104 Ibid.

105 Bynum (n 94).

106 Clean Clothes Campaign, '#GoTransparent' <https://cleanclothes.org/campaigns/gotransparent> accessed on 5 October 2023.

107 Ibid.

108 Corporate Sustainability Due Diligence Directive (n 86) art 5 cl 2 (h), also art 16.

109 Ibid art 5.

110 Guiding Principles (n 18) 16.

111 Ibid.

112 Ibid 1.

113 Ibid 16.

114 John F Sherman, 'Irresponsible Exit: Exercising Force Majeure Provisions in Procurement Contracts' (2021) 6(1) Business and Human Rights Journal 127, 132–33. – DOI: https://doi.org/10.1017/bhj.2020.27.

115 John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime' (1982) 80(7) Michigan Law Review 1468, 1470. – DOI: https://doi.org/10.2307/1288556; Grant Hammond, Geoff McLay, and Wayne Mapp, 'Civil Pecuniary Penalties' (NZ Law Commission paper 33, 2012) <https://www.lawcom.govt.nz/assets/Publications/IssuesPapers/NZLC-IP33.pdf> accessed on 5 August 2024.

all French companies are required to conduct human-rights and environmental due diligence, and not honouring one's obligations under the act could result in pecuniary penalties imposed under civil law.*[116] Implementing flexible and efficient due-diligence practices applicable along the entire supply chain is crucial to mitigating potential financial, legal, and reputation risks before they emerge.*[117]

Businesses generally apply due diligence to reduce their legal or financial risks; that is, they follow the processes primarily to safeguard their own interests.*[118] Without binding state-level obligations and consequences, businesses are unlikely to employ due diligence voluntarily.*[119] The UN draft treaty on business and human rights foresees regulation requiring states to adopt measures that ensure corporate due-diligence reporting.*[120] According to the draft text, the states are obliged to adopt legislation, regulations, or other suitable measures that guarantee following the established practice of company due-diligence reporting.*[121] The terms would require businesses to engage in such actions as undertaking regular human-rights impact assessments and publishing the results.*[122] Additionally, states that have signed the treaty would have to make sure that businesses operating under their jurisdiction prevent human-rights abuses by third parties under their control. This obligation may be fulfilled, for example, by imposing a legal duty for businesses to prevent any human-rights abuses from occurring in their supply chains, wherever this is possible.*[123]

5. Conclusions

The expansion of Western companies into 'the developing world' in the 1990s sparked discussion of business responsibilities as the potential for human-rights violations expanded, a dialogue that has not reached consensus even after several decades of observation and analysis.*[124] The garment industry's complex web of stakeholders highlights the challenges in protecting human rights. While international human-rights law has traditionally placed obligations on states' shoulders, growth in the role of non-state actors has increasingly complicated this state-centric approach.*[125] Therefore, efforts to extend these responsibilities to non-state actors have been established, through initiatives such as the draft treaty on business and human rights, which is aimed at enforcing stricter regulation of corporations.*[126]

Among the solutions proposed for tackling the human-rights issues that continue to plague the garment and fashion sector are reforming the wage systems involved and imposing requirements for human-rights directly on non-state actors – requirements backed up by solid enforcement. Such approaches aimed at strengthening accountability could protect workers more effectively. While progress has been made, it is vital to continue directing attention to addressing human-rights abuses. This calls for urgency if we wish to prevent further exploitation and ensure the protection of workers' rights.

116 Christophe Clerc, 'The French "Duty of Vigilance" Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains' (ETUI research paper – Policy Brief 1/2021, 2021) 1, 2. – DOI: https://doi.org/10.2139/ssrn.3765288.

117 Francesca Richmond, Graham Stuart, and Adeel Haque, 'EU: European Commission Adopts Report on Corporate Due Diligence and Accountability' (Lexology: Baker McKenzie 2021) < https://www.lexology.com/library/detail.aspx?g=edab6968-97bc-4323-853b-de241265f296> accessed on 20 August 2024.

118 Kolieb (n 8) 810–11.

119 Ibid.

120 Updated Draft LBI (n 29) art 6.2 (c).

121 Ibid.

122 Ibid art 6.4 (a).

123 Ibid art 6.5.

124 'The UN "Protect, Respect and Remedy" Framework' (n 3).

125 Monnheimer (n 7) 11.

126 For instance, art 6.2 (c) of the updated draft legally binding instrument regulates the activities of transnational corporations and other business enterprises under international human-rights law.

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Data-driven Public Administration and the GDPR:

Seeing the Court of Justice's Judgement in Case C-175/20 in a Broader Context

Abstract. Increasingly, public authorities are looking to get the most from their records, with the aid of new technologies that allow them to extract the desired features or patterns from large volumes of data. This could position these authorities well for efficiency and to identify offenders – and, in some cases, future offenders. At the same time, the General Data Protection Regulation lays down the principle of purpose limitation and requires both the European Union and its member states to ensure that the rules by which personal data get processed are foreseeable for the individuals affected. In this context, a distinction must be made between two steps to processing, each with its own issues – the request for or direct access to personal data and mass analysis of the data obtained. The European Court of Justice dealt with several of these after the Latvian tax authority requested 'big data' from a private company. The article examines the guidance that the Court issued in this case (C-175/20) to both national legislators and administrations with regard to the distinct stages of mass processing of data, and it considers which questions remain unanswered.

Keywords: data protection, GDPR, purpose limitation, big data and data-mining in public administration, fundamental rights

1. Introduction

More and more public authorities are exploring the potential of implementing new technologies that could aid in screening various types of data to identify persons who have failed to comply with their legal obligations or might fail to honour them in the future and to increase the authorities' effectiveness as they carry out their public tasks. Data-screening requires working with several relevant datasets in combination, however, including personal data. This, in turn, raises legal issues and problems as data get requested from other controllers for purposes other than initial processing.

On 24.2.2022, the Court of Justice of the European Union (CJEU) ruled in the case *Valsts ieņēmumu dienests* (C-175/20)[*1] on those provisions of the General Data Protection Regulation[*2] (GDPR) related to

1 Case C-175/20 *SIA 'SS' v Valsts ieņēmumu dienests* EU:C:2022:124.

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

public administrations' requests for personal data from the private sector. In the case at issue, the Latvian tax authority obliged a provider of Internet-based advertising services to supply the data of its customers who wanted to sell a car via its services. The tax authority required that access to the data be granted either by direct access or through submitting the required data each month. In doing so, Latvia's tax authority relied on Article 15 (6) of the Law on Taxes and Fees, which provides that all providers of online-advertisement services are obliged to provide, at the request of the Latvian tax authority, the information available to them on those taxable persons who have placed advertisements by means of their services.[*3] As to whether this provider of Internet advertising services was afraid of losing the trust of its customers or sources of its own obscured income[*4], one can only speculate. The company might just as well have been afraid of possible responses by the Latvian Data Protection Supervisory Authority, which, for example, had fined an Internet service provider 1.2 million euros in autumn 2022 for passing personal data of its customers onward to a debt-collection company.[*5] In any case, the proprietor lodged a complaint with the tax authority and, after it was rejected, appealed to the Administrative Court to clarify whether the tax authority could legitimately require them to provide such data. The company expressed the view that the tax authority's action violated the GDPR. At this point, the Latvian court referred the case to the CJEU for a preliminary ruling.

A closer look at the ensuing judgement by the CJEU shows that the clarifications given, the references made, and the positions taken by the Court are not specific to tax law. Rather, they have broader relevance for administrative-law relations involving the processing of personal data. This paper, then, written in light of the CJEU's clarifications, examines which requirements are in force for the legal basis for requesting data from another controller or for obtaining direct access to those data, along with the basis for further processing of these data, including examination of efforts to identify useful patterns in large datasets (i.e., data-mining). The modern state needs (personal) data if it wishes to tackle abstract threats to public order as well as to identify those who are already breaching the law or are likely to do so in the future.

2. The importance of big data in administrative proceedings

Politicians often want to solve the problems facing society by toughening penalties. However, the reactive, purely punitive approach visible in Estonia's public administration was gradually replaced in the early 2000s by a more preventive approach, with the introduction of an intelligence-led-policing model.[*6] Through intelligence-led policing, the focus of the police shifts from investigating individual crimes to proactive and strategy-oriented forward-looking crime control. This implies an increased emphasis on data's collection and processing, the use of data-analytics technologies[*7], and more widespread use of covert processing of personal data in the early stages of events – before damage occurs.[*8] On account of the emergence of various

3 'Noteikumi par likuma "Par nodokļiem un nodevām" 23. panta otrās un trešās daļas piemērošanu [Regulations on the Application of Section 23 (2) and (3) of the Law On Taxes and Fees]' [1995] (106) Latvijas Vēstnesis <https://www.vestnesis.lv/ta/id/35882-noteikumi-par-likuma-par-nodokliem-un-nodevam-23-panta-otras-un-tresas-dalas-piemerosanu> accessed on 8 July 2024.

4 According to the Latvian press, the implicated provider of Internet-based advertising services has been suspected of playing an important role in the maintenance of the black economy, especially in the context of sales of cars. See A Kulbergs, 'Viedoklis: *ss.lv* spēlē ļoti nopietnu lomu pelēkās ekonomikas uzturēšanā' (*Dienas Bizness*, 7 August 2017) <https://www.db.lv/zinas/viedoklis-sslv-spele-loti-nopietnu-lomu-pelekas-ekonomikas-uzturesana-465294> accessed on 8 July 2024.

5 A summary of the infringement and details of the fine imposed on 9 September 2022 are accessible via GDPRhub: 'DVI (Latvia) – SIA "TET"' <https://gdprhub.eu/index.php?title=DVI_(Latvia)_-_SIA_%22TET%22> accessed on 8 July 2024.

6 For instance, see Priit Suve, 'Kogukonnakeskse politsei roll politsei kujunemisel: arengud Eestis 1991–2013 [The Role of Community Policing in the Development of the Police: Developments in Estonia from 1991 to 2013]' [2014] (5) Acta Politica Estica 42 <http://publications.tlu.ee/index.php/actapoliticaestica/article/view/211> accessed on 8 July 2024.

7 For example, E Aav, who served as Director General of the Tax and Customs Board (in 2006–2011), stressed in 2012: 'The next step in analytical work should be the development of data-collection and forecasting capabilities, which would allow the Board to focus its activities on anticipating and preventing future problems from past events. This will require a serious investment in software.' See 'Enriko Aav: maksuamet peab edasi liikuma [Tax Administration Must Move Forward]' (*Äripäev*, 12 April 2012) <https://www.aripaev.ee/opinion/2012/04/12/enriko-aav-maksuamet-peab-edasi-liikuma> accessed on 8 July 2024.

8 Mait Laaring, 'Eesti korrakaitseõigus ohuennetusõigusena [Estonian Law-Enforcement Law As Threat-Prevention Law]' (PhD thesis, University of Tartu 2015) 19–20 <http://dspace.ut.ee/bitstream/handle/10062/48472/laaring_mait.pdf?sequence=1&isAllowed=y> accessed on 8 July 2024.

new threats, the society of today is often referred to as a 'risk society' and the state's response to it as that of a 'preventive state'.[*9] The increasing focus of other authorities too (alongside the police) on risk prevention is confirmed by, for example, the existence of numerous public-information campaigns centred on how citizens themselves can prevent risks and breaches of the law.

Depending on the sphere of life involved, proactive public administration may require the processing of a large volume of data (that is, working with 'big data') to identify areas wherein the risk of infringement is greater, in aims of designing proactive procedures geared for a more specific target group. Depending on the domain and the situation's particulars, the need might not extend beyond aggregated non-personal data. However, it is often in the administration's interest to process big data, including personal data, in the policy-preparation stage and to 'nip things in the bud': well-executed preparation allows the state to select the 'right' persons for specific procedures while avoiding 'unnecessary' bureaucracy for those who are law-abiding. Via this approach, the rapid development of new technologies makes it possible to utilise different types of data in combination to screen for not only infringers[*10] but also – by means that might even employ artificial intelligence – persons who might end up in breach of legal requirements down the line and who should therefore, at least in the view of state organs, be more closely monitored.[*11]

Although the question of how the Latvian tax authority planned to analyse the requested data[*12] was not addressed in depth in Case C-175/20, it is undisputed that the tax authority had proceeded from a desire to obtain big data from a private company not for the purpose of prosecution for any specific infringement (involving a possible offence) but so as to identify who among the customers obtaining its Internet-based advertising services might be infringers.

3. The fundamental-rights framework for the processing of big data

3.1. The principle for legality

The fundamental right to privacy (enshrined in § 26 of the Constitution of the Republic of Estonia, or EC) protects individuals from both the collection and the further processing of personal data. Fundamental rights may be restricted only in accordance with the Constitution, with account taken of the principle of legality, which is laid down in Article 3 of the EC and requires that any restriction of a fundamental right must be based on an existing legal foundation.[*13] Article 3 of the EC also lays down the principle of

9 Ibid 20, 23.

10 In the public sector, data-mining is used mostly by financial and tax-supervisory authorities to detect abuses on the basis of 'big data' data structures; see Leonid Guggenberger, 'Einsatz künstlicher Intelligenz in der Verwaltung' [2019] (12) Neue Zeitschrift für Verwaltungsrecht 844, 848. In Estonia, even without the involvement of artificial intelligence, data held by both the tax authorities themselves and the state as a whole are used in detection of tax avoidance in tenancy relationships. See Reet Pärgma and Janno Riispapp, 'Maksuamet nügib üürileandjaid: aastas jääb laekumata kümneid miljoneid [The Tax Office Is Tricking Landlords: Tens of Millions Are Not Collected Every Year]' (*Postimees*, 1 February 2020) <https://majandus24.postimees.ee/6887251/maksuamet-nugib-uurileandjaid-aastas-jaab-laekumata-kumneid-miljoneid?_ga=2.198474540.2039862133.1580404709-1120930609.1394797767>. Among the tax authority's hopes for the future is use of artificial intelligence to create a decision model from mass data for effectively and efficiently ascertaining the likelihood of 'envelope wages' having been paid. See Märt Belkin, 'Maksuamet hakkab tehisintellekti abiga ümbrikupalga maksjaid püüdma [The Tax Authorities Will Use Artificial Intelligence To Catch Payers of Hidden Wages]' (*Rahageenius*, 6 February 2020) <https://raha.geenius.ee/rubriik/uudis/maksuamet-hakkab-tehisintellekti-abiga-umbrikupalga-maksjaid-leidma/>. As for other countries, the French tax authority has offered an example by using artificial intelligence in 2022 to uncover private swimming pools that had gone undeclared, which affect property taxes; see the Euronews piece 'France Uses Artificial Intelligence To Detect More Than 20,000 Undeclared Swimming Pools' (30 August 2022) <https://www.euronews.com/my-europe/2022/08/30/france-uses-artificial-intelligence-to-detect-more-than-20000-undeclared-swimming-pools>. All links accessed on 8 July 2024.

11 For details, see such reports as Kiana Alikhademi and others, 'A Review of Predictive Policing from the Perspective of Fairness' (2022) 30 Artificial Intelligence and Law. – DOI: https://doi.org/10.1007/s10506-021-09286-4.

12 In many countries, data analytics is used to detect tax and benefit fraud. For a more in-depth look at data analysis, as performed by the Latvian tax administration, see Nicolas Gavoille and Anna Zasova, 'Detecting Labor Tax Evasion [by] Using Administrative Data and Machine-Learning Techniques]' (FREE Policy Brief, 17 May 2022) <https://freepolicybriefs.org/wp-content/uploads/2022/05/freepolicybriefs20220517.pdf> accessed on 8 July 2024.

13 See the commentary provided by Madis Ernits on the Constitution of Estonia, s 3, comment 105. <https://pohiseadus.riigioigus.ee/v1/eesti-vabariigi-pohiseadus/i-uldsatted-ss-1-7/ss-3-pohiseaduse-ulimuslikkus-ja-reservatsioon> accessed on 8 July 2024.

importance, under which both the conditions and the scope of any interference must be defined at the level of the law.*[14] Also, in cases of more intensive intervention, the regulation must be more precise than in other cases.*[15]

The Charter of Fundamental Rights (CFR) is an instrument that applies to European Union institutions, bodies, offices, and agencies, but EU member states likewise are bound by the CFR when implementing Union law (under Art. 51 (1) of the charter). The implementation of EU law can take place both in the legislative sphere (through enactment of national law) and in the executive sphere (through the activities of national administrations). As the CFR provides for the right to respect for private life and the right to the protection of personal data (in Art. 7 and Art. 8, respectively)*[16], the CFR is therefore applicable with regard to the GDPR's provisions when a Member State 'complements' the GDPR – i.e., when it creates the legal basis for administrative authorities' processing of personal data. According to the CFR, the exercise of the rights and freedoms recognised under the charter shall be restricted only by actual law and in a manner showing due regard for the nature of those rights and freedoms and the principle of proportionality (per Art. 52 (1)). The right to respect for one's private life and the fundamental right to the protection of personal data are not absolute; they may be restricted by the Member State, subject to Article 52 of the CFR.*[17]

In a recent case pertaining to a directive on public access to information about beneficial ownership, the CJEU explained the content of the principle for a legal basis thus: 'As regards the requirement that any limitation on the exercise of fundamental rights must be provided for by law, this implies that the act which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned', where it must be borne in mind, on one hand, that said requirement 'does not preclude the limitation in question from being formulated in terms [...] sufficiently open to be able to adapt to different scenarios and keep pace with changing circumstances' and, on the other hand, that 'the Court may, where appropriate, specify, by means of interpretation, the actual scope of the limitation in the light of the very wording of the EU legislation in question as well as its general scheme and the objectives it pursues, as interpreted in view of the fundamental rights guaranteed by the Charter'.*[18]

3.2. The GDPR: Requirements for a legal basis and purpose limitation

In the CJEU's data-protection jurisprudence, the question of how detailed/general the legal basis for the processing of personal data needs to be to comply with the requirements of the CFR, including what role the nature of the processing operation plays, has not received significant attention thus far.*[19]

According to the GDPR, the processing of personal data is lawful if at least one of the six bases exhaustively listed in Article 6 (1) of the GDPR exists.*[20] In connection with administrative procedure, Article 6 (1)(e) of the GDPR holds relevance. According to it, the processing of personal data is lawful if it is 'necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller'. Paragraph 3 thereunder specifies that the basis for the processing of personal data referred to here must be established either by Union law or by the law of the Member State

14 Supreme Court Administrative Law Chamber decision 3-3-1-41-00, 31 October 2000, para 4.

15 Supreme Court Administrative Law Chamber decision 3-19-549, 18 May 2021, paras 18, 22.

16 However, the CJEU usually does not distinguish between what articles 7 and 8 of the CFR address. Neither has it clarified whether there are any non-overlapping aspects of the respective fundamental rights. See also Paloma Krõõt Tupay, 'Õigusest eraelule kuni andmekaitse üldmääruseni ehk tundmatu õigus isikuandmete kaitsele [From the Right to Privacy to the GDPR, or the Unknown Right to the Protection of Personal Data]' [2016] (4) Juridica 227.

17 Case C-184/20 *Vyriausioji tarnybinės etikos komisija* EU:C:2022:601, para 70.

18 Joined Cases C-37/20 and 601/20 *Luxembourg Business Registers* EU:C:2022:912, 47; most recently, Case C-61/22 *Landeshauptstadt Wiesbaden*, not reported yet, para 77.

19 The European General Court has recently concluded that a provision of an EU Regulation instrument that generally provides for the possibility of the European Commission requesting the necessary information from undertakings and associations of undertakings constitutes a sufficient legal basis for requesting information (inclusive of personal data) on the Commission's part: Case T-451/20 *Meta Platforms Ireland v Commission* EU:T:2023:276, paras 184–194. However, in *Bara and Others*, the CJEU stated with regard to the legal basis for the transfer of personal data only that it must generally incorporate appropriate safeguards: Case C-201/14 *Bara and Others* EU:C:2015:638, para 28ff.

20 Although it is not excluded that personal data collected by the tax administration may prove necessary also for the purposes of criminal-law proceedings, the activities of the tax administration presumably fall within the scope of administrative law if the facts need to be clarified. Therefore, it is the GDPR, not the Law Enforcement Authorities Directive, that applies, in light of Case C-175/20 (n 1) paras 39–47.

to which the controller is subject, and that either the purpose of the processing must be specified in the relevant legal act or the processing has to be 'necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller' with respect to the processing of personal data referred to in paragraph 1 (e) of Article 6. In the case of a special category of personal data, the source of law for the Member State and the additional requirements to be imposed on it should be sought not only in Article 6 but also in Article 9 of the GDPR.[*21] With respect to the legal basis for the processing, Recital 45 of the GDPR does not require each individual processing operation to be governed by a separate legal act, but the legal basis nevertheless must be 'clear and precise[,] and its application should be foreseeable to persons subject to it' (per Recital 41). However, the requirement for a legal basis does not always presuppose a law adopted by the country's parliament – the level of regulation required depends also, *inter alia*, on the constitutional order of the Member State.[*22]

In cases wherein an administrative authority collects personal data from a source other than the individual, by requesting the data either from another administrative authority or from a private person, the purpose-limitation principle too demands consideration, because the purpose behind processing of retained personal data is presumably different from the purpose for which those personal data were initially collected. According to the purpose-limitation principle, which is considered a cornerstone of data-protection law[*23], the processing of personal data must ensure that all personal data's collection is for explicitly specified and legitimate purposes and that the data are not further processed in a way incompatible with those purposes (see Art. 5 (1)(b) of the GDPR).[*24]

The GDPR does, however, allow Member States to regulate the processing of personal data for a different purpose. Authors of various GDPR commentaries have been far from unanimous as to the meaning of the relevant provisions of the GDPR, though. According to Article 6 (2), Member States may maintain pre-existing systems for data-processing in their public administration, while respecting the general framework of the GDPR. It is debatable whether Article 6 (2) constitutes separate delegation to regulate data-processing in the Member State[*25], as opposed to this norm being merely declaratory and, in fact, superfluous[*26], since the real delegation follows from Article 6 (3). The latter allows a Member State to regulate its purpose limitation for the processing of personal data in more detail in connection specifically with the performance of public tasks, with proper specification of 'the entities to, and the purposes for[,] which' the personal data may be disclosed, the purpose limitation involved, etc. There are also some authors who consider the delegation to be derived from sections 2 and 3 of Article 6 in mutual conjunction.[*27]

In addition, Article 6 (4) of the GDPR provides that the processing of personal data for a purpose other than that for which the personal data were collected is permissible under Union or Member State law so long as that processing consists of 'a measure which is necessary and proportionate in a democratic society' to ensure fulfilment of the objectives referred to in Article 23 (1).[*28] Alexander Roβnagel is among the scholars who have found that a distinction must be drawn between situations wherein the legislator regulates purposes that are still compatible with the original purpose and situations in which the legislator regulates processing for a purpose different from the original one. In the first case, the Member State invokes

21 Case C-667/21 *Krankenversicherung Nordrhein* EU:C:2023:433, para 79 (arts 6 and 9 apply cumulatively, not in a relationship between general and specific rules).

22 Per Recital 41 of the GDPR.

23 Article 29 Data Protection Working Party, 'Opinion 03/2013 on Purpose Limitation' (2 April 2013) 4 <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf> accessed on 8 July 2024.

24 Art 8(2) of the CFR also requires that processing of personal data be for 'specified purposes'. In addition, see, for instance, Recital 39 of the GDPR and Recital 26 of the Law Enforcement Agencies Directive, regarding 'specific purpose'; Case C-175/20 (n 1) paras 45, 63–66; Case C73/16 *Puškár* EU:C:2017:725, para 111; Case C-180/21 *Inspector v Inspectorata kam Visshia sadeben savet* EU:C:2022:967; Case C-77/21 *Digi* EU:C:2022:805, para 34; Case C-77/21 EU:C:2022:248, Opinion of AG Pikamäe (31 March 2021), para 37ff. The last of these states that a 'sufficiently precise purpose thus constitutes a fundamental guarantee in terms of predictability and legal certainty in the sense that it contributes to the proper understanding by the data subject of the possible use of his data and enables him to make a fully informed decision'.

25 Alexander Roßnagel in Spiros Simitis, Gerrit Hornung, and Indra Spiecker gen. Döhmann (eds), *Datenschutzrecht: DSGVO mit BDSG* (Nomos 2019) art 6 s 2, marginals 1, 16.

26 Benedikt Buchner and Thomas Petri in Jürgen Kühling and Benedikt Buchner, *Datenschutz-Grundverordnung BDSG Kommentar* (Beck 2020) art 6, marginals 2, 93.

27 Ibid, art 6, marginal 196.

28 For a more in-depth discussion of the problems besetting interpretation of art 6(1–4) of the GDPR, see Monika Mikiver and Paloma Krõõt Tupay, 'Has the GDPR Killed E-government? The "Once-Only" Principle vs the Principle of Purpose Limitation' (2023) 13(3) International Data Privacy Law 194. – DOI: https://doi.org/10.1093/idpl/ipad010.

Article 6 (3) to establish its rules; in the second case, the delegation follows directly from paragraph 4.[*29] The alternative view is that Article 6 (4) does not feature a delegation at all and that delegation follows from the interaction of paragraphs 2, 3, and 4.[*30]

The recitals of the GDPR, which explain, for example, that '[i]f the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Union or Member State law may determine and specify the tasks and purposes for which the further processing should be regarded as compatible and lawful' and that '[t]he legal basis provided by Union or Member State law for the processing of personal data may also provide a legal basis for further processing',[*31] do not shed any particular light on matters to dispel the confusion.

Analysis by the Ministry of Justice of the Republic of Estonia, which dealt with the compatibility of the national regulations on public databases with the EC and with the GDPR, reached the conclusion that a Member State may, on the basis of Article 6 (2)–(3), more precisely regulate the processing of data carried out on the basis of Article 6 (1)'s items (c) and (e) (addressing, respectively, performance of public tasks and legal obligations), concluding also that in this connection the Member State may regulate the purpose limitation too, relying on the provisions of Article 6 (4). In other words, the purpose of the secondary processing must align with the purposes referred to in Article 23 (1) and the regulation must ensure compliance with the principle of proportionality.[*32] In the opinion of the authors of the article, the latter interpretation is fully justified.

4. Conclusions about the legal basis and purpose limitation in Case C-175/20

The question as to how general or detailed the legal basis for the access to personal data should be was obviously also a core issue for the referring Latvian court. In fact, the Latvian court seemed to want to know whether Article 15 (6) of the Latvian Law on Taxes and Fees, which provides that 'Internet advertising service providers shall be obliged to provide, upon request of the national tax authority, any information on taxable persons who have used those services for the publication of advertisements and on the advertisements published by them', is 'GDPR-compliant'.

Regrettably, the CJEU did not give a clear answer. From the reasoning of the judgement one can deduce the Court's understanding that it is up to primarily the national legislator to find the right solution in each situation. In other words, it is not excluded that a general legal basis may be permissible in conditions wherein the two levels – the level of the legal basis and the reasoned request – by functioning together constitute an adequate (i.e., GDPR-compliant) legal basis for the processing of personal data.

This position is reflected, firstly, in the Court's reasoning on the question of whether the GDPR's provision for a law that restricts the rights set out in the GDPR points exclusively to a legislative act adopted by Parliament or, instead, is broader in meaning and may cover other legislative acts, adopted by different levels of government, also. On one hand, the Court referred to the CFR, which lays down the principle of legality.[*33] On the other hand, the Court pointed to the above-mentioned recital of the GDPR: Recital 41 is based *expressis verbis* on a broader understanding of what constitutes a legal basis or legislative measure.

Secondly, referring to its previous case law, the CJEU stated that the limitation of rights that is provided for in the GDPR must have a clear and precise legal basis, the limitations' application must be foreseeable

29 Roßnagel (n 27) art 6 s 4, marginal 24.

30 Philipp Reimer in Hjalmar von Sydow, *Europäische Datenschutzgrundverordnung: Handkommentar* (Nomos 2018) art 6, marginal 67; Buchner and Petri (n 28) art 6, marginal 200; Marion Albers and Raoul-Darius Veit in *BeckOK Datenschutzrecht* (Beck 2022) art 6, marginal 77; Horst Heberlein in Eugen Ehmann and Martin Selmayr, *Datenschutz-Grundverordnung DS-GVO Kommentar* (Beck 2018) art 6, marginal 51.

31 Text from Recital 50 of the GDPR.

32 Monika Mikiver, 'Analüüs: Andmekogud ja isikuandmed: EV Põhiseadusest ja IKÜM-st tulenevad nõuded regulatsioonile. Justiitsministeerium 2021 [Analysis: Databases and Personal Data – Regulatory Requirements under the Constitution of the Republic of Estonia and the GDPR]' (Estonian Ministry of Justice 2021) accessible via <https://www.just.ee/uuringud> accessed on 8 July 2024.

33 Case C-175/20 (n 1) para 54.

for the data subjects, and the data subjects must be able to identify the circumstances and conditions under which the scope of the rights conferred on them by the GDPR may be limited.[*34]

After addressing what the general requirements are for a legislative measure that provides for restrictions to the rights set out in the GDPR, the Court's decision turns to other matters, but it later returns to this question when dealing with the sub-topic of the processing of the dataset requested by the Latvian tax administration.[*35] The Court did not say that processing of data in bulk, which might include the granting of direct access for said operation, should be treated more strictly in light of the terms regulating an explicit legal basis. Moreover paragraph 69 of the CJEU judgement makes clear reference to the fact that the authorisation allowing bulk transfer of data must comply with the requirements of Article 6 (1(e) and 3). However, a few paragraphs later (in paragraph 71), the Court seems to concede that it might even be permissible for a detailed rule of authorisation to be entirely absent, so long as a heightened obligation to state reasons with a higher threshold for the administrative body's request stands in its stead.[*36]

Moreover, the CJEU ruling in Case C-175/20 does not address Article 6 (4) of the GDPR, which provides for an exception to the purpose-limitation principle stated in Article 5 (b). Rather than delve into this, the Court found that the legal basis from a Member State's perspective must stem instead from Article 23 of the GDPR, which allows a Member State to limit the rights of the data subject and the obligations of the controller, but also 'Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22'.[*37]

It is regrettable that the judgement does not explain the reasons for the exclusion of Article 6 (4) (in conjunction with Article 6 (2)–(3)) of the GDPR. At the same time, the Court did not specify how to understand the additional conditions for the restriction on Article 5 that are laid down in Article 23 either. There is some question as to whether Article 23 allows a Member State to limit the processing principles set forth in Article 5 as such or, in contrast, the wording of Article 23 makes it instead the rights of the data subject and the obligations of the controller that are subject to said national restrictions. The answer, in turn, affects, for example, the transparency obligation under Article 5.[*38] For instance, a Member State may rely on Article 23 as a basis for restricting the data subject's right to know the precise logic of the profiling of their data, which is what the German legislator has done with regard to such activities as risk assessment in the tax domain[*39]. The legal world is unfortunate also in that the Court did not further elaborate on the content of Article 23 (2) of the GDPR, which lays out in detail the minimum content of such legislation. In rulings prior to the one in Case C-175/20, the CJEU held that any legislative measure adopted under Article 23 (1) GDPR must comply with all the specific requirements comprehensively articulated in Article 23 (2).[*40]

The above reasoning suggests that the CJEU would seem to favour a rather flexible approach to the question of how strict the rules on parliamentary legislation should be. The choice between a special and a general parliamentary law is a matter for the Member State. Such a view is supported also by Recital 41 of the GDPR (which allows space for the constitutional order of the Member State to determine the level of regulation suitable) in conjunction with Recital 45 (the wording of which permits generalisations in the creation of standards). The advantage of a more general legal basis is that the legal regulation necessary for appropriate implementation of the GDPR could be better adapted to the national legal order of the Member States. In particular, it would not lead to 'legal dislocations' – situations wherein, simply because of EU law, a relatively general parliamentary regulation is accepted for extensive or intense interference with fundamental rights while the rules required by law for enabling some forms of less intense invasion must be laid down in detail in a concrete, practice-oriented fashion. One could, of course, offer as a counter-argument that the implementation of the GDPR, as a directly applicable regulation, should not differ very much between Member States.

34 Ibid, paras 55–57.

35 Ibid, paras 83–84.

36 Also Thomas Zerdick, 'EuGH: Datenschutzrecht: Übermittlung von Daten durch Unternehmen an Behörden' [2011] (11) Europäische Zeitschrift für Wirtschaftsrecht 532.

37 Case C-175/20 (n 1) para 51.

38 Also M Bäcker in *Datenschutz-Grundverordnung BDSG Kommentar*, art 23 para 9.

39 For example, under German tax law, the parameters to the algorithm used by the tax-supervisory authority are not published to any degree of precision: 'Details of risk-management systems may not be published where this could jeopardise the uniformity and legality of taxation' (*Abgabenordnung*, s 88(5)).

40 Joined Cases C-511/18, C512/18, and C-520/18 *La Quadrature du Net and others* EU:C:2020:791, para 209.

Irrespective of the choices made by Member States in adopting the measures necessary for the implementation of the GDPR, all of them must meet the criterion presented above as 'foreseeability', which in the Estonian legal tradition entails primarily the adoption of accessible legislative acts.[*41] We hope that the new references for a preliminary ruling will soon give the CJEU an opportunity to 'paint a broader picture', so that it will be easier for Member States to craft and apply GDPR-compliant rules, thereby ensuring stronger protection of fundamental rights.

5. Taking the case law on the processing of communications data as a model

As mentioned above, processing of big data varies greatly: it might involve identifying infringers via simple cross-checking between sets of data already held but also can extend to using more sophisticated, AI-based analytics to make predictions and estimations as to who might become an infringer in the future. In any case, working with big data implies 'machine-reading' of data concerning as many people as possible (whether the entire general population or a specific target group). In any context of processing big data, a particularly crucial element is transparency of the personal data's handling[*42], whereby the data subject should be aware of who is processing his or her personal data and for what purpose they are being processed.[*43] This issue has links to the individual's right to verify the accuracy of the data, not least since an error in the source data may get carried forward to other procedures and could affect the assessment of certain characteristics of the data subject. It is precisely because of problems of this kind that, for example, a Dutch court, in a ruling from 5 February 2020, suspended automated risk assessment related to national-tax fraud and labour-law violations.[*44]

Returning our attention to Case C-175/20, we can see that the CJEU based its answer on the questions referred for a preliminary ruling. Those questions dealt with only the request of the tax authorities for big data; therefore, the Court could not tackle the matter of the legal basis for the further processing of the big data collected 'under the belly of' the administrative authority. It is noteworthy that, after the CJEU had listed in its reasoning the requirements for a 'legislative measure' allowing limitation to the rights articulated in the GDPR, the CJEU did, however, refer twice[*45] to its previous judgements addressing processing of communications data (traffic and location data) that is carried out in the context of criminal proceedings or in that of the protection of national security. Namely, the Court explicitly referred to cases C-746/18, *Prokuratuur* (involving criminal proceedings), and C-623/17, *Privacy International* (centred on the right of security and intelligence services to process bulk communications data for the protection of national security).[*46] This manner of attention, of course, raises the question of whether the requirements fleshed out by the CJEU and the ECHR in the areas of surveillance and communications-data processing can (or should) be adhered to in the area of administrative law (and whether they pertain only to the processing of mass data) and, if so, to what extent. If we look at the reasoning provided by the CJEU in Case C-175/20, it is clear that the logic has been modelled on and inspired by cases involving the processing of communications data.

The European Court of Human Rights has a long-standing tradition of case law in the field of surveillance, with which it has developed criteria and requirements for the relevant legal provisions: how precise the substantive presumptions should be; what procedural guarantees must be in place; and under what conditions, for how long, and how the data collected may be used in the future.[*47] The CJEU also

41 See also, for instance, Case C-306/21 *Koalitsia "Demokratichna Bulgaria - Obedinenie"* EU:C:2022:813, paras 46, 50.

42 See art 5(1)(a) ch III s 1, Recital 60.

43 However, this right may be limited by the EU or a Member State under art 23.

44 Jan Horstmann, 'Rechtbank Den Haag: System zur Erkennung von Sozialbetrug verstößt gegen EMRK' [2020] (6) Zeitschrift für Datenschutz-Aktuell, 07047. The judgement of the Dutch court could be found at <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2020:865> accessed on 8 July 2024.

45 Case C-175/20 (n 1) paras 55, 83.

46 Case C746/18 *Prokuratuur* EU:C:2021:152, 48; Case C-623/7 *Privacy International* EU:C:2020:790, paras 68, 78.

47 For examples, see *Klass and Others v Germany* App no 5029/71 (ECHR, 6 September 1978); *Association for European Integration and Human Rights and Ekimdzhiev v Bulgaria* App no 62540/00 (ECHR, 28 June 2007); *Kennedy v United Kingdom* App no 26839/05 (ECHR, 18 May 2010); etc.

has amassed extensive case law pertaining to the processing of communications data.*[48] Both surveillance and the processing of communications data are linked to criminal law and procedure. That link extends also to the preliminary stages (proactively combating security threats); however, criminal proceedings and their outcome, whatever it might be (which may be enabled by or decisively influenced by the processing of personal data), generally entail more intense interference with fundamental rights than administrative proceedings/actions do.

The CJEU clarified in Case C-175/20 that collection of personal data that is not limited in time might be permissible by its very nature. The position taken may suggest that there are differences between the processing of communications data and the processing of personal data for administrative purposes, however. One would hope that this is a sign of the emergence of a more nuanced position in administrative law on the question of whether the processing of big data for administrative-law purposes is permissible, when that might be, and what restrictions should be imposed on it.

Processing big data in such a way as to screen specific individuals in or out for the purpose of ascertaining any need for surveillance mechanisms in certain cases implies broad-based invasion of privacy; such retrieval and screening of data on large scale should not be permissible under the general allowances for processing of personal data that are established for specific administrative procedures.*[49] Data-mining of this sort requires a legislative mandate, in which the legislator should set detailed limits to the scope and conditions for the data-processing. The case law developed in the areas of surveillance and communication-data processing can certainly be a source of inspiration here.

6. Conclusions

Although Case C-175/20 seems at first glance to be yet another case clarifying the requirements of the GDPR, it gives reason to discuss the boundaries between what is permissible and impermissible in the processing of big data in preparation for administrative proceedings. Indeed, data-mining can, depending on the technology and methodology used, make a significant contribution not only to the fight against serious crime*[50] but also to the prevention of other serious threats to human life and health and to other legitimate interests, allowing better targeting of administrative-law measures. After all, it would be in the public interest to make efficient use of the personal data at the disposal of the state: every paper not needlessly shuffled and every breach of law not committed brings savings for society as a whole. The Estonians have shown innovative progress in the digital services of the state and have set an example for other countries in cutting red tape, through e-services alongside other mechanisms.

However, there is a limit at some point where the interference with people's fundamental rights becomes so great that it outweighs the administrative efficiency sought through such mass data-processing. It is entirely predictable that soon every administrative body will want some kind of 'tool' that, by relying on certain data already available, carries out comparisons among data. One such tool might employ aerial

48 For example, the relevant first judgement of the CJEU: Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* EU:C:2014:238; the latter at the time of writing: C-162/22 *Lietuvos Respublikos generalinė prokuratūra* EU:C:2023:631.

49 For example, the Estonian Administrative Procedure Act provides in s 7(5) that an administrative authority may, for the purpose of administrative acts, measures, or entry into administrative contracts under administrative procedure, process personal data regarding any circumstances necessary for the proceedings in a matter, unless otherwise provided by law or legislation issued pursuant to law. This cannot be considered a sufficient legal basis; see <https://www.riigiteataja.ee/en/eli/505122023003/consolide>. The legal basis for the Estonian Tax Board's collection and screening of personal data held by the state for the purpose of so-called tax intelligence is derived from s 59(1^1) of the Tax Administration Act, according to which the tax authority of the state has the right to obtain, free of charge and on the basis of a reasoned request, data from the state database that pertain to the real property and other assets owned or held by persons, to the nature and logistics of the economic activities of persons, and to the goods and services related thereto, for the purpose of assessing and analysing the risk of a breach of tax laws or of said act of law and also for the purpose of identifying related persons within the meaning of s 8 of the Income Tax Act. The administrator of the database shall inform the State Tax Administration of any circumstances that render it impossible to comply with the request or that necessitate extending the deadline for complying with the request; see <https://www.riigiteataja.ee/akt/121062024006#para59>. Both links accessed on 8 July 2024.

50 Also, for example, in a decision taken on 16 February 2023, the Federal Constitutional Court of Germany took a position on the Hessian criminal police's data analysis. It found that the authorisation rules allow such IT assistants to serve the legitimate aim of enhancing the fight against serious crime but considered the authorisation rules for the implementation of algorithmic systems to be too general and therefore unconstitutional. See BVerfG, 16.2.2023, 1 BvR 1547/19, 1 BvR 2634/20, para 52ff.

photographs to identify people who have built a fence too close to another building. Another might reveal those who have left their lawn unkempt or have mown it too often. While in the first case the constitutional value at stake is the protection of human life, health, and property (through detection of a breach of fire-safety rules), in the second case any breach might be merely of a code of amenities established for aesthetic reasons. Processing of big data to pave the way for possible administrative proceedings is justified only for the protection of more important legal interests; we must prevent the normalisation of sweeping automated monitoring of individuals.

The CJEU did not take the opportunity that its preliminary ruling in Case C-175/20 offered to clarify in depth the extent of any difference for administrative law between those requirements relevant for the processing of big data for the purpose of preventing an abstract threat and the conditions for the processing of personal data in an individual concrete case. Several of the Court's other conclusions, such as those on the transfer of personal data between controllers, the change of purpose for the processing, and the requirements applicable for a parliamentary law permitting the processing of bulk data, do not provide ultimate clarity either. The restrictions to the scope of privacy that result from increased use of new technologies in the course of performing administrative tasks pose a challenge for the national legislator's seeking of suitable measures: it has to find balance in the intrusion on privacy.[*51]

[51] For example, one option that has been considered in Estonia is to indicate in the administrative decision whether profiling was applied at the time at which it was issued and to identify those databases (of other administrative bodies) whose data were used to inform issuing the administrative decision. See the bill for an act of law amending the Administrative Procedure Act and other, related acts, first proposed on 6 June 2022, 634 SE, s 1 para 3, which fell by the wayside in parliamentary processes <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/21f6df90-a333-413a-a533-ebbf7e9deebe/haldusmenetluse-seaduse-muutmise-ja-sellega-seonduvalt-teiste-seaduste-muutmise-seadus> accessed on 8 July 2024. With regard to the same subject, consult also Mikiver and Tupay (n 28).

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Time of Signing:

Legal Requirements and Technical Options for Hand-written and Electronic Signatures[*1]

Abstract. The article examines the legal and technical aspects of determining the time of signing for both hand-written and electronic signatures. Of particular relevance in light of the widespread utilisation of electronic signatures in Estonia, involving both government-issued and private-sector e-signatures, it explores how signatures are linked to the time of transactions and whether the time of signing affects the validity of signatures under Estonian and European Union law. The paper discusses the general principle of freedom of form in transactions, highlighting the formal requirements imposed by law for certain transactions and wills, with special focus on comparing the traditional analogue world with the digital environment. Additionally, a review of recent amendments to the eIDAS Regulation examines their impact on the union's electronic-signature ecosystem. Discussion addresses technical challenges also, with specific regard to linking a signature to the time of the transaction and the legal implications of timestamping in the domain of electronic signatures. For broader context, the insight is informed by comparison with Norway, another member of the European Economic Area. The research reported upon contributes to awareness of the importance of understanding both the legislative framework and technical practices involved in identifying the time of signing for ensuring the legal validity and reliability of electronic signatures.

Keywords: eIDAS Regulation, electronic signatures, time of signing, validity of electronic signatures

1. Introduction to the landscape

The principal e-signature[*2] instrument used in Estonia is a document (a physical ID card, digital ID, 'mobile ID', e-residency card, or residence-permit card) issued by the Police and Border Guard Board on the basis of the Identity Documents Act[*3] (hereinafter, 'IDA'). This document is utilised in conjunction with an electronic document with a digital identification certificate and a digital-signature certificate (discussed below). In

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2 According to the eIDAS Regulation, art 3(22), an e-signature device is a piece of appropriately configured software or hardware that would be used for e-signing.

3 Or *Isikut tõendavate dokumentide seadus*: RT I 1999, 25, 365; RT I, 26.4.2024, 13.

addition to government-issued e-signatures, private-sector e-signatures are witnessing increased use (with Smart-ID signatures being a key example).[*4] On 7 October 2002, the mayors of Tallinn and Tartu digitally signed an inter-city co-operation agreement, thus establishing the first digitally signed document, and in a 20-year span since then, more than 800 million signatures have been provided via Estonia's ID-card, Mobile-ID, and Smart-ID systems.[*5] Given that Estonia has a population of 1.3 million, these volumes attest that handling the exchange of declarations of intent and the conclusion of contracts electronically has become commonplace in the country, where it permeates the public and private sector both.

Notwithstanding the well-established general principle of freedom of form[*6], transactions exist for which a mandatory form requirement is imposed by law. Mandatory formal requirements for transactions and wills may be provided for also by specific agreement. A signature might be required for statements of intent in cases of analogue or electronic transactions, and the variety of actions that are considered to represent intent has grown wider as new technical solutions become available.

The article compares signing and the determination of the time of signing between the analogue world and the electronic environment to answer the question of how it is possible to link a signature to the time of the transaction. The examination here identifies an answer to whether the time of signing has a legal effect on the validity of the signature and, hence, is required by Estonian and European Union (EU) laws. Further discussion considers some examples, mainly from Norway, which is closely associated with the EU through its membership in the European Economic Area. For a well-grounded answer to the questions probed, the paper describes the technical set-up for e-signing, thereby clarifying which time expressed in the e-signature software has legal meaning and should be regarded as the e-signature time. Because there are technological challenges, the paper analyses the recent amendments made at EU level (mainly with regard to the eIDAS Regulation[*7] and its amendments[*8]) and on Estonian level additionally, alongside how they affect the ecosystem of electronic signatures.

The legislative framework and technical practice connected with the time of signing are especially deserving of analysis since the recent amendments to the eIDAS Regulation are going to influence the ecosystems in all EU countries and there have not been many scientific articles in this field (of particular relevance is technical research into the theoretical possibility of changing the registered time of signing[*9] after the electronic signature is issued). By examining these matters and the larger constellation of related issues, the article contributes also to research in such areas as electronic identification (eID) and trust services in domestic and cross-border transactions. The discussion is based on foundations the author and a colleague laid in an article published in *Juridica* in 2020[*10].

4 Smart-ID, a service provided by SK ID Solutions AS, has been recognised nationally as a qualified e-signature tool since November 2018. An electronic-identification service, it uses an application on a person's phone (itself called Smart-ID) and the Smart-ID system's key-management-server service. Smart-ID credentials can be issued to those persons with an Estonian personal identification code. An expert group appointed by the Information System Authority (RIA) found the assurance level for electronic identification issued to persons with an Estonian personal identification code to be 'high' with Smart-ID. Further details are provided on the Smart-ID Web site <https://www.smart-id.com/et/smart-id/> accessed on 28 February 2024.

5 In 20 years, more than 800 million digital signatures have been produced in Estonia, according to the country's Information System Authority <https://www.ria.ee/en/news/20-years-more-800-million-digital-signatures-have-been-given-estonia> accessed on 28 February 2024.

6 General Part of the Civil Code Act (*Tsiviilseadustiku üldosa seadus*), s 77(3); see RT I 2002, 35, 216; RT I, 6.7.2023, 98.

7 Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on e-identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L257, 28.8.2014, 73.

8 Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 910/2014 as regards establishing the European Digital Identity Framework. *OJ L2024/1183, 30.4.2024*.

9 Further information is available: T Mets and A Paršovs, 'Time of Signing in the Estonian Digital Signature Scheme' (2019) 16 Digital Evidence and Electronic Signature Law Review 40. – DOI: https://doi.org/10.14296/deeslr.v16i0.5076. The author continues closely examining the research and analysing how new amendments to the legislative framework could settle the technical possibility.

10 L Kask and K Laanest, 'Elektroonilise allkirjastamise aja tuvastamine: õiguslikud nõuded ja tehnilised võimalused [Determining the Time of Electronic Signing: Legal Requirements and Technological Possibilities]' (2020) 4 Juridica 294 <https://www.id.ee/wp-content/uploads/2022/10/j_20_4_294.pdf> accessed on 29 March 2024.

2. Time of signature of the declaration of intent and the transaction

2.1. Time of signing in the case of hand-written signatures

A declaration of intention makes the will of a person visible to the/each other party and legally binding; i.e., it expresses the will to entail certain legal consequences. A transaction is an act or a set of interrelated acts within the meaning of Section 67 (1) of the General Part of the Civil Code Act (GPCCA) that includes a declaration of intent to produce a specific legal effect. The statement of intention could be called the core of the transaction, without which no transaction can be concluded.[*11] A transaction may encompass several statements of intent, made by several persons. In particular, an expression of intention might be articulated via such an action as concluding a last will and testament, submitting a draft contract, executing withdrawal from a contract, or proposing modification to a contract[*12]. Statements of intent must be made by an identifiable person, and therefore written statements of intent are signed irrespective of whether a written form is required for either the contract or the statement of intent. Also, a signature is among the forms of expressing the completion of a statement of intent, which results in the transaction being deemed to have been carried out or contributed to by a specific person. That person must understand what they have agreed to, what they have signed, and what consequences follow from their intention.

Section 77 (1) of the GPCCA establishes the freedom of form of transactions, together with the right to prescribe by law or by mutual agreement of the parties the formal requirements applicable to transactions.[*13] Notwithstanding the principle of freedom of form, it is necessary to take account of certain subsequent problems, related to proving the substance of the transaction in the course of judicial proceedings.[*14] Although Estonian law at present does not define the form for a transaction, the form is the external expression of the transaction. The main functions of the requirements imposed as to the form of a transaction are to serve a warning function (to avoid undue haste and thoughtless or careless execution of the transaction), an advisory function (in particular where, for example, a notary's services are employed), and a verification function (to facilitate subsequent ascertainment and verification of the fact of the transaction and its substance).[*15] However, the signature constitutes confirmation of the party's will and gives the other party/parties to the contract or third parties additional assurance that said person has expressed their true will. The authors of the commentaries to the GPCCA have acknowledged that a hand-written signature must be placed at the end of the transaction document, to delimit the extent of the content of the transaction, and that the signing must be expressed in such a way as to enable the signatory to be identified. For the signer's identification, the signatory need not write their full name, nor does evidence that they have made a mistake in producing the signature (e.g., omitting a letter) necessarily preclude identification of the person signing. A signature that is illegible but written in such a way that it can be attributed without doubt to a specific person may be sufficient.[*16] The signature provides information that the making of a declaration of intent has reached its final stage – i.e., that the parties have reached an agreement or that the person in question has become convinced that a transaction is taking place – and that this is being expressed via a signature sufficiently personal to allow the declaration of intent to be attributed to a specific person.

Section 78 provides that, where the law specifies written form for the transaction, the transaction document must be signed in writing by the parties to that transaction. Although the written-form requirement is characterised by hand-signing, the law does not define signature by hand, nor does it mandate that the hand-signing and the legal effect be linked to the time of signature or specify details for this. The intention that is to be confirmed must be identified on a case-by-case basis.[*17] There are, however, special provisions by dint of which it is important that the hand-written document indicate the day and year if it is to comply

11 P Varul, 'Tahteavaldus ja selle tegemine [Declarations of Intention]' (2010) 7 Juridica 497.

12 Ibid.

13 P Varul and others (eds), *General Part of the Civil Code Act, Commented Edition* (Juura 2010) 243.

14 K Sein, 'Tehingu vorminõuded ja nende järgimata jätmise tagajärjed [Requirements for the Format of Transactions and Consequences of Failure To Respect Such Requirements]' (2010) 7 Juridica 510.

15 I refer to the requirements imposed with regard to the form of the transaction as described by Sein (ibid 509).

16 *General Part of the Civil Code Act* (n 13) 248.

17 Ibid 249.

with the formal requirement. For example, according to Section 23 (1) of the Law of Succession Act[*18], a will prepared in one's home must be written from beginning to end in the testator's own hand, indicate the date (including the year) of execution, and be signed by the testator. The same rule applies under Section 42 of the Norwegian Inheritance Act[*19], where it is stated that a will drafted in the home must be in writing, the testator must sign the document, and it shall be dated. In both cases, a last will and testament prepared at one's home cannot be only electronically signed, and there is an explicit aim of the legislator to ensure that the testator and witnesses were physically in the same location at the relevant moment. In the analogue world, in the case of a hand-signed will, the time of signature is important for the expression of the will, particularly where the legal effects of the transaction are linked to a certain period of time. The obligation to indicate the time may also be imposed through an agreement between/among the parties or by their established mutual practice, when the parties consider said agreement/practice to be legally binding.

However, signing the entire document and indicating the time does not in itself necessarily mean that the signature confirms acceptance of all the terms and conditions reflected in the document. For example, the Estonian Supreme Court in civil case no. 3-2-1-144-09[*20] held that the acceptance and/or signature of an invoice does not generally imply that the recipient of the invoice agrees to terms and conditions set out in the invoice that were not agreed upon previously. For the terms indicated in the invoice to become part of the parties' agreement, the invoice should state clearly that its acceptance is intended to encompass agreement to terms not previously accepted. Accordingly, the mere fact of signing a document is insufficient for assessment of the actual intention of the person who signed it. The conduct of that person too must be assessed, as must past practices and customs in activities between/among the parties. The foregoing conclusion is confirmed by the position taken by the Supreme Court with regard to civil case 2-17-14766, according to which the mere fact that a document was signed later rather than at the time stated in the contract (a situation of intellectual forgery) did not exclude the legal consequences arising from the contract.[*21]

It is clear from the above that the law does not define a hand-written signature[*22]; neither does it generally require the time of signature to be specified for transactions. The time of signature is not necessarily decisive with respect to the legal consequences. The Supreme Court has held in its case-law that, as a rule, it is irrelevant in civil law when a document was drawn up and that it having been drawn up later does not preclude the legal consequences from ensuing. There certainly are exceptions, but this description captures the main direction of legal thought.

2.2. Time of signing in an e-signature setting

While in the analogue world the validity of a transaction carried out in writing and authenticated by means of a hand-written signature does not, in general terms, require the time of signature to be linked to the time of the transaction, an electronic form equivalent to a written form imposes additional conditions on the link between the signature and the transaction. According to Section 80 of the GPCCA, electronic form is equivalent to written form.[*23] According to the commentary to the GPCCA, the electronic form is not a separate type of transaction form; it merely is an equivalent that supersedes a written form, unless the law provides otherwise, and its validity requires three conditions to be met.[*24] Firstly, the transaction must be

18 Or 'Pärimisseadus': RT I 2008, 7, 52; RT I, 6.7.2023, 67.

19 Or the Act on Inheritance and Succession of Estates (Inheritance Act) (*Lov om arv og dødsboskifte (arveloven)*) ACT-2019-06-14-21 <https://lovdata.no/dokument/NL/lov/2019-06-14-21/KAPITTEL_2-6-1#%C2%A742> accessed on 28 February 2024.

20 RKTKo 3-2-1-144-09, 17.12.2009 [11].

21 RKTKo 2-17-14766, 9.4.2020 [15]. See also RKTKo 2-16-3785/114, 3.4.2019 [14]; RKTKo 3-2-1-96-13, 23.10.2013 [34].

22 It should be reiterated that this must be written in such a way as to enable the signatory to be identified; therefore, one could argue that three crosses or a single letter is not sufficient for a hand-written signature. Nevertheless, a decree of the Minister of Justice on the list of examinations performed at the Estonian Institute of Forensic Science attests that said institute provides expert opinion on hand-written signatures. Experts resolve identification quandaries related to identification of the signer. See 'Eesti Kohtuekspertiisi Instituudis tehtavate ekspertiiside loetelu [List of Examinations Performed at the Estonian Institute of Forensic Science]' RT I, 8.9.2023, 20; RT I, 7.9.2023, 23 ('Nora Kasemaa ekspertiisibüroo'). A description of the service is available in Estonian at <https://ekspertiisibyroo.ee/et/ekspertiis/kaekirjaekspertiis/> accessed on 29 March 2024.

23 For details, see also CM Laborde, *Electronic Signatures in International Contracts* (Frankfurt am Main, Peter Lang 2010) 2017. – DOI: https://doi.org/10.3726/978-3-653-00124-2.

24 *General Part of the Civil Code Act* (n 13) 250–251.

executed in a form that can be reproduced in a manner allowing for permanent reproducibility; secondly, the medium must include the names of the persons who have entered into the transaction; and, thirdly, there must be electronic signing by those persons (see Section 80 (2) of the GPCCA). Under Section 80 (3) of the GPCCA, an electronic signature must be provided in a manner that allows the signature to be associated with the content of the transaction, the person taking part in that transaction, and the time when the transaction was executed. Therefore, when an electronic signature is used to express an intention, not only the identification of the content of the transaction and the identity of the person, as expressed under the general rule for hand-written signatures, are important; the time of signature too is of relevance.

That said, the legislation does not specify the level of granularity (i.e., the unit of time) or precision to which an electronic signature must be capable of being linked to the time of the transaction such that the condition set is considered to be met. It also does not specify which action[*25] required for an electronic signature is the one that should be linked to the time of the transaction. Neither does the law define the time of the transaction in any other way. But the GPCCA does regulate setting of time limits, which under Section 134 (2) of the GPCCA are stated in numbers of years, months, weeks, days, hours, or smaller time units from the transaction date or by reference to a definite event. This approach could inform determining the time of the transaction also. In the case of an electronic signature, the time of the transaction must be determined in a manner taking into account that the time is given in the signature container to the nearest second. From a legal point of view, it is possible for a due date to be expressed through a time limit calculated in units of time smaller than a day (per Section 136 (10) of the GPCCA), but time limits are not expressed in seconds (or to seconds' granularity) in real-world practice. As for delimiting of days for the purpose of expressing a time limit (per the GPCCA's Section 136 (9)), the relevant span runs from one midnight to the next midnight. Seconds are not relevant here either: expression in hours and minutes indicates whether the relevant statement of intention or document has been filed within the time limit (before '12:00am' or '2400').

Thus the unit of time for determining the time of e-signature can be derived from the law, but the link between the time of e-signature and the time of the transaction is left to practice. Importantly, there is no difference in legal meaning between a hand-written signature and an electronic signature, since, even in an electronic environment, the signing of a document is not sufficient to assess the actual intention of the person who signed it (in that the conduct of the person too must be evaluated, alongside the custom and previous practice established mutually by the parties), since the agreement may be concluded in any manner so long as it is sufficiently clear that the parties have reached an agreement. Signatures used in civil claims differ, depending on the requirements for e-signature. This is discussed in more detail below.

2.3. Making and receiving a signed declaration of intent

If one is to ascertain the meaning of time in the case of an electronic transaction, it is necessary to analyse the rules governing the making and receipt of a signed declaration of intent, since time obtains legal meaning only when the declaration of intent is made and delivered. Since the rules applicable to the declaration of intent do not distinguish between an e-signature and a hand-written signature, the question arises of whether the general rules on the making of a declaration of intent apply to e-signatures.

For execution of a transaction, a declaration of intent is required. According to Section 69 (1) of the GPCCA, a declaration of intent addressed to a specific person must be expressed by the person making the declaration of intent and becomes valid upon receipt. Under its Section 69 (2), a declaration of intention made to an absent person is deemed to have been received and thus become valid when it has reached the addressee's residence or domicile and when the addressee of the declaration of intention has a reasonable opportunity to acquaint themselves with it. The notion of reasonable access refers to the statement of intention having reached the addressee; the burden of knowing its contents rests with the recipient of the statement of intention. In the event of a dispute, the sender of the statement of intent must prove that the statement of intent has entered the 'sphere of influence' of the addressee, except in the case of a notice of breach of contract as provided for in Section 70 of the GPCCA (a notice pertaining to a breach of contract shall be deemed to have been received at the time when it would have been received under normal

[25] For a description of the e-signature process, see 'How To Sign an ID-Card Document in [the] DigiDoc4 Client' <https://www.id.ee/index.php?id=38801> accessed on 28 February 2024. For more information on the steps required to e-sign, see Section 4 of this article.

circumstances if the sender proves that they reasonably expressed their intention). The addressee of the statement of intention, in turn, must prove that they did not receive it if asserting as much.*[26]

If an electronic signature is used, the declaration of intent is sent to the other party electronically. Proving that the declaration has reached its addressee is somewhat easier when an electronic channel rather than a physical channel is used. Nowadays, there is a wide variety of means of transmission available, which in many situations can increase the efficiency of the delivery of information. This is no longer just a matter of sending electronically signed declarations of intent as attachments to email; alternative mechanisms may involve transferring files via third-party 'cloud' platforms (Google Drive, Dropbox, etc.) or social-networking sites (Facebook, WhatsApp, and others). Although the Supreme Court has dealt with the question of when an email message is to be considered received (in civil case 3-2-1-123-07), there is some question as to whether, given the various technical possibilities that have emerged over the years, it is possible to describe the time of receipt in a uniform way across all forms of transmission. The Supreme Court concluded in the case of transmission by email that the email must be deemed to have reached the addressee when it has arrived on the server of the addressee or of the service provider of his or her choice. However, an email message shall be deemed to have been received within the meaning of Section 69 (1) of the GPCCA only when the addressee has a reasonable opportunity to acquaint themselves with it. When the person has a reasonable opportunity to access email or a particular email message with particular formatting, links, scripting, language, etc. depends on the specific circumstances of the case, including whether or not the addressee has a permanent Internet connection. In business and professional activities, a person should be expected to check their email at least once a day. Therefore, in the course of business and professional activities, an email message can be deemed accessible on the day following the day on which it arrived on the server of the recipient or of the recipient's chosen service provider, at the latest.*[27] Though presented in 2007, the position described above is still valid today*[28], irrespective of the fact that the use of the Internet and overall ability to access one's emails have increased and that email typically reaches the final server (the recipient's or service provider's) in a fraction of a second. Therefore, there is no technological justification or any need for revising the position of the Supreme Court according to which a statement of intention sent by email – one of the instruments that fall under the definition connected with an electronic signature – should be deemed to be accessible from the day following the day on which the email is received. Therefore, that position supplies some framing for the meaning of time with regard to when the intention of a party is shown to and accessed by another party.

At the same time, several social-networking applications ('Messenger' services offered by Apple, Facebook, etc.; WhatsApp; and various others) through which documents can be exchanged allow the recipient to see when a message sent to them was first opened. For example, Facebook Messenger shows the time at which each message was read, and WhatsApp indicates whether a file or message has been viewed. While this is standard practice in two-party communication wherein the content of the transaction requires immediate delivery, setting a time for receipt (i.e., a given time at which the message is to reach the recipient's sphere of influence) by agreement is possible for statements of intent sent via innovative technological solutions. For example, with some technological solutions that allow the parties to see the time at which the other person has opened the message and/or that record the time of sending, the parties may link the time of receipt of the expression of intent to the time at which the message is read.*[29] At the same time, activities involving standard contracts must comply with Section 42 (3) (35) of the Law of Obligations Act*[30] (LOA), according to which regulating assessment of the receipt of a statement of intent

26 Varul (n 11) 503.

27 RKTKo 3-2-1-123-07, 21.12.2007 [12]. A somewhat different rule follows from the Draft Common Frame of Reference's art I-1:109(4)(-)(d), according to which a communication sent electronically is deemed to be received if the recipient has access to it – i.e., if email has reached the recipient's server; see also UNCITRAL Model Law on Electronic Commerce 1996, art 15(2); UNIDROIT Principles (Rome 2004) 29.

28 The legislator has introduced exceptions to the general rule that the information must be deemed to have been served. For example, according to s 314^1(1) of the Code of Civil Procedure (RT I 2005, 26, 197; RT I, 19.3.2019, 23), a procedural document sent by means of telecommunication shall be deemed to have been served three working days after its sending.

29 Since 1 January 2013, courts have, in addition, had the right to contact defendants via, for example, Facebook, which should help speed up proceedings. While documents cannot be considered served in these conditions, it is possible to send a notification of service to the Facebook account. For more details, see M Teder, 'Kohtud võivad inimeste leidmiseks ka sotsiaalvõrgustikke kasutada [Courts Can Use Social Networks To Find People]' (*Postimees*, 2 January 2013) <https://www.postimees.ee/1090258/kohtud-voivad-inimeste-leidmiseks-ka-sotsiaalvorgustikke-kasutada> accessed on 29 March 2024.

30 Võlaõigusseadus: RT I 2001, 81, 487; RT I, 8.1.2020, 10.

in a manner different from that provided for by law is unfair and void in the context of standard terms. Obviously, this does not preclude agreeing on a time for making the declaration of intent.*[31]

Although technology makes it possible to find out the time of receipt of the statement of intent and the parties may legitimately agree on the time noted for receipt of the statement, technical capacity and the principle of reasonableness should certainly be considered to dictate the time of receipt of a statement of intent expressed by electronic signature. It may be difficult to read the content of a statement of intent received electronically for reason of a lack of technical capacity. For example, while the validity of an e-signature can be verified by means of specific software, the software involved may be structured somewhat differently from one country to another. In assessment of reasonable opportunity to consult the declaration of intention*[32], factors such as the time needed to set up the technical environment and the person's technical ability to handle such e-signatures must therefore be considered.

It can be concluded, then, that there is no difference in the legal requirements for making and receiving a signed declaration of intent between the analogue world and the electronic domain. In the case of an electronically transmitted statement of intent, the technical mechanisms available provide a wider range of possibilities for verifying the receipt of both signed and unsigned statements of intent.

2.4. Authentication as sufficient means of showing intent in an electronic environment

As more and more transactions get handled via e-services, the differentiation between authentication (using an electronic identity issued by a commercial service provider or by a government) and trust services (using e-signature or e-seal*[33] mechanisms) is gaining importance. A recent study*[34] revealed a strong preference among Nordic countries (expressed the most clearly by Finland, Sweden, Norway, and Denmark) to focus on authentication when considering the cross-border dimension and only after that on electronic signatures. A cross-border web of trust between eID schemes would be the most important element, since more than 90% of residents have means available to them*[35] for accessing e-services while not necessarily possessing an electronic-signature-creation device. In the Nordic–Baltic region*[36] there is a very clear divide: Estonia, Latvia, and Lithuania rely on e-signature for their electronic transactions whereas the other countries have deemed authentication a sufficient means of showing one's intent online. While reasons vary, it has been argued that the use of authentication instead of signatures in services is commonly at the discretion of the service provider and based on risk analysis. In general terms, it can be stated that certain services related to high-risk operations seem to necessitate an electronic signature while the rest may be dealt with on the basis of authentication only.*[37] The associated policy directions affect attitudes to various practical questions surrounding use of e-signatures as well. For instance, if someone has a valid electronic identity but does not possess a device for creating and issuing a valid electronic signature, showing intent online might not even be possible in some cases.

31 The Supreme Court has held, in civil case 3-2-1-151-11, that 'in a contract to which the consumer is the other party, a standard term that provides for the disclosure of a statement of intent contrary to the law and that is detrimental to the other party is unfair' unless either the difference is related solely to the form of expression of the other party's intention or a provision specifies that the address supplied by the other party to the contract to the user of the term may be regarded as the correct address as long as no other address has been communicated to said party. See RKTKo 3-2-1-151-11, 25.4.2012 [12].

32 According to s 7(2) of the LOA, the nature of the obligation and the purpose of the transaction, the customs and practices of the relevant trade or profession, and other circumstances shall be taken into account in the assessment of reasonableness.

33 An e-seal is proof that the e-document has been issued by a legal entity and should provide certainty as to the origin and integrity of the document. While it is not within this article's remit to discuss the legal challenges connected with the time of signing for e-seals, one can conclude readily that similar problems arise. To learn more about the legal framework for e-seals, see L Kask, 'The Electronic Seal As a Solution To Prove the Intent of a Legal Entity' (2021) 30 Juridica International 59. – DOI: https://doi.org/10.12697/ji.2021.30.08.

34 H Hinsberg and others, 'Study on Nordic–Baltic Trust Services' <https://www.digdir.no/internasjonalt-samarbeid/study-nordic-baltic-trust-services/2058> accessed on 1 April 2024.

35 Ibid 48.

36 Those countries being Norway, Sweden, Finland, Iceland, Denmark, Estonia, Latvia, and Lithuania.

37 Hinsberg and others (n 34) 49.

3. Requirements for an e-signature equivalent to signing by hand in EU settings

European Union law too is silent on the time of signature. Prior to the entry into force of the eIDAS Regulation ('the regulation on e-identification and e-transactions'), there was no distinction between levels of e-signatures in Estonia, and such signatures could be divided simply into digital signatures and other electronic signatures. Now, with the eIDAS Regulation, e-signature can be split into several distinct levels of signature provided for therein.[*38] This article focuses primarily on the regulation's provisions dealing with electronic signature that is equivalent to a hand-written signature – i.e., a 'qualified e-signature'.

According to Article 3(12) of the eIDAS Regulation, a qualified e-signature is an advanced electronic signature issued by means of a qualified e-signature-issuing device and anchored in a qualified e-signature certificate. According to the regulation, a qualified e-signature is equivalent to a hand-written signature (per Article 25(2)). Therefore, an electronic signature equivalent to a hand-written signature is an electronic signature that

- complies with the requirements for an advanced e-signature (per Article 26 of the eIDAS Regulation) – i.e., the signature being linked only to the signatory, the signature being capable of identifying the signatory, the signature being issued by means of e-signature data that are only at the disposal of the signatory at a high level of confidentiality, and the signature being linked to the signed data in such a way that any subsequent changes to the data can be identified;
- uses the qualified e-signature-creation tool to create a signature (for example, the chip used for signing must be certified in accordance with Article 30 of the eIDAS Regulation); and
- is based on a qualified e-signature certificate – i.e., it must meet the requirements of Article 28 of the eIDAS Regulation.

Because the regulation is directly applicable, it is impossible to regard an electronic signature that is non-compliant with the requirements for a qualified e-signature that are set forth in the eIDAS Regulation as an electronic signature equivalent to a hand-written signature under national law. The general principle behind the eIDAS Regulation also provides a legal basis for cross-border recognition of e-signatures in the public sector. Where a Member State requires a specific level of e-signature for the use of an Internet-based service provided by or on behalf of a public-sector body, it must likewise recognise e-signatures issued by means of facilities of other countries and service providers, in the format specified in the eIDAS Regulation or using methods specified in the implementing acts for said regulation (see Article 27(2)). Among the implementing acts referred to are the national e-signature implementing acts[*39], which address the standards to which the corresponding e-signatures must be able to be handled by the member states of the European Union. For non-compliant e-signatures, it is up to the country of signature creation to ensure the relevant cross-border processing capability.[*40] What is more, eIDAS 2.0 (see Note 7) will not bring any clarity with regard to the time of signing.

Therefore, European legislation does not create an obligation to determine the time of signature in cases of an electronic signature equivalent to a hand-written signature – i.e., a qualified e-signature. However, it cannot be argued that fixing the time of signature would be in contradiction with the eIDAS Regulation either, since one of the requirements for a qualified electronic signature is that the signature be linked to the signed data in such a way that any subsequent changes to the data can be identified. Also, it can be implicitly inferred from the requirements that some time component of the signature must be fixed, relative to which subsequent changes must be fixed. For Estonia, the national obligation to determine the time of signature is

38 Further information on e-signature levels is available from L Kask, 'E-Eestist e-Euroopasse: elektrooniline allkiri riigisiseses ja piiriüleses suhtluses [From E-Estonia to E-Europe: Digital Signature in National and Cross-Border Communication]' (2017) 10 Juridica 675.

39 Commission Implementing Decision (EU) 2015/1506 of 8 September 2015 laying down the specifications of the advanced e-signature and advanced e-stamp formats pursuant to Articles 27(5) and 37(5) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on e-identification and trust services for electronic transactions in the internal market [2015] OJ L235, 9.9.2015, 37 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2015_235_R_0006> accessed on 29 March 2024.

40 M Erlich, 'e-Allkirjad Euroopas ja nende käsitlemine Eestis: Juhend ja nõuanded e-allkirjade käsitlemiseks [E-signatures in Europe and Their Treatment in Estonia: A Guide and Advice on Handling E-signatures]' <https://www.ria.ee/sites/default/files/documents/2022-11/EL-e-allkirjade-kasitlemine.pdf> accessed on 29 March 2024.

rooted in Section 80 (3) of the GPCCA. Again, neither the eIDAS Regulation nor national law defines what is to be considered the time of signature, however.

4. Technical components of an e-signature equivalent to a hand-written signature

4.1. Technical creation of an e-signature equivalent to signing by hand

Before one can develop an assessment addressing which of the e-signature operations should be linked to the time of the transaction, one must be familiar with the technical components used to create the e-signature.

The technical creation of a qualified e-signature is guided by numerous international standards, in addition to the requirements of the eIDAS Regulation and the legislation in place that governs transactions. Implementation of international standards ensures that the signature-creation components comply with the requirements laid out in the eIDAS Regulation and provide a high level of security and interoperability of trust services. With respect to the key linked to the e-signature-creation components that is equivalent to that for 'self-signing', the standards of the European Telecommunications Standards Institute (ETSI), as recognised in the implementing act[*41] for the eIDAS Regulation, are central. In Estonia, XAdES e-signatures and ASiC e-signature containers conforming to ETSI standards predominate, but the structure of all the other e-signature formats follows analogous logic.[*42]

If one wants to determine the time of e-signature, it is appropriate to discriminate among the timestamps of three components to the e-signature:

- the fixed time supplied by the e-signature-creation device, such as a personal computer or a service provider's server (denoted as the claimed time);
- the e-signature time that is obtained from the timestamp received from the trust-service provider;
- the time of the request for confirmation of an e-signature certificate's validity (generated via the Online Certificate Status Protocol).

The timestamps associated with these e-signature components are visible to the person in question via the DigiDoc software applied for Estonia.[*43]

The first component mentioned above, the fixed time from the device or the server of the service provider used by the person to e-sign, employs a value set at the time of e-signing (PIN2 or PIN entry for e-signing). Technically, this is the time the device has captured for when the signatory 'claims' to have e-signed.[*44] The time fixed by the e-signature-creation tool or the service provider's server is stored in the e-signature container when the PIN2 value or signature PIN is entered, and the signature created thereby cannot be changed without harm to the technical signature chain. At this juncture, it is necessary to immediately consider the fact that the fixed time from the e-signature-creation device might not be accurate. A person can change the time on his or her device manually, in addition to which the accuracy of the timestamp generated by that device can be affected by external factors without the user's knowledge. The fixed time from the e-signature device could be compared especially pertinently to the date someone marks in the

41 According to Commission Implementing Decision 2015/1506 (n 33), the advanced e-signatures referred to in art 1 must comply with one of the ETSI technical specification sets mentioned in the decision.

42 'Electronic Signatures and Infrastructures (ESI); XAdES Digital Signatures; Part 1: Building Blocks and XAdES Baseline Signatures' (ETSI EN 319 132-1 v. 1.1.1, April 2016) <https://www.etsi.org/deliver/etsi_en/319100_319199/31913201/01.01.01_60/en_31913201v010101p.pdf> accessed on 29 March 2024; 'Electronic Signatures and Infrastructures (ESI); Associated Signature Containers (ASiC); Part 1: Building Blocks and ASiC Baseline Containers' (ETSI EN 319 162-1 v. 1.1.1, April 2016) <https://www.etsi.org/deliver/etsi_en/319100_319199/31916201/01.01.01_60/en_31916201v010101p.pdf> accessed on 29 March 2024. In addition to DigiDoc, components are visible through alternative e-signature validation applications.

43 DigiDoc software allows the user to open digitally signed documents, check the validity of signatures, and digitally sign and encrypt data. See the software's documentation from the State Information System Authority, 'eID lõppkasutaja rakendused' <https://www.ria.ee/et/riigi-infosusteem/eid/digidoc-tarkvara.html> accessed on 28 February 2024.

44 The ETSI standard describes the time fixed by the e-signature facility thus: 'The SigningTime qualifying property's value shall specify the time at which the signer claims to hav[e] performed the signing process.' See 'Electronic Signatures and Infrastructures … XadES' (n 42) para 25.

signature block of a physical document to be signed: the date marked may or may not coincide with the actual time of signature.

The second time component, from the timestamp[*45] request to the trust-service provider, gets created immediately after the signer enters PIN2, which is required for the signature to be created.[*46] The timestamp serves to associate the electronic signature data with a specific point in time, so as to prove the existence of the transaction and the e-signature data at the time of the timestamp request. A timestamp can be likened to an envelope in the analogue world, with information inside and a stamp on the outside postmarked to indicate roughly when the information was put inside. It cannot be used as proof of when the information itself was documented. Although Estonian practice equates the time of the timestamp request with the time of the signature, one must recognise that the timestamp request cannot be used to verify what world time[*47] was in force at the moment when the person confirmed their will by entering their PIN2. The timestamp query indicates a fixed time reflecting the actual time of the world, but the event preceding it – the basic signing – has already taken place.[*48]

Thirdly, since a qualified e-signature is valid only if the qualified e-signature certificate is valid at the time of issuance, a validity-confirmation request is placed with the trust-service provider after the timestamp request, to check the validity of that certificate. The validity-confirmation query allows requesting information on the validity of certificates in real time – but only this. Hence, the query does not retrospectively address whether the certificate was valid at either the time stated by the e-signature facility or the time of the timestamp request; it covers purely the validity of the certificate at the time of the request.[*49] For an additional technical verification measure, the DigiDoc software compares the timestamp from the e-signature facility with the timestamp connected with the validity confirmation query. If there is a mismatch (a difference of more than 15 minutes), the signature-generation chain is broken, and a qualified e-signature container cannot be created.

In Estonia, all three components are used, in the order presented above, for the creation of an e-signature, and the timestamps from all three components are stored in the associated, set sequence in the e-signature container. In the 'front-page' view of the e-signature container, the Estonian DigiDoc software displays the time of the timestamp request as the time of e-signature creation, while a detail-level view of the container shows all three times. Since the timestamp request and the validation request are, in accordance with Estonian best practice, made immediately after PIN2 is entered via the e-signature device and the time between the timestamp request and the certificate-validation request hence cannot reasonably be more than 15 minutes, all three components generally refer to the same date, so disputes about the date of signature very seldom arise.

However, in the case of an e-signature that has already been created, it is possible to perform a timestamp enquiry and a validity-confirmation query again. After that later point, the timestamps stored in the e-signature container get updated[*50], while, the initial time from the e-signature device is preserved, unaltered. At present, though, the author is not aware of anyone, outside theoretical studies, who has distorted the true facts of the transaction by re-timestamping the e-signature or by querying the validity of the e-signature such that legal disputes have ensued. Furthermore, doing so has no practical value anyway,

45 The eIDAS Regulation's art 3(33) states that 'electronic timestamp' means data in electronic form that bind other data in electronic form to a particular time, thereby establishing evidence that the latter data existed at that time. The technical solutions permit a situation wherein the signature may have been provided at any time before the time indicated in the timestamp, provided that the signature-creation data and the corresponding certificate already existed at that time. For a solid understanding of the various technological challenges connected with this, the reader is directed to the doctoral dissertation of A Parsovs, 'Estonian Electronic Identity Card and Its Security Challenges' <https://cybersec.ee/storage/phd_idcard.pdf> accessed on 28 February 2024.

46 In the previous system, using TimeMark signatures, the timestamp request was merged with the validity-confirmation request.

47 For more information on world times, in Estonian, see 'Maailmaaeg' <https://et.wikipedia.org/wiki/Maailmaaeg> accessed on 28 February 2024.

48 The ETSI standard defines timestamp requests in the same way: the term '"electronic time stamp" means data in electronic form which binds other electronic data to a particular time establishing evidence that these data existed at that time […]. Containers for electronic time-stamps proving that some or all the signed data objects have been created before [a] certain time instant.' See 'Electronic Signatures and Infrastructures … XAdES' (n 42) para 5.3.

49 The nature of the certificate-suspension scheme renders it impossible to obtain information on whether a certificate was valid at a specific instant any time in the past through a validity-confirmation query.

50 Mets and Paršovs (n 9) 44.

since the e-signature container in the possession of the person making the declaration of intent in the case of a multilateral transaction can be used by the latter person to prove when the request was actually made, and, furthermore, making a declaration of intent in an electronic environment always necessitates utilising some medium or channel to deliver the declaration of intent, which applies its own stamping/logging. Even if the person making the declaration does not have the original container of the e-signature any longer, it is possible to request the necessary information from the trust-service provider, who is responsible for maintaining a record of the timestamp requests and validation requests. This is not discretionary: under Section 5 (3) of the Electronic Identification and Trust Services for Electronic Transactions Act*[51] (EUTS), a qualified trust-service provider is obliged to document the activities carried out during its provision of the trust service and to keep a record of these activities for a period of 10 years from the creation of the record. In this connection, it is important to stress that a later request cannot change the time of the timestamp request in the e-signature container from the original one when adding the time of the new request. This is a vital aspect of the infrastructure.

4.2. Establishing the link between an e-signature equivalent to hand-signing and the time of the transaction

The requirement for a link to the time of e-signing is derived from Section 80 (3) of the GPCCA, discussed above. In the case of the three time components described in Subsection 4.1, distinctions must be drawn with regard to the manner of linking to the time of the transaction. At the moment at which the person e-signing enters the PIN2 value and the timestamp generated by the e-signature-creation device is fixed, an invariable, complete chain is created that links the identity of the signatory, the time stored by the e-signature-creation device, and the content of the transaction. In legal terms, an e-signature thus created fulfils the conditions for an electronic-form transaction that are set out in Section 80 (2)–(3) of the GPCCA (with the reservation that the time recorded by the e-signature device may not be accurate). Since the time of the e-signature cannot be considered wholly reliable, the practice in Estonia is to take the time of the timestamp request instead as the time of the qualified e-signature. The time of that request corresponds to the actual Universal Time (i.e., Greenwich Mean Time) point at which the transaction and the e-signature data were verified.

Alternatively, one could consider the time of requesting validity confirmation for the qualified certificate for the e-signature to be the time of e-signature issuance, because at that moment there exists, in addition to the timestamp, confirmation of the validity of the certificate. While the certificate-validity-confirmation query plays a central role in the validity of the qualified e-signature – in that this query is important for proof that the certificate is valid and that the e-signature issued meets the conditions for a qualified e-signature – it should not, however, be considered the time of issuance of the e-signature.

It follows from the foregoing reasoning that linking the act of e-signature to the time of the transaction within the meaning of the GPCCA's Section 80 (3) is problematic and requires consensus. The search for a solution is made more difficult by the fact that the legislator's intention in linking the e-signature to the time of the transaction is unclear in substance. Questions arise as to which fixed point in time from a component should constitute the link to the time of the transaction, and in what way, with the distinct levels of e-signatures being taken into account also.

Linking the time of the e-signature to the time of the transaction has long formed the starting point in Estonian practice for e-signatures equivalent to hand-written signatures. Therefore, from the standpoint of legal certainty (but also from the perspective of the reliability of transaction execution), the author does not consider it expedient to abandon fixing of a time associated with the e-signature altogether. One possibility could be to consider interpreting the mandatory time component articulated in the current Section 80 (3) of the GPCCA as a timestamp request whereby the person can prove, in addition to the existence of the transaction and the e-signature data, the declaration of intent having truly been made. At the same time, it should be borne in mind that lower-tier e-signature mechanisms are in circulation, ones for which there is no requirement to bind the time of making the declaration of intent to the time of the transaction. Alternatively, the time set by the e-signature-creation device could be considered sufficient (since lower-tier e-signatures do not entail making any additional requests to trust-service providers). A final consideration is that it is

[51] E-identimise ja e-tehingute usaldusteenuste seadus: RT I, 25.10.2016, 1; RT I, 12.12.2018, 30.

impractical to waive the requirement for some time of signature: having a precise time of signature allows signatures to be machine-processed in an integrated, automated fashion. For automatic data exchange, information systems must be able to rely on agreed time formats.

Given that the eIDAS Regulation does not, as Section 80 (3) of the GPCCA does, require linking of the e-signature to the time of the transaction, the appropriateness of the Estonian legislator requiring this in such an imperative form is cast into doubt, though. If, when the eIDAS Regulation entered into force in 2016, the system of e-signatures regulated by the Digital Signatures Act had been reorganised, the legislator could also have considered revising the regulation of electronic-form transactions directly related to the e-signature. In addition, one should remember that, while the legal obligation for cross-border recognition of e-signatures equivalent to hand-written signatures stems from the eIDAS Regulation, the process of creating an e-signature is structured differently from country to country. Both the content of the e-signature container and the technical process of creating an e-signature may differ greatly.[*52]

5. Practical problems in identifying the time of e-signing equivalent to hand-signing

5.1. The time-verification impact of suspending the certificate for e-signature equivalent to hand-written signature

If someone has lost their e-signature document, it has been stolen, or the person suspects that it may be misused, the certificates connected with the source electronic document can be suspended. The certificate is electronic proof that links the data necessary to authenticate the person and the digital signature and that confirms that person's identity. In the case of mobile identification solutions, the certificates are not stored on the SIM card. As with ID-card-based solutions, these utilise two certificates, one for authentication and the other for signing.[*53]

Articles 28(5) and 38(5) of the eIDAS Regulation give Member States the right to introduce national rules that take into account the regulation's requirements, with eIDAS Recital 53 going on to explain that suspension of qualified certificates is a well-established practice among trust-service providers in several Member States. This differs from revocation in that it only leads to the temporary invalidity of the certificate in question. The provisions that the EUTS makes for suspending a certificate are similar to those previously found in Section 12 of Estonia's Digital Signature Act[*54]. According to Section 9[5] of the former IDA, the issuer of the document (the Police and Border Guard Board and the Ministry of Foreign Affairs) may, under the conditions set out in sections 17 and 18 of the EUTS, suspend the certificate tied to the identity document and restore the validity of a suspended certificate. With the former, the EUTS gives the trust-service provider the right to suspend the validity of a trust-service certificate if there is a suspicion that false data have been entered for the certificate or that the private key corresponding to the public key held in that certificate can be used without the consent of the certificate-holder (see Section 17 (1)). Correspondingly, according to the explanatory memorandum on the EUTS, discretion to suspend a certificate is granted to the trust-service provider if there is a suspicion that incorrect data have been entered for the certificate or that a private key corresponding to the public key contained in the certificate can be used without the consent of the certificate-holder. A formal procedure involving filing a petition is not appropriate in these cases, because certificates may have to be suspended swiftly if major damage is to be prevented (e.g., if an ID card and the associated PINs are lost), and expeditious means must be possible – for example, involving a telephone call. Processing an application, in contrast, is a longer and more time-consuming procedure.[*55]

52 For reasons of space, the technical components of e-signatures in individual countries and their national legislation on signature timing are not examined in this article.

53 State Information System Authority, 'Sertifikaadid [What Certificates Are]' <https://www.id.ee/index.php?id=30228> accessed on 29 March 2024.

54 Digitaalallkirja seadus: RT I 2000, 26, 150; RT I, 14.3.2014, 12 (invalid).

55 See the explanatory memorandum on the draft act for the law on e-identification and e-transaction trust services, 237 SE: 'E-identimise ja e-tehingute usaldusteenuste seadus 237 SE' <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/323afaca-cb96-4118-a675-2a2db388141e/> accessed on 29 March 2024.

In the interests of legal certainty, it is necessary that the status of the certificate (valid, suspended, or invalid) always be clear, which is why a validity-confirmation check is carried out for the certificate, the time of which is captured for the e-signature container. In the case of suspension of a certificate, trust-service providers has to honour an obligation to indicate the exact span for which the certificate has been suspended.[*56] Pursuant to Section 17 (3) of the EUTS, once a certificate has been suspended, the trust-service provider must promptly enter the details of the suspension in the certificate database it maintains and must keep records of the timing, reason, and applicant connected with the suspension and any termination of that suspension. Consequently, whenever a trust-service provider suspends certificates, a specific span of time during which the certificates remain suspended shall be specified, case-specifically.[*57] Technically, it is possible to begin creation of an e-signature even if the certificate is suspended, since the e-signature-creation tool can create a basic signature and can perform a timestamp request, but the maximum time lag that Estonia specifies between a timestamp request and a request for confirmation of the validity of a certificate renders it highly unlikely in practice that the certificate was in a suspended state at the time of the timestamp request but its validity had been restored by the time of the confirmation request. There is no expectation of ultimately generating a qualified e-signature when one starts with a suspended certificate.

For querying the suspension status and validity of a certificate, a check involving validity confirmation for the person's certificate is made against the certificate database maintained by the trust-service provider (e.g., SK ID Solutions AS in Estonia); this prompts a procedure checking whether the certificate used to issue the e-signature was valid at a specific point in time, and the time of this status query gets added to the e-signature container. Because the conditions for a qualified e-signature require that the e-signature certificate be valid at the time of that e-signature (i.e., at the time of e-signing equivalent to signing by hand), issuing an e-signature with a suspended certificate is rendered impossible, and any e-signature somehow issued while a certificate is suspended is invalid according to Section 17 (5) of the EUTS. Suspension of a certificate generally occurs only in isolated cases, but Estonia has experienced large-scale certificate suspensions too: in 2017's 'ID-card crisis'[*58] caused by the ROCA vulnerability, 760,000 individuals had their ID-card certificates suspended.[*59] Although it could be argued that the permissibility of suspension is one of the main factors enabling remote renewal of one's ID card, without individuals having to exchange documents physically, recent discussions have nonetheless led to a proposal to cancel the option of suspension.

The draft law to amend the IDA[*60] includes elimination of the possibility of suspending these certificates. The main reason is the existence of a theoretical possibility of creating a cryptographic signature with a suspended certificate such that, when the validity of the certificate is restored, it is not possible to identify that the signature was produced while the certificate's validity was under suspension.[*61] This scenario runs counter to the requirement stated in Article 32 of the eIDAS Regulation with regard to the validation of a qualified e-signature, because there is no way to verify with full certainty whether the certificate was indeed valid at the time of signing. Should the newly proposed amendments be adopted, the possibility of suspending and later restoring the validity of a certificate therefore will no longer exist for any identity documents issued under the IDA, from 1 November 2025 onward.

Since suspension has been employed as a convenience measure in the lightweight process described above, researchers have sought to prove that the same level of convenience can be reached by means of the revocation mechanism. They have answered in the affirmative, assuming the use of a technical solution that allows the signer to obtain a new certificate without having to replace the existing qualified-signature-creation device.[*62] So far, solutions of this kind have been utilised only to rectify security flaws.

56 See the eIDAS Regulation's recital 53.

57 K Laanest and L Kask, 'ID-kaardi turvarisk: Õiguslikud probleemid [Legal Issues Related to ID-Card Security Risk]' (Tallinn, 2017) <https://www.ria.ee/sites/default/files/content-editors/publikatsioonid/id-kaardi-turvarisk-oiguslikud-probleemid.pdf> accessed on 28 February 2024.

58 For more information on suspension of certificates and on termination of that suspension, see Laanest and Kask (ibid).

59 For details, see the ID.ee page on Estonia's suspension of nearly 760,000 ID-card certificates from the evening of 3 November 2017 (2 November 2017) <https://www.id.ee/index.php?id=38339> accessed on 28 February 2024.

60 A list of IDA amendments is available online, under the heading 'Isikut tõendavate dokumentide seaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus' (23 January 2024) <https://eelnoud.valitsus.ee/main#fHAkf6ru> accessed on 29 March 2024.

61 Ibid. See the explanatory memorandum's para 18.

62 Mets and Paršovs (n 9) 49.

5.2. Agreement on identifying the time for an e-signature equivalent to a hand-written signature

In practice, problems may arise in situations wherein the entry into force of a contract or the time at which it is deemed to have been concluded is linked to the time at which e-signing is performed. According to Section 11 (2) of the LOA, a contract shall not be deemed to have been concluded before it has been given any prescribed form specified by agreement between/among the parties or requested by one of the parties as the form in which the contract must be concluded. According to Article 25 of the eIDAS Regulation, an e-signature shall not be declared legally invalid or inadmissible in legal proceedings merely because it is in electronic form or does not meet the requirements for an e-signature equivalent to a hand-written signature – i.e., for a qualified e-signature. Associated common practice is not to express the time in the letter of intent or the contract but to use wording such as 'the contract is deemed to have been concluded upon digital signature' or 'the contract takes effect upon digital signature by both parties' and leave it to the parties to determine the time of signature. This approach is supported by Section 11 (4) of the LOA, under which a written contract is deemed to have been concluded when the contracting parties have signed the contract document or have exchanged contract documents or letters signed by both parties. If the time of signature is undefined and technically expressed with significantly different timestamps, a question may arise as to whether the contract has entered into force or at least when the contract must be fulfilled. Whilst the date is generally sufficiently relevant for determining the time, there may exist time-critical agreements whose time of signature makes it possible to ascertain whether a party to the transaction was late with finer granularity. Any inter-party practice established, alongside the channel through which the statement of intent or contract is presented to another party, plays an important role here. One possibility, however, is to indicate in the letter of intent or the contract the time from which the parties wish the legal consequences to be realised.*[63] Since the timestamp request and the validation request get made immediately after the PIN2 credential is entered to the e-signature device and the timestamp request and the request for validation of the certificate cannot be more than 15 minutes apart, the times of all three components generally coincide such that there is usually no dispute about the date of signature. Where minutes too are relevant for a fact subject to dispute, the author considers it the most reasonable to rely on the time of the timestamp request, which points to the actual time in the world, to pinpoint the time at which the person expressed their will and whether it was related to the circumstances underlying the expression of that will.

6. Conclusions and implications

The central conclusion from comparing signing and timing in the analogue world with their equivalents in an electronic environment is that, as a rule, determination of the time of signature is not necessary from the perspective of the legal consequences and is not required by law. From a civil-law point of view, when the agreement-expressing document was drawn up is irrelevant and the formalisation of an agreement subsequently as a document does not preclude the timing-related legal consequences. While signing by hand is necessary for compliance when a written-form requirement exists and while said signature should be placed at the end of the transaction document to indicate the content and scope of the transaction, a hand-written signature is not legally defined and stating the time of signature is required only in those cases for which the law renders it mandatory. In an electronic environment, contrastingly, the requirement to sign does necessitate specifying the time of signature. Nevertheless, no definition is given for the time of signing and, as in the analogue world, it is necessary to assess the behaviour of the person in question, in conjunction with the custom and practice previously established or agreed upon between/among the parties, to evaluate the real intention of the person.

Neither the eIDAS Regulation nor the recent amendment of the EU's regulation on European electronic signatures mandates setting a time for signing. In addition, the GPCCA requiring a time for signature does not contradict the eIDAS Regulation, since the latter regulation can be read as entailing an implicit requirement for a fixed time component. As for which of the e-signature operations should be linked to the

[63] T Mets and A Paršovs (n 9) have also come to the conclusion that the legally relevant dates (time) could still be indicated in the document to be signed.

time of the transaction, the paper's analysis focusing on the process of creating an e-signature equivalent to a hand-written signature provides a starting point.

The linking of the act of e-signature to the time of the transaction within the meaning of Section 80 (3) of the GPCCA is not defined in substance. From the legal-certainty standpoint and in the interest of smooth and reliable execution of transactions, it is not expedient to waive fixing of a time for the e-signature. Still, consideration should be given either to amending the law or to interpreting the practice in such a way that the time of the timestamp request could be regarded as the mandatory time provided for by Section 80 (3) of the GPCCA. Although technical shortcomings would still remain, accepting the proposed elimination of the possibility of suspending the certificate for electronic signature would help to overcome the technical possibility of discrepancies related to time spans for which signature are not valid. Also, since the eIDAS Regulation mandates a certain level of cross-border recognition of e-signatures, cross-border practice should certainly be taken into consideration. As analysis of conditions in the Nordic–Baltic region revealed, the signer might not even have an electronic-signature-creation device, and many of the region's operators and countries deem authentication together with the technical logs for transactions sufficient to attest to intent in an electronic environment. Conditions such as these certainly are affecting the evolving practice of using e-signatures in both national and cross-border transactions.

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Preserving Secrecy within the Patent System to Safeguard Western Countries' Technological Innovation[*1]

Abstract. Russia's aggression in Ukraine has brought patent-policy debates into sharp focus with regard to secrecy. Russian violations of international and multilateral agreements on intellectual property have drawn significant attention and highlighted potential risks pertaining to safeguarding of technological innovation by Western countries, not least European Union member states. Against this backdrop, the article reflects on the secret-invention regulations in place and opportunities to keep an invention secret under European patent law. While the concept of a secret invention may appear contradictory to the patent system's primary aim – disclosure – secret patents are nothing new in the history of patenting. The paper presents a recommendation to expand the scope of secrecy in current patent law, thereby allowing Western countries to implement sufficient counter-measures in response to adversaries' flouting of international intellectual-property law. The article directs particular attention to expansion of this secrecy's scope to the technical description of a patent application involving dual-use inventions.

Keywords: patent, secrecy, intellectual property, invention, technological innovation

1. Introduction

Rapid technological development and shifting political landscapes have introduced new risks to Western companies' intellectual property[*2] (IP) and technological innovation. In current conditions, the economy and security are growing increasingly interconnected and woven into geopolitical competition. Technological innovation creates new vulnerabilities in infrastructure and services crucial for the functioning of the state while also opening doors to external threats. Further complicating matters, the IP field covers a broad range

1 The author would like to thank Professor Aleksei Kelli and Professor Tõnis Mets for their assistance.

2 Intellectual property is defined as 'rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields' under the Convention Establishing the World Intellectual Property Organization (signed in Stockholm on 14 July 1967 and as amended on 28 September 1979) <https://www.wipo.int/wipolex/en/text/283854#P50_1504> accessed on 20 March 2024. Traditionally, it is divided into three categories: copyright, related rights, and industrial property. This paper focuses primarily on industrial property. Particular attention is given to patent law.

of technical knowledge and expertise, much of which companies consider private information that helps distinguish them from their competitors.[*3]

The values of some third countries, with Russia being prominent among them, differ significantly from those of the European Union (EU) and other Western players. The North Atlantic Treaty Organization[*4] (NATO) has stated that Moscow's behaviour reflects a pattern of aggressive actions by Russia against its neighbours and the transatlantic community at large.[*5] Moreover, Russia's recent actions, including various violations of international and multilateral agreements in the IP field, have underscored potential risks. In March 2022, the Russian Federation passed a decree allowing local companies and individuals to use inventions, utility models, and industrial designs of patent-holders from 'unfriendly countries' without their consent or any compensation: Decree 299[*6]. Therefore, one can conclude that Russia is following an antagonistic strategy of deploying technology to expand its sphere of influence, which it refers to as gaining technological sovereignty.[*7]

The Russian invasion of Ukraine brings technological innovation's protection sharply into focus. Fruits of this innovation can be protected under patents, which give the inventor certain intellectual property rights (IPRs) in return for disclosing the invention to the public. Keeping inventions secret has become a policy imperative not only for the countries involved in the war in Ukraine but also for those nations seeking to assert their role as geopolitical leaders in the years ahead.[*8] It should be pointed out that measures to keep strategic inventions secret should be adopted at the EU or NATO level. Most companies are not expected to refrain from patenting for the sake of enhanced transatlantic security. Also, it has become evident in the course of the Ukraine war that several businesses have continued their activities in Russia without regard for sanctions, with their main goal being profit. Measures at state, regional, and international levels are pivotal. These are particularly relevant for so-called dual-use inventions.[*9]

This paper focuses on what lies at the core of secret (or 'classified') patents in patent law. The aim is to explore whether extending the concept of secret patents, with its origins in the international agreement for mutual safeguarding of the secrecy of inventions related to defence for which patent applications have been filed[*10], could pave the way for protecting the transatlantic knowledge base and keeping it secure. That agreement is discussed in greater detail in the article's Section 2. Underpinning all patent systems is a rationale under which the public availability of information about some inventions must, in certain circumstances, be prevented for national-security reasons.[*11] The protection of secret inventions specifically under European patent law is discussed in the article's third section, against the backdrop of examples from Estonian[*12] patent law.

The central argument here is that the objective for the IP system should not be limited to rewarding innovation and ought to express an aim also of protecting and enhancing the technological knowledge base of Western countries. This implies that countries not supporting the international framework for IP protection should not be able to copy inventions from disclosed patent documents for their benefit.

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3 Oksana Kashyntseva, 'How To Be Prepared for the Membership in NATO with the Perspective of Intellectual Property' (2022) 5 Theory and Practice of Intellectual Property 103, 105. – DOI: https://doi.org/10.33731/52022.270913.

4 See the North Atlantic Treaty (4 April 1949) <https://www.nato.int/cps/en/natohq/official_texts_17120.htm> accessed on 20 March 2024.

5 'NATO 2022 Strategic Concept' 1 <https://www.nato.int/strategic-concept/> accessed on 14 March 2024.

6 Decree of the Government of the Russian Federation of 6 March 2022, no 299, on 'amending item 2 of the methodology for calculation of the compensation amount to be paid to a patent-owner in consequence of a decision to use an invention, utility model, or industrial design without the patent-owner's consent, and the procedure for its payment' <http://publication.pravo.gov.ru/Document/View/0001202203070005?index=1> accessed on 22 June 2024.

7 For further discussion, see Anna Nadibaidze, 'Understanding Russia's Efforts at Technological Sovereignty' (2022) Foreign Policy Research Institute paper <https://www.fpri.org/article/2022/09/understanding-russias-efforts-at-technological-sovereignty/> accessed on 20 March 2024.

8 Duncan Matthews and Hanna Ostapenko, 'The War in Ukraine Raises Questions about Patents for Secret Inventions' (2023) 72(7) GRUR International 665. – DOI: https://doi.org/10.1093/grurint/ikad042.

9 Defining dual-use items is especially relevant for export control. Dual-use items are specified as 'goods, software and technology that can be used for both civilian and military applications': European Commission, 'Exporting Dual-Use Items' <https://policy.trade.ec.europa.eu/help-exporters-and-importers/exporting-dual-use-items_en#:~:text=Dual%2Duse%20items%20are%20goods,both%20civilian%20and%20military%20applications> accessed on 20 March 2024.

10 Agreement for the Mutual Safeguarding of Secrecy of Inventions Relating to Defense and for Which Applications for Patents Have Been Made (UN treaty 5664, 21 September 1960) <http://treaties.un.org/doc/Publication/UNTS/Volume%20394/volume-394-I-5664-English.pdf> accessed on 20 March 2024.

11 Matthews and Ostapenko (n 8) 665.

12 Estonia is taken as an example since the author has a suitably extensive understanding of Estonian patent law.

The contention, then, is that expanding the scope of secrecy in patent law necessitates concluding that, for the sake of keeping sensitive information secret from the public, some portion of a patent application shall not be disclosed in public patent registers. That portion consists primarily of the technical description of a dual-use invention. An inventor restricted from commercialising the invention should be compensated for losses that arise from that restriction. Though this is far from incidental, the subject of compensation for secret inventions is not within the scope of this article, on account of limitations related to the volume and the focus of the paper. Therefore, the topic of compensation shall be discussed in connection with further research.

The discussion below relies on traditional legal methods such as legal analysis, with assessment based on examination of regulatory instruments, policy documents, and theory-oriented research literature.[*13]

2. The intersection of patents and secrecy

The concept of a secret invention may appear contradictory to the primary aim and rationale of the patent system. Namely, said system is purported to incentivise inventors to reveal their inventions rather than keep them secret, with patents therefore being frequently characterised as a form of social agreement. Under that agreement, society bestows upon inventors a temporary monopoly and specific rights in exchange for disclosure of their secrets. However, in conditions of threats acting in opposition to Western countries' technological security, secrecy in the patent system can help prevent adversaries' misappropriation of technological innovation.

Secret patents are not a new phenomenon in national patent systems. From a historical perspective, security-classified patents have their origins in the early years of World War I, which propelled the extension of secrecy to patenting in France, Germany, the United Kingdom, and the United States.[*14] In the course of that war and World War II, it became increasingly apparent that disclosure pertaining to those inventions most beneficial to the developers' governments in wartime could convey helpful information also to the enemy, about said nations' military capabilities.[*15] Secret patents emerged in response to the conflicts of war, for protection of a nation's security.

Patent applications are generally published up to 18 months after either the filing date or the earliest 'priority date' of the patent application.[*16] Before that publication, the application is confidential to the patent office with which it was filed. Even when such delays are imposed, however, requiring the disclosure of inventions through patents poses a significant risk to innovative companies, potentially diminishing their competitive edge and technological foothold. If disclosure represents an existential threat, it is reasonable to expect the inventor to opt for secrecy instead of mere delays to revealing the information.[*17]

At this juncture, it is essential to point out also that inventions that might merit security-based classification are being developed more extensively than ever before in the private sector. In connection with the pattern identified, reports indicate that the balance of financial support for associated research and development activities has shifted from government funding to private funding. In telling evidence of this, nearly 70% of all business-based research and development in the largest OECD[*18] countries before 1970 was directly funded by government entities, but the figure had dropped to roughly 10% in 2018.[*19]

13 Full disclosure of methods also requires acknowledging utilisation of OpenAI's ChatGPT and Grammarly to improve sentence structure and the effectiveness of the communication in draft versions of the paper. The substance of the output nonetheless is exclusively the author's own work. It bears reiterating that all aspects of the analysis and core insight are fruit of that human work.

14 John A Martens, 'Secrecy in the USSR and German Democratic Republic Patent Systems' (2021) 14 <https://www.ssoar.info/ssoar/bitstream/handle/document/74323/ssoar-2021-martens-Secrecy_in_the_USSR_and.pdf> accessed on 15 March 2024.

15 Gregory Saltz, 'Patently Absurd: The Invention Secrecy Order System' (2022) 8(2) Texas A&M Journal of Property Law 211, 215. – DOI: https://doi.org/10.37419/jpl.v8.i2.6.

16 European Patent Convention (5 October 1973) art 93 <https://www.wipo.int/wipolex/en/treaties/details/226> accessed on 20 March 2024.

17 Juliana Pavan Dornelles, 'Why Are They Hiding? Patent Secrecy and Patenting Strategies' (2020) 22(3) Innovation: Organization & Management 313, 317. – DOI: https://doi.org/10.1080/14479338.2019.1685886.

18 See the Organisation for Economic Co-operation and Development Web page <https://www.oecd.org/about/> accessed on 22 June 2024.

19 Ioannis Rematisios and Yannis A Pollalis, 'Strategic Value of NATO's Investment on Science, Technology & Innovation (STI): Management of Information and Knowledge As Intangible Assets' (2018) 9(2) Journal of Defense Resources Management 5 <https://doaj.org/article/55ed92b91b6a43599a50c252add73ef0> accessed on 16 March 2024.

Overall, the inventions granted classified status are inventions that have a dual-use option. Technologies defined as 'dual-use' have both military and civilian applications. Their development typically includes private firms, and the fruit of that development can serve a private market.*[20] In acknowledgement of the growing significance of military technologies and to obstruct their dissemination to potential rivals, many developed market economies have adjusted their patent systems to introduce classified patents despite this adjustment conflicting with the disclosure principle.*[21] Until a few decades ago, defence technology was quite distinct from civilian-use technology – such technology had relatively unique application or a niche customer base. Today, however, this technology has become closely intertwined with its commercial counterparts, particularly in fields such as information technology, artificial intelligence, and robotics.*[22] The author submits, then, that expanding the scope of secrecy in patent law is relevant primarily with regard to dual-use inventions and their technological description.

The European Council adopted Regulation 428/2009, of 5 May 2009, to set up a community regime to control exports, transfer, brokering, and transit for dual-use items.*[23] Under its Chapter 1, Article 2 (1), 'dual-use items' denotes items, among them software and technology, that can be used for both civil and military purposes and shall encompass all goods that could function for both 'non-explosive' uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices. Annex I to that regulation provides a list of items and technology qualified as dual-use, thus assisting in understanding which inventions may be classified after filing of a patent. The list comprises 10 categories of innovation, across various fields (e.g., 'computers', 'electronics', and 'telecommunications and "information security"'), dealing also with unique materials and related equipment. Importantly, not all dual-use inventions are covered by classification aimed at protecting national security. This creates a reason to discuss expanding the concept of secrecy to all dual-use items. The author preliminarily proposes that the annex's categorisation should function as the basis for arranging a scheme for identifying dual-use inventions eligible for secrecy protection under the regional or international patent system.

Dual-use technology may offer a means of enhancing competitiveness at company but also regional level. An empirical study of the world's largest defence companies indicated that European firms engaged in operations with dual-use technologies show higher technological productivity than corresponding United States firms.*[24] At the time of writing, in mid-2024, the European Commission is considering allowing technologies with both civilian and defence applications to be funded under Framework Programme 10, to boost the union's strategic autonomy.*[25] Accordingly, it seems imperative not to restrict focus on dual-use technology to solely defence agencies' activities. Significant technological advancements at large offer far more opportunities through development of dual-use technology within the private sector and in light of vital civilian uses.

Furthermore, neuroscience research has not only played a role in advancing weaponry and other technology for national-security purposes but also led to collapsing the dichotomy between what constitutes a military *versus* civilian application.*[26] Alongside many cutting-edge technologies with relatively direct application – high-performance computers, drones, special software of several sorts, etc. – a threat is posed by hostile state and other entities' practices applying reverse-engineering or replication technologies. Authoritarian regimes could exploit these tools to suppress their populace but also to weaponise the public for orchestrated attacks. With patent applications being publicly accessible, authoritarian regimes can advance that agenda by gleaning details of another country's technical capabilities. Therefore, protecting

20 European Commission, 'EU Funding for Dual Use: A Practical Guide to Accessing EU Funds for European Regional Authorities and SMEs' COM (2014) 8 <https://ec.europa.eu/docsroom/documents/12601/attachments/1/translations/en/renditions/pdf> accessed on 14 March 2024.

21 Martens (n 14) 14.

22 Rematisios and Pollalis (n 19) 9.

23 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] OJ L134/1.

24 Manuel Acosta and others, 'Patents and Dual-Use Technology: An Empirical Study of the World's Largest Defence Companies' (2018) 29(7) Defence and Peace Economics 821, 836. – DOI: https://doi.org/10.1080/10242694.2017.1303239.

25 Martin Greenacre and David Matthews, 'EU Commission Launches Bid To Expand Funding of Dual-Use Research in Horizon Europe's successor' (*Science Business*, 24 January 2024) <https://sciencebusiness.net/news/dual-use/eu-commission-launches-bid-expand-funding-dual-use-research-horizon-europes-successor> accessed on 11 March 2024.

26 Tara Mahfoud and others, 'The Limits of Dual Use' (2018) 34(4) Issues in Science and Technology 73.

IPRs and industrial interests is crucial for any decision-making process in a global world rife with political instability.[*27]

Secret patents are not the only pertinent exception introduced to traditional patent law. In 1968, the German Democratic Republic issued a special decree for secret patents whose subject was economic secrets that percolate to other state interests.[*28] Its aim was to allow cultivation of an advantage over capitalist competitors and surprise market adversaries. More recently, the notion of economic-secret patents entered discussion in the United States in 2012 in conjunction with arguments as to whether the state should bar the publication of specific patent applications as detrimental to the nation's economic security.[*29]

The concept of a patent connected with economic secrets should be revisited for today's patent law. Restricting publication of those patent applications that might include technological-innovation details whose public nature could harm a state's economic security is controversial yet may offer an avenue for Western countries against adversarial countries. Secret economic-innovation patents could help to keep information related to economic capacity secret and, thereby, prevent specific knowledge from reaching adversaries who might otherwise be able to use it to gain a technological advantage in war activities while potentially also obtaining an advantage in the general economy and market competition. The author suggests that, in contrast against secret patents justified by national security, secret economic-innovation patents could enjoy a fairly broad scope, wider than that for dual-use inventions. There is doubt, though, as to whether a government has the competence or expertise to declare any invention a highly economically valuable development whose exposure could damage state economic interests, while the equivalent is seldom argued in discussion of secret patents that could impinge on national security interests. These decisions directly affect the freedom of the inventor, who has the right to determine how to exploit the invention, including whether to maintain its secrecy and under which conditions.

3. The legal framework for secret inventions

3.1. Incentive for keeping an invention secret

National-security threats have precipitated an increase in the number of secret patents, but their use is not limited to times of warfare, and use of them continues into peacetime.[*30] With regard to secrecy in the domain of patent law, national security is a powerful talking point, and its appearance in debates over patent policy points to a need for careful thought about how exactly patent policy and national security intersect.[*31]

The intention behind classified patents is to protect IP and secrets related to national defence by NATO standards. Today, authoritarian actors pose a significant challenge to NATO's interests and values, showing little regard for international norms and commitments.[*32] Therefore, in the coming decades, NATO and its allies must redirect their attention to crafting strategies and action plans to tackle the associated security challenges.

The purpose of NATO's agreement on mutual safeguarding of the secrecy of defence-related inventions for which patent applications have been made[*33] (the NATO Mutual Safeguarding Agreement) is to facilitate defence co-operation among NATO member states and provide protection for classified defence inventions. The secrecy measures in place under this agreement still hold force today and constitute means of safeguarding patent rights related to classified military inventions.[*34]

27 Rematisios and Pollalis (n 19) 9.

28 Martens (n 14) 22.

29 Ibid 23.

30 Matthews and Ostapenko (n 8) 668.

31 Charles Duan, 'Of Monopolies and Monocultures: The Intersection of Patents and National Security' (2020) 36(4) Santa Clara High Technology Law Journal 369, 379–80.

32 Albulena Halili, 'Non-Traditional Security Threats and NATO's Response in the Contemporary Security Environment' (2023) 18(2) SEEU Review 148, 149. – DOI: https://doi.org/10.2478/seeur-2023-0095.

33 Agreement for Mutual Safeguarding (n 10).

34 Rematisios and Pollalis (n 19) 8.

Also, NATO has adopted an agreement on the communication of technical information for defence purposes[*35]. Known as the NATO Agreement for Protection of Technical Information, this agreement is broadly intended to encourage the flow of technical information for defence purposes among NATO governments and affiliated organisations. The preamble states that the rights of owners of proprietary technical information communicated accordingly (e.g., inventions, drawings, know-how, and data) should be recognised and protected. A significant part of the invention is its technical description. However, that agreement's Implementing Procedures[*36] text establishes that the communication of copies of patent applications placed under a secrecy order is expressly excluded from the scope of the agreement. This is to prevent any conflict with the NATO Mutual Safeguarding Agreement.

In its Article 1, the NATO Mutual Safeguarding Agreement states that NATO member states are obliged to protect the secrecy of inventions, which encompasses protection of inventions from within the country of origin and also protection of inventions that is requested by other member states. The prerequisites for protection are submitting patent applications and declaring the corresponding invention classified for reason of national defence. Article II sets out the entities that may perform actions related to a patent application. The obligation to safeguard the secrecy of a classified invention follows upon the request of either the originating country's government or the patent applicant.

Article III governs the procedure for damages claims connected with patent applicants. Under that procedure, a government called upon to safeguard the secrecy of an invention under the terms of Article I is entitled to demand from the patent applicant a waiver of any claim to compensation for loss or damage due solely to the imposition of secrecy on the invention as a condition prerequisite to the application of said safeguard. In return, the applicant is awarded compensation for losing the right to exploit the invention. Rules for annulling secrecy, in turn, are laid out in Article IV, which states that only the country of origin can rescind the secrecy of the invention. The country of origin must inform the participating countries of its intention to do so six weeks in advance of lifting the secrecy requirement.

Although the NATO Mutual Safeguarding Agreement pertains to classified military inventions, principles set forth in the agreement form the basis for today's regulation of classified patents in nations' patent law. The role of NATO in the global security environment is pivotal, profoundly influencing, among other activities, the use of technology in political conflict and war-related actions. Keen attention should be given to emerging issues such as energy security, hybrid threats, cyber-threats, and certain types of new technologies. The definition of threats to national security should not be limited to purely 'defence issues'; the argument here is that it should be broadened to explicitly include non-traditional threats to the functioning of the economy and technological innovation, where 'non-traditional threats' refers to risks that conventional forces and weapons cannot completely address.[*37] Accordingly, threats to national security should be considered to include threats to a nation's economy, IPRs, and technological innovation.

NATO has stated that strategic competitors and potential adversaries are directing investments toward technologies that target civilian and military infrastructure, undermine defence mechanisms, and pose security threats.[*38] As emerging disruptive technologies bring both opportunities and risks, they alter the character of conflict, acquiring greater strategy-linked importance and forming new key arenas of global competition.[*39] It needs pointing out, therefore, that Western countries must tackle challenges ushered in across the vast landscape of rapidly developing technologies and global relations in collaboration with international organisations. Particularly because adjustment to and integration of new technology both require alignment with a contested and unpredictable global field, collaborative efforts need a sharper focus on limiting the disclosure of information in patent applications. Therefore, the author recommends expanding the current framework of secret patents to prevent disclosure of the technological description of dual-use inventions.

35 NATO Agreement on the Communication of Technical Information for Defense Purposes (19 October 1970) <https://www.regeringen.se/contentassets/882f6758ed7547d6a6c2aea6484f60b8/sveriges-tilltrade-till-vissa-natoavtal-del-3-ds-202322.pdf> accessed on 20 March 2024.

36 Implementing Procedures for the NATO Agreement on the Communication of Technical Information for Defense Purposes <https://www.regeringen.se/contentassets/882f6758ed7547d6a6c2aea6484f60b8/sveriges-tilltrade-till-vissa-natoavtal-del-3-ds-202322.pdf> accessed on 20 March 2024.

37 Halili (n 32) 149.

38 NATO 2022 Strategic Concept (n 5) 5.

39 NATO 2022 Strategic Concept (n 5) 5.

3.2. Secret patents in international patent law

In addition to NATO agreements, secrecy-based orders to classify patents are anchored in several other instances of jurisdiction at international level. The Agreement on Trade-Related Aspects of Intellectual Property Rights[*40] (TRIPS Agreement) is the most relevant international agreement addressing the issue of protecting IP in trade-related arenas. Its regulation mandates that the parties provide invention patents encompassing products or processes across all technological domains, without prejudice, subject to evaluations of novelty, inventiveness, and industrial applicability. In addition, however, the terms provide several flexible options to facilitate development and protect national security interests.

The TRIPS Agreement comprises provisions for security exceptions in its Article 73. It does not restrict the authority of governments in any way with regard to supplying information or disclosure they consider contrary to their fundamental security interests. Under these provisions, a World Trade Organization (WTO) member[*41] is permitted to implement measures that are otherwise non-compliant with the TRIPS Agreement so as to protect its vital security interests amid war and other emergencies in international relations.[*42] Consequently, Article 73 equips WTO member states to pursue their vital security interests and fulfil global peace and security obligations.[*43]

The same design is implemented via the international agreement called the Patent Law Treaty[*44] (PLT), intended to harmonise and streamline formal procedures related to national and regional patent applications and patents. The PLT's Article 4 specifies that this treaty shall not constrain the contracting party's freedom to undertake any action necessary for safeguarding essential security interests. Hence, the PLT does not restrict secrecy in the realm of patent law.

How does Russia fit into the picture? It has violated many rules of international IP law. Among Russia's counter-sanction mechanisms is the implementation of specific legal instruments related to IPRs owned by residents of Western countries that imposed sanctions against Russia over its invasion of Ukraine or entities domiciled there.[*45] One such counter-sanction entails, in effect, compulsory licensing, with no compensation to the IPR-owners. The Government of the Russian Federation has declared that it may decide to use an invention, utility model, or industrial design without the rights-holder's consent, ostensibly in cases of 'emergency' and 'under the necessary conditions', irrespective of international commitments of the Russian Federation.[*46]

The above-mentioned Decree 299[*47] of the Government of the Russian Federation, dated one week after the 2022 invasion, grants permission to lift IPR protections. The meaning is that in circumstances deemed to involve critical necessity of supporting the defence and security of the state, Russia's government possesses the authority to waive the IPRs of third parties without the consent of the right-holders. According to Russian patent law, a rights-holder shall be compensated for waiving of IPRs; however, said remuneration shall amount to zero per cent under Decree 299 if the rights-holder conducts unfriendly actions against Russian legal entities or natural persons.[*48] A link thus is articulated between the person and said right-holder's state of residence or domicile – i.e., a foreign state carrying out actions against Russia. Thereby, this instrument allows appropriation of IPRs that is similar to a compulsory licence.

Although this may appear to be a significant abnormality, it is not unprecedented in the history of Russia. In the early years of the Soviet Union, a similar effect on patents was established when Lenin decreed in 1919 that inventions could be declared property of the state government and subject to use by all citizens through compulsory licensing.[*49] This decree precipitated a low volume of patent applications. In

40 Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> accessed on 18 March 2024.

41 See the organisation's Web site <https://www.wto.org/> accessed on 29 March 2024.

42 Olga Gurgula, 'Invoking Article 73 TRIPS in Good Faith: No Recourse to "Security Exceptions" for Russia's Violation of TRIPS' (2023) 18(6) Journal of Intellectual Property Law and Practice 418, 431. – DOI: https://doi.org/10.1093/jiplp/jpad032.

43 Peter K Yu, 'The Objectives and Principles of the TRIPS Agreement' (2009) 46(4) Houston Law Review 979, 1010.

44 Patent Law Treaty (1 June 2000) <https://www.wipo.int/treaties/en/ip/plt/> accessed on 18 March 2024.

45 Gurgula (n 42) 419.

46 WIPO Background Paper on the Zero Remuneration Rate (26 April 2022) <https://www.wipo.int/edocs/mdocs/sct/en/sct_45/sct_45_russian_federation_info_paper_2.pdf> accessed on 18 March 2024.

47 Russian Federation decree 299, of 6 March 2022 (n 6).

48 WIPO Background Paper (n 46).

49 Martens (n 14) 3.

1931, a new regulation entered force, with an invention-focused law introducing an 'inventor's certificate'.[*50] The logic was that if an inventor's certificate was granted, the innovation was new to the world and hence should be used by industry.[*51] Inventor's certificates were held by the state, eliminating any worries about ownership.

Currently, Russia relies on the TRIPS Agreement's Article 73 to impose counter-sanctions in the domain of IP law. It has been argued that it should not be allowed to rely on Article 73, because the current emergency in international relations was triggered by Russia's own unlawful act of invading Ukraine, for which numerous countries sanctioned it.[*52] The author finds that any argument otherwise, supporting Russian invocation of Article 73, would cut against good faith and the principle of reasonableness.

By refusing to issue compensation to patent-owners from countries unfriendly to it, Russia violates Article 3 of the TRIPS Agreement, in that Russian patent-owners continue to receive compensation when a compulsory licence is issued in relation to their patent rights.[*53] Article 3 addresses national treatment by obliging every WTO member state to afford the nationals of other member states treatment no less favourable than that it accords to its own nationals for IP protection.

Furthermore, the agreement's Article 31 states that if compulsory licensing is applied, the right-holder shall be paid remuneration that is adequate in the circumstances of each case, with consideration for the authorisation's economic value. There is no exception to the requirement for paying compensation. If a decree stipulates that the compensation to owners from unfriendly countries is to be set at zero per cent, it makes a blanket statement that those IPR-holders are to receive no compensation for use of their IPRs.[*54] Because Article 31 mandates payment of compensation, Russia's Decree 299 clearly violates the terms of the TRIPS Agreement.

In conclusion, the NATO framework, the PLT, and the TRIPS Agreement all deal with international regulation of secret patents. While the last of these permits member states to implement measures to protect their essential security interests (in the main, measures for keeping patent applications secret), the NATO agreement sets out specific terms to be considered in implementing secret patents as part of a country's patent law. The author submits that NATO's framework for classified patents allows expanding the scope of secrecy in patent law to protect the interests of Western countries' technological security. Still, a workable proposal for protection of Western technological innovation could implement regulations to expand secrecy under patent law not through NATO agreements but via regional or international agreements. This is because the NATO agreements pertain mainly to protection of military inventions' use. Under the reasoning presented above, dual-use inventions should not be delineated as out of scope through instruments limited to only military technology. They should cover a broader space, as Annex I of European Council Regulation 428/2009 implies.

4. Secret inventions' protection within the European patent system

4.1. Legislation in European-level patent law

The European Patent Convention[*55] (EPC) established a system of law for the European patent system. According to the EPC's Article 2 (2), a European patent has the effect of and is subject to the same conditions as a national patent unless the convention's terms state otherwise. The EPC is managed through the European Patent Organisation[*56], whose primary purpose is to grant European patents, which are handled by the European Patent Office (EPO) and supervised by the Administrative Council. For protection of European

50 Ibid.

51 Ibid 4.

52 Gurgula (n 42) 431.

53 Ibid 422.

54 Gurgula (n 42) 422.

55 European Patent Convention (5 October 1973, 17th edition November 2020) <https://www.epo.org/en/legal/epc> accessed on 27 June 2024.

56 See the European Patent Office Web site <https://www.epo.org/en> accessed on 25 March 2024.

technological innovation, the author recommends implementing regulations added to the EPC whereby expanding secrecy to patents for dual-use items is expressly permitted. Drafting such regulation directly addressing the secrecy of dual-use-invention patents could significantly enrich European Union law.

According to the EPC, Article 75, a European patent application may be filed with the EPO, the relevant state's central industrial-property office, or another competent authority of the individual state. Any application filed by the competent authority has an effect fully equivalent to filing on the same date with the EPO. The EPC's Article 77 (1) and Implementing Regulations*[57] Rule 37 establish that applications filed through the central industrial-property office – i.e., the local patent office – shall be forwarded to the EPO in the shortest time compatible with the relevant national law related to the secrecy of inventions in the interests of the state. According to Article 77 (2), a European patent application that has been made secret shall not be sent to the EPO. Therefore, if a European patent is sought for a classified invention through the central industrial-property office, the classified invention shall not receive protection under a European patent.

Things are different when a European patent application is directly submitted to the EPO. After submission, the application undergoes examination in accordance with the procedures and criteria set forth by the EPC. Once the EPO grants a European patent, it protects the designated Member States without requiring separate filings or examinations in each country. Under the EPC's articles 2 (1) and 52, a European patent may be granted for any invention that meets the criteria of novelty, an inventive step, and industrial applicability, without regard for whether the invention has been classified in individual Member States. Furthermore, the EPC's Article 64 (1) stipulates that the European patent, once granted, shall confer on its proprietor a right to prevent third parties from commercially exploiting the patented invention, from the date of publication of the mention of the grant. This right extends to the contracting states' territories where the patent is in force. The EPC states in Article 98 that, simultaneously with notice of the issuance of the European patent, the EPO shall publish a European patent description, containing the invention's description, patent claims, and drawings.

Hence, even if the invention is classified in one or more of the EPC signatory states at the same time, obtaining a European patent based on the EPC is still possible if application is made directly to the EPO. This is because classified patents are not disclosed in public patent registers. If the EPO carry out the examination, they cannot compare EPC states' classified patents to the patent application under examination. This situation diverges from that of patent proceedings undertaken by a regional patent office, which is discussed in greater depth below. In a contrast against patent proceedings under the EPC, the regional patent office considers classified patents too during its examination. The author suggests considering applying the latter approach for EPO patent proceedings, to avoid situations wherein an invention's patent is classified in an EPC state but also receives protection under a European patent, with the accordant risk of disclosure of a classified invention.

4.2. Legislation specific to Estonian patent law

Patent procedures and patent grants are regulated in Estonia by the country's Patents Act*[58]. It employs a definition under which a classified invention is an invention of national-defence importance. According to Section 7 (6) of the State Secrets and Classified Information of Foreign States Act*[59] (or States' Secrets Act), secrets related to national defence consist of items of information pertaining to inventions and studies conducted for public-defence purposes and their outcome, except information the disclosure of which would not damage the security of Estonia. Such information shall be classified as Secret, Confidential, or Restricted for a maximum of 30 years. The Patents Act's Section 61 (7) states that in cases of patent applications involving a classified invention, the provisions of the States' Secrets Act and the NATO Mutual Safeguarding Agreement shall be applied in addition to the requirements of the Patents Act.

Overall, the processing of classified-patent applications is the same as processing for unclassified patents. All the criteria for filing an application for an unclassified patent apply to one for a secret patent;

57 Implementing Regulations to the Convention on the Grant of European Patents (signed on 5 October 1973) <https://www.epo.org/en/legal/epc/2020/regulations.html> accessed on 25 March 2024.

58 RT I 1994, 25, 406.

59 RT I 2007, 16, 77.

alongside these, there are some additional requirements, though. Classified patents adhere to specific procedures to prevent the disclosure of ideas detailed in the application. In Estonia, a properly formalised patent application for a classified invention is submitted to the Estonian Patent Office in line with the relevant legal norms specified in the Patents Act. A request to maintain the secrecy of the invention can be made either by the applicant for the patent or by the patent office examining the patent application.

Generally, classified inventions can be divided into two categories on the basis of the origin of the invention: inventions with domestic origins and inventions that originate from a foreign country. The category dictates which documents shall accompany the patent application in the submission to the patent office. According to the Patents Act, specifically items 4–5 in its Section 19 (2), in cases involving an application for classifying the patent, the applicant must provide a certificate from the Ministry of Defence addressing the classification of the invention. If the invention is classified in a foreign state and the application is being submitted by the applicant instead of by the competent authority of that foreign state, the applicant must supply, again in addition to the patent application itself, a statement of permission from that competent authority.

During the application's processing, requirements arising from the States' Secrets Act apply to the employees of the Estonian Patent Office. A patent officer dealing with classified patent applications must have an official permit to work with items of information involving classified inventions. This is the only significant difference in proceedings between classified patents and cases of applications for unclassified patents. The confidentiality of the secret-patent proceedings, inclusive of confidentiality of technical information disclosed in the application, is ensured by having only patent officers who are authorised to access classified materials and state-secret permits deal with classified patents.

The Ministry of Defence has the authority to keep an invention secret. Under the States' Secrets Act, Section 11 (2), the level and term of information's classification are established separately for each invention/study by the minister in charge of the relevant policy sector. The Ministry of Defence communicates information to the Patent Office that specifies which branches of technical fields might be important for national-defence purposes and, therefore, be subject to classification. Such information is classified at Restricted level as appropriate, or as information intended for internal use only.

According to Section 22 (5^1) of the Patents Act, if an application for classifying a patent application has not been annexed to the application, such that proceedings rely instead on the information forwarded by the Ministry of Defence, the Patent Office may conclude that the patent application might concern the entities charged with national defence. In this event, the Patent Office submits an enquiry to the Ministry of Defence for a decision on whether the patent application shall be classified. That is, if suspecting that application is being made to patent an invention that may be important for the national defence, the patent officer forwards the corresponding information with the patent application to the Ministry of Defence, which decides on secrecy. The application need not be classified if a decision by the Ministry of Defence is not forthcoming; for this protection, it must reach the patent office within four months.

By default, patents are disclosed to the public; i.e., patent registers are publicly accessible. In contrast against unclassified patents, the content of a classified-patent application is not made available to the public after the passing of 18 months from the date of submission. In Section 24 (4), the Patents Act prohibits publication of the latter entirely. In addition, Section 34^1 (2) states that no information is to be released from the register with regard to any information related to classified-patent applications. Upon granting of a patent for a classified invention, an entry is made in the patent register and a patent number is issued, as in the case of unclassified patents. The difference is that a classified patent is not displayed to the public.

This does not imply that the application shall be merely filed away after the examination procedure. Rather, the Patents Act stipulates, in Section 24 (2^1), that a classified-patent application is considered in the comparisons with later patent applications, for ascertaining their novelty and whether they represent an inventive step. One may conclude, then, that it is not excluded for a classified-patent application to prove to be an obstacle to granting a patent in cases of an unclassified-patent application. When carrying out an examination, the patent officer compares the new filing with the patents issued, including classified patents. If it turns out that a classified patent already protects the invention in question, the new application, for an unclassified patent, does not render it eligible for protection. The inventor cannot prepare for such a consequence – after all, from the public patent registers, it appears possible to patent the invention.

The situation described above raises the question of whether keeping the previously classified patent application secret is reasonable. The rejected patent application still represents the state of the art, and

the technical description is available for public inspection from the day on which the application for an unclassified patent is made public.[*60] Keeping the classified patent secret cannot prevent others from accessing the information; the benefits of secrecy get undermined in either case. For such scenarios, the author suggests that alternative strategies, such as seeking protection through other means or adapting the innovation for a different application, might be more effective. Estonia does not yet have case law dealing with infringement on a classified patent.

Generally, patent protection granted for an invention lasts up to 20 years. There is no distinction between classified and non-classified patents in that respect. This term delineates the legal right of an inventor to exclude others from making or using the invention. The ideal term of protection for any given invention may depend primarily on the technology in question.[*61] However, in light of today's rapid development of technology, it is unlikely that the duration of secrecy for inventions could reach levels comparable to the term of a patent's validity.[*62] While an invention has been classified for a certain period, it is not beyond the realm of possibility that the solution represented becomes known to the public in some other way by the time the classification ends. Still, the inventor's commercialisation efforts may be subject to strict regulatory oversight and scrutiny throughout the term of secrecy. By the time secrecy is lifted from a patent, the inventor has most probably lost the opportunity to sell the results of the creation for his own benefit even though the invention was duly patented at its creation. Consequently, the inventor's loss must be subject to compensation.

In many countries, patent law states the criteria applicable for compensation when an invention is kept secret.[*63] In Estonia, the Patents Act specifies that in the event of an invention being classified on the initiative of the minister in charge of the relevant policy sector, the proprietor behind the patent / the author has the right to receive, throughout the term for which the invention is classified, compensation for the restriction to the invention's use that arises from classification, per Section 18^1 (1). The author does not have the right to receive said compensation if having transferred this right. The amount of compensatory payment is decided upon by the minister in charge of the corresponding policy sector. According to Section 18^1 (2) of the Patents Act, the setting of compensation amounts shall consider, among other factors, the estimated service life of the invention as of the date of classification and the commercial profit that the author or proprietor could be presumed to gain from the use of the invention were the invention not classified. The issue of compensation for keeping an invention secret merits specific attention in further scholarly discussion.

5. Concluding remarks

The Russian invasion of Ukraine brings heightened urgency to safeguarding Western countries' technological innovation. Current conditions highlight the importance of prioritising respect for inventors' intellectual property rights in aims of protecting Western countries' technological innovation from exploitation by adversarial parties. Attention should be directed to pivotal issues in the debate surrounding secrecy in patent policy. While secrecy may appear to contradict the central aim of the patent system (i.e., disclosure), it benefits crucial interests related to the protection of technological innovation against unfriendly state actors, the rule of law, etc.

Preserving the secrecy of inventions is a crucial mandate in a world witnessing global political instability. It seems clear that such an environment demands not limiting consideration of national-security threats to narrowly defined 'defence issues'. The protection mechanisms, then, should be broadened to tackle non-traditional threats. One could justifiably contend that threats to national security tie in with threats to the nation's economy, IPRs, and technological innovation. Therefore, these must be attended to in combination.

From the reasoning presented in this article, one must conclude that the legal framework for secret patents provides opportunities for keeping an invention secret. This is particularly relevant with regard to

60 Jaak Ostrat, 'Salastatud leiutis Eesti õiguses [Classified Invention in Estonian Law]' (2012) 7 Juridica 565, 568.

61 Michael McGurk and Jia Lu, 'The Intersection of Patents and Trade Secrets' (2015) 7(2) UC Law Science and Technology Journal 189, 203 <https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1023&context=hastings_science_technology_law_journal> accessed on 17 March 2024.

62 Ostrat (n 60) 566.

63 Matthews and Ostapenko (n 8) 668.

dual-use inventions. Keeping secret the technical description of a patent should prove to be to be a sufficient counter-measure against adversaries' violations of international IP law. This conclusion is supported by the application of economic patents from Germany's history, and the approach is aligned well with NATO agreements and international regulation of secret patents.

The author submits that secrecy should be integrated into current patent law by extending the scope of secrecy to the technical description of dual-use inventions. Regulations should be implemented at regional or international level – i.e., via the EPC or European Union regulations – rather than through NATO agreements. Classifying a dual-use invention's technical description allows the patent to be displayed in the patent register but not in full; only a certain part of the patent application is omitted. Finally, the topic of compensation for keeping an invention secret is a crucial one, to which thorough attention will be devoted in further research.

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The Effect of European Union Law on the Criminal and Quasi-Criminal Liability of Legal Persons in Estonia

Abstract. The punitive competence of the European Union encompasses both criminal law and, in the form of administrative sanctions, quasi-criminal law. Now undergoing vast changes amid rapid development, the latter field of Union legislation is anything but systematic. The sporadic evolution of EU punitive law recently led to the European Court of Justice judgement in the case *Deutsche Wohnen*, wherein the substantive provisions for liability of legal persons in Germany were found to be in contradiction with European Union law. The article gives an overview of the European Union's legislation on criminal and quasi-criminal liability of legal persons, presents reflections on the Estonian experience, and articulates conclusions from the *Deutsche Wohnen* case.

Keywords: European Union criminal law, administrative sanctions, quasi-criminal law, liability of legal persons, GDPR, Deutsche Wohnen

1. Introduction

This article presents an effort to analyse the effects of European Union law on national legislation pertaining to the liability of legal persons. The scope of EU criminal law connected with legal persons is rather constrained, with the Member States' cautious and conservative approach having brought certain safeguards into play. The same cannot be said for the Union's legislation on administrative sanctions or the so-called quasi-criminal law. Member States are bound by a plethora of directives and regulations, in various domains of Union law, whereby they are obliged to lay down rules on administrative liability for legal persons. That legislation lacks a common general component so may differ in many respects, whether in nuances or more fundamentally. Because transposing this body of legislation into national law has clear effects on the states' criminal and quasi-criminal-justice systems, the non-systematic nature of Union legislation creates an argument against codification of the modes of liability for legal persons in national legislation: each piece of legislation might well require a tailor-made solution. This problem was highlighted

by the recent judgement of the European Court of Justice in the *Deutsche Wohnen* case[*1], wherein how the general part of German law addresses legal persons' liability was found to be incompatible with the requirements of an especially prominent instrument of regulation, the GDPR[*2].

The article gives an overview of the demarcation between European Union criminal and quasi-criminal law, followed by deeper analysis of the EU-level legislation related to the criminal and quasi-criminal liability models connected with legal persons. Then, for concrete illustration, the discussion turns to the Estonian legal system, introducing its peculiarities – namely, the concept of misdemeanours (governed by the general part of the Penal Code), which functions in transposition of the Union's legislation on administrative sanctions. Before presenting general conclusions, the paper examines the effects of the judgement in *Deutsche Wohnen* on the choice of liability model oriented toward legal persons.

2. The divide between European Union criminal and quasi-criminal law

At first glance, the principles of national penal law appear to be guarded relatively well against disturbance wrought via European Union legislation. After a lengthy competence struggle that resulted in the landmark decisions in *Environmental Crime*[*3] and in the *Ship-Source Pollution* case[*4], the Member States agreed to very careful and limited delegation of criminal-law competence with the adoption of the Treaty of Lisbon. According to Article 83 (1) of the Treaty on the Functioning of the European Union (TFEU), the co-legislators are permitted to establish minimum rules pertaining to the definition of criminal offences and sanctions in only areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of said offences or from a special need to combat them on a common basis. The relevant spheres of crime are exhaustively listed[*5] in Article 83 of the TFEU, with the so-called annex competence expanding this competence to an area that has been subject to harmonisation measures only in conditions wherein alignment among the Member States in the domain of criminal law and regulations (i.e., approximation of law in that domain) proves essential for ensuring the effective implementation of a Union policy. As a means of last resort, a Member State may fall back on the 'emergency brake' procedure provided for in Article 83 (3) of the TFEU when finding that a draft Directive instrument is bound to affect fundamental aspects of its criminal-justice system.[*6]

Article 83, however, pertains to criminal law only in the strictest sense, and it forms merely one small part of the punitive-law competence of the Union. The latter competence of the EU has its roots in Member States' obligations to lay down rules on sanctions, which need not be criminal-law-oriented. That said, administrative-offence law (or quasi-criminal law) became a distinct field of approximation in the years following the compromise on the criminal-law competence of the Union under the Treaty of Lisbon.[*7] Numerous directives and regulations require Member States to lay down rules on punitive sanctions that, while not formally classified as of a criminal-law nature, would by dint of their punitive aim fall under

1 Case C-807/21 *Deutsche Wohnen SE* EU:C:2023:950, decision of 5 December 2023.

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119, 1–88.

3 Issued by the European Court of Justice on 13 September 2005. Case C-176/03 *Commission of the European Communities v Council of the European Union* [2005] ECR I-07879.

4 From 23 October 2007 by the European Court of Justice. Case C-440/05 *Commission of the European Communities v Council of the European Union* [2007] ECR I-09097.

5 While the list is exhaustive, it still may be subject to overly broad interpretation – for example, the lack of competence to harmonise offences related to hate crimes and hate speech was recently addressed via a compensating mechanism of establishing minimum rules on 'cyber'-incitement to violence and hatred as a form of computer crime in Article 8 of the European Parliament and Council directive of 14 May 2024 on combating violence against women and domestic violence (Directive 2024/1385) OJ L1385, 24.5.2024.

6 For further discussion of the emergency-brake procedure, see the work of K Rosin and M Kärner, 'The Limitations of the Harmonisation of Criminal Law in the European Union Protected by Articles 82(3) and 83(3) TFEU' (2018) 26 European Journal of Crime, Criminal Law and Criminal Justice 315. – DOI: https://doi.org/10.1163/15718174-02604003.

7 M Kärner, 'Punitive Administrative Sanctions after the Treaty of Lisbon: Does Administrative Really Mean Administrative?' (2021) 11(2) European Criminal Law Review 160. – DOI: https://doi.org/10.5771/2193-5505-2021-2-156.

the autonomous concept 'criminal' per the *Engel* and *Bonda* criteria (that is, qualify as quasi-criminal sanctions).[*8] The associated legislation is adopted on various legal bases (such as Art. 16 or 114 of the TFEU) and, accordingly, circumvents the safeguards afforded to the Member States' national criminal-justice systems by the Article 83 of the TFEU. The most prominent body of legislature for which Member States must set forth rules on levying quasi-criminal fines against legal persons concerns the financial-services sector. The proliferation of such legislation can be attributed to the 2010 European Commission communication on reinforcing the sanctioning regimes affecting that sector.[*9] However, prescriptions for sizeable fines for breaches of Union law are by no means limited to one sector. High fines have become part and parcel of enforcing Union law in nearly every field. Among the most prominent examples are the fines set forth in the GDPR and in the directive on empowering competition authorities (the ECN+ Directive)[*10].

This legislation has blurred the lines between criminal and administrative law. Furthermore, Article 83 of the TFEU restricts the harmonisation of criminal law to the mechanism of directives. Quasi-criminal law, in contrast, is harmonised on legal bases that leave room for the adoption of regulations. This opens room also for debate on the possibility of directly applicable Union-level quasi-criminal law.

3. Liability of legal persons under EU criminal and quasi-criminal law

3.1. The context in general

Natural persons have been subject to judgements of guilt and punishment throughout most of the history of criminal law. Notions such as intent, guilt, and blame are intrinsically linked to individual humans. With the growth of the modern economy, risks in spheres such as the environment, finance, and public health ballooned correspondingly. It became evident that legal persons, while not capable of acting without humans, are the catalyst of many offences and should, as such, be liable for these alongside the natural persons who commit the offences.[*11]

There are several differences in jurisdiction-specific ways of tackling the liability of legal persons. Firstly, legal persons are not made subject to criminal sanctions in all jurisdictions. Sanctions against legal persons are often imposed outside formal criminal law, in administrative proceedings. For example, German authors are of the view that the criminal-law concept of guilt requires a socio-ethical awareness that legal persons do not possess. Therefore, those scholars maintain that legal persons cannot be subject to criminal law and can only be held liable for administrative offences.[*12] As a consequence of imposing sanctions beyond the lines of criminal law, the procedural guarantees afforded to legal persons may vary from one jurisdiction to another. Even though legal persons should benefit from procedural guarantees similar to those extended to natural persons, the threshold for minimum guarantees required by both the European Court of Human Rights and the European Court of Justice might be lower than that applied to natural persons.[*13]

Secondly, the sanctions applicable may vary, although a fine – whether underpinned by criminal or non-criminal law – constitutes the predominant form of negative sanctions for legal persons in any case.

8 M Kärner, 'Procedural Rights in the Outskirts of Criminal Law: European Union Administrative Fines' (2022) 22(4) Human Rights Law Review 10, 14–15. – DOI: https://doi.org/10.1093/hrlr/ngac027.

9 Commission, 'Reinforcing sanctioning regimes in the financial services sector' (Communication) COM (2010) 716 final. The communication, issued in Brussels on 8 December, was directed to the European Parliament, the European Economic and Social Committee, and the Committee of the Regions.

10 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive) OJ L11, 14.1.2019, 3–33.

11 For an overview of the developments against the backdrop of history, consult M Pieth and R Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer 2011) 4–5, 9–11. – DOI: https://doi.org/10.1007/978-94-007-0674-3.

12 W Gropp, *Strafrecht. Allgemeiner Teil* ('4., ergänzte und terminologisch überarbeitete Auflage', Springer 2015) 128–31. – DOI: https://doi.org/10.1007/978-3-642-38126-3.

13 Kärner, 'Procedural Rights' (n 8) 10, 14–15.

Finally and most importantly, the models of liability applied to legal persons can dramatically differ. Punitive liability follows from breach of a legal norm. The key question is which breaches may be attributable to a legal person and under what circumstances. The divergence in models reflects differences in understandings of the *nullum crimen nulla poena sine culpa* principle. It is evident that some imputation model is necessary: otherwise, it would be impossible to discern whether a legal person is liable for a given breach. Even if views on whether legal persons are capable of guilt differ starkly, any punishment must be proportional to the aim. The twin aims of (criminal- or administrative-law) sanctions – namely, punishment and deterrence[*14] – are achievable only if the wrongdoer was at fault (i.e., could have prevented the breach).[*15]

The models of liability of legal persons applied in general, across jurisdictions, can be summarised in terms of alignment with three main principles:

1) the identification model (also called the alter-ego, directing mind and will, or direct-liability model);
2) the *respondeat superior* model (known also as the agency, vicarious, or strict-liability model);
3) the organisational model (referred to also in connection with corporate culture).

The identification model is the narrowest. Only the actions of persons sufficiently high in the hierarchy of a legal entity are deemed connected to that legal person for liability purposes, in that the mind and will of only these persons can be equated to the mind and will of the legal person. The *respondeat superior* model, in contrast, is the broadest: a legal person is liable for any offences committed by persons under its authority, such as employees or contractors on assignment. Finally, the organisational model concentrates on the corporate culture and does not require ascertaining the guilt of any individual person.[*16] It appears that, being extremely narrow renders the identification model insufficient for tackling sector-specific offences in conditions wherein the breach cannot be directly attributed to a person with a controlling mind. The *respondeat superior* approach, on the other hand, subjects the legal person to nearly blanket-level liability for the actions of everyone under its control. With that in mind, many jurisdictions employ a combination of models. For example, they might attribute the actions of any agent under the authority of a legal person to that legal person only in cases of failure of supervision or control.

3.2. European Union criminal law

Directives adopted on the basis of Article 83 of the TFEU that establish minimum rules related to defining criminal offences and sanctions require the Member States to guarantee that legal persons in addition to natural ones can be held liable for the criminal offences specified in the directive.[*17] The grounds for liability of legal persons are uniform across all domains. Occasional negligible differences in wording notwithstanding, a template similar to the following in its language gets employed:

> Article [number]
> Liability of legal persons
> 1. Member States shall ensure that legal persons can be held liable for criminal offences referred to in [the Directive] where such offences have been committed for the benefit of those legal persons by any person who has a leading position within the legal person concerned, acting either individually or as part of an organ of that legal person, based on:
> (a) a power of representation of the legal person;
> (b) an authority to take decisions on behalf of the legal person; or
> (c) an authority to exercise control within the legal person.

[14] Aims that the European Court of Human Rights too has acknowledged. See, for example, *Blokhin v Russia*, application 47152/06, 23.3.2016, 179–80; *Janosevic v Sweden*, application 34619/97, 23.7.2002, 68.

[15] With regard to the concept of guilt and objective liability of legal persons, see also J Sootak, S-K Kärner, and M Kärner, 'Juriidilise isiku kriminaalvastutus Eesti karistusõiguses: praegune seis ja võimalikud arengusuunad [Criminal Liability of Legal Persons in Estonian Criminal Law: Current Status and Possible Directions of Development]' [2022](9–10) Juridica 686, 699–702.

[16] C Wells, 'Containing Corporate Crime: Civil or Criminal Controls?' in J Gobert and A-M Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge 2011) 25. – DOI: https://doi.org/10.4324/9780203819203.

[17] There is one exception: the recently adopted Directive 2024/1385, on combating violence against women and domestic violence (n 5).

2. Member States shall ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission by a person under its authority of a criminal offence referred to in [the Directive] for the benefit of that legal person.
3. Liability of legal persons under paragraphs 1 and 2 of this Article shall not preclude criminal proceedings against natural persons who commit, incite or are accessories in to the criminal offences referred to in [the directive].

Some, though not all, directives adopted on the basis of the Article 83 of the TFEU define a legal person as 'an entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations'.*[18] The non-inclusion of public bodies in the concept's definition is justified by the fact that the contrary would ultimately entail the state punishing itself. Moreover, public bodies have public functions, which should not be placed in jeopardy by sanctions. Nevertheless, Recital 12 of the recent directive on the protection of the environment through criminal law*[19] reminds Member States that, since said directive establishes minimum rules, the states are free to adopt stricter rules, inclusive of rules on criminal liability for public bodies.

The imputation of liability is based on a modification to the identification model. Generally, only the actions of a person with sufficient authority may be attributed to the legal person. In an extension to this principle, however, actions of anyone subject to the legal person's authority may be ascribed to that legal person in cases of a lack of supervision or control by persons with sufficient authority, The subsidiary nature of this extension of the identification principle is spotlighted by an odd distinction articulated in one of the criminal-law directives. Article 10 (2) of the directive on attacks against information systems*[20] gives Member States more flexibility in the choice of sanctions to be applied where a legal person is held responsible for reason of lack of supervision or control. For the latter case, the Member State is not obliged to lay down rules on (criminal or non-criminal) fines; merely codifying effective, proportionate, and dissuasive measures is deemed sufficient.

The directives require Member States to ensure that a legal person held liable is subject to effective, proportionate, and dissuasive sanctions, which shall include criminal or non-criminal-system fines and may include other sanctions.

In consequence, the criminal-law directives do not require the Member States to set up a system of criminal penalties for legal persons.*[21] Non-criminal penalties suffice. This has to do with the fact that some Member States deem only natural persons to be subject to criminal law whereas any negative sanctions on legal persons are imposed as a form of response to civil or administrative liability.*[22] This distinction was called into question with the simultaneous adoption of the Market Abuse Regulation (MAR)*[23] and the Directive on Criminal Sanctions for Market Abuse (CSMAD)*[24]. Both instruments require Member States to lay down rules on fines for legal persons that have engaged in market abuse, where the MAR stipulates administrative fines and the CSMAD criminal sanctions. However, in line with other criminal-law directives, the CSMAD allows for fines for legal persons under both criminal and non-criminal law. This fact led the Legal Service of the Council of the European Union to conclude that the EU's member states are obliged

18 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA is the source of the wording here. See OJ L335, 17.12.2011, 1–14.

19 Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC. The text is found in OJ L2024/1203, 30.4.2024.

20 Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. See OJ L218, 14.8.2013, 8–14.

21 With respect to the critical matter of whether Article 83 of the TFEU could serve as a source for harmonising non-criminal sanctions, see N Selvaggi, '*Ex Crimine* Liability of Legal Persons in EU Legislation: An Overview of Substantive Criminal Law' (2014) 4 European Criminal Law Review 46, 49–51. – DOI: https://doi.org/10.5235/219174414811783360.

22 G Heine and B Weißer, 'Vorbemerkungen zu den §§ 25 ff' in A Schönke and others (eds), *Strafgesetzbuch – Kommentar* ('30., neu bearbeitete Auflage', CH Beck 2019), paras 123–26.

23 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. See OJ L173, 12.6.2014, 1–61.

24 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (the Market Abuse Directive) OJ L173, 12.6.2014, 179–89.

to transpose the CSMAD's requirements by stipulating criminal-law sanctions for legal persons, because a reference to non-criminal liability in the CSMAD would not add any further value to the MAR's terms.[*25] However, the legal service's interpretation cannot be accepted, as it is *contra legem*.[*26]

Until very recently, the criminal-law directives were quite modest in their attention to harmonising sanctions against legal persons. The only mandatory prescription was a fine (under criminal or non-criminal law). In addition, the directives provided an indicative list of optional other sanctions, which might encompass:

(a) exclusion from entitlement to public benefits or aid;
(b) temporary or permanent disqualification from practising commercial activities;
(c) placing under judicial supervision;
(d) judicial winding-up; and/or
(e) temporary or permanent closure of establishments that were used for committing the offence.

The directive on criminal-law mechanisms' application for fighting fraud perpetrated against the Union's financial interests[*27] explicitly added optional sanctions of another sort to the list: temporary or permanent exclusion from public-tender procedures. The directive specific to combating money-laundering under criminal law[*28] articulated another kind: exclusion from access to any public funding. This exclusion, which likewise may be either temporary or permanent, covers tender-related processes but also grants and concessions.

A significant leap forward in the realm of criminal sanctions for legal persons was made with the adoption of Directive 2024/1203, on protection of the environment through criminal law. Before its adoption, and in marked contrast against European Union legislation on quasi-criminal fines for legal persons, the criminal-law directives did not harmonise either minimum or maximum fines for legal persons. The environmental-crime directive introduced specific thresholds for fines, expressing these as minimum/maximum levels or, alternatively, as a percentage of the legal person's annual turnover. In addition, it provided for optional sanctions such as obliging the legal person to restore the harmed environment to its prior state or pay compensation for the damage to the environment, requiring the legal person in breach to establish due-diligence schemes, and publishing the judicial decision related to the criminal offence committed. Quickly following suit, the directive on criminal sanctions for violating EU-level restrictions[*29] set forth terms for sanctions similar to these precedent-setting ones.

As European Union criminal law is angled purely toward minimum harmonisation, many aspects of the liability of legal persons are left to the discretion of the Member States, or at least so it seems. On the other hand, not many matters of interpretation of European Union criminal law have been brought to the attention of the European Court of Justice (ECJ). For example, it would be difficult to predict how the ECJ might respond when asked about national rules' conformity with the directives where identifying a legal person as liable in the event of lack of supervision or control hinges on demonstrating intent on the part of a person failing to fulfil his or her supervisory duties.[*30] Situating the limits of Member States' discretion is ultimately a balancing act between respect for national criminal-justice systems and the aims behind the Union's strivings for establishment of effective, proportional, and dissuasive sanctions. The absence of referrals from national courts pertaining to matters of substantive criminal law might stem from a cautious approach and desires to protect the criminal-justice system in question: do not ask if you are unwilling to know the answer.

25 Legal Service of the Council of the European Union, 'Proposals for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, a Regulation on insider dealing and market manipulation and other instruments regarding the harmonisation of administrative sanctions in the framework of financial services', Opinion 12979/12, 40–43.

26 M Kärner, 'Interplay between European Union Criminal Law and Administrative Sanctions: Constituent Elements of Transposing Punitive Administrative Sanctions into National Law' (2022) 13(1) New Journal of European Criminal Law 42, 54–55. – DOI: https://doi.org/10.1177/20322844221085918.

27 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (the PIF Directive) OJ L198, 28.7.2017, 29–41.

28 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (the Criminal Money-Laundering Directive) OJ L284, 12.11.2018, 22–30.

29 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673. See OJ L2024/1226, 29.4.2024.

30 Andrê Klip has posited that the goal was to criminalise negligent lack of control or supervision in this connection. See A Klip, *European Criminal Law: An Integrative Approach* (4th edn, Intersentia 2021) 279.

3.2. The European Union's quasi-criminal law

Quasi-criminal law focuses considerably less on the individual. Therefore, imposing non-criminal sanctions on legal persons is considered less problematic. In fact, a legal person is quite commonly the primary addressee of sanctions for breaches of norms established beyond the core of criminal law – in such domains as financial markets and data protection. Here, sanctions imposed on individuals are of a somewhat secondary nature.

Most of the Union's legislation on quasi-criminal fines requires each Member State to lay down rules providing for the possibility of levying fines against legal persons. When we take the criminal-law directives as a backdrop, we find that legislation on quasi-criminal law does not provide for a definition of a legal person. Moreover, not only legal persons but also undertakings (expressing a broader notion) or associations of undertakings may be subject to fines, though this depends on the directive or regulation. In another general pattern, whether or not public bodies should be subjectable to fines seldom gets regulated at EU level. For example, Article 83 (7) of the GDPR explicitly leaves that issue to the discretion of the Member States.

The array of sanctions here shows greater variety than that visible in the criminal-law directives. Though the sanctions most often consist of fines, several alternatives exist: the minimal upper limit may 1) be of a fixed value, 2) depend on the profits gained or losses avoided on account of the infringements, or 3) be dictated by the turnover of the legal person. Furthermore, the quasi-criminal legislation requires Member States to lay down rules on further sanction-based and other measures, often rather specific.[*31] While the body of legislation on Union criminal law is relatively coherent, legislation in the domain of quasi-criminal law exhibits vast differences from one legal act to the next. These go far beyond variations in the terminology employed. The treatment is anything but systematic.

Overall, the quasi-criminal-domain legislation does not specify the model to be applied for liability of a legal person. Furthermore, and in a sharp contrast against what the criminal-law directives address, legislation in the quasi-criminal realm does not, as a rule, render the sanctions contingent on any expressions/indications of intention (or negligence). Instead, such legislation commonly refers to 'the degree of responsibility' as an element for one to consider when imposing fines. In light of the fragmented nature of the Union's quasi-criminal law, ascertaining specific facets to liability of legal persons when transposing such legislation into national law is challenging.

The fact that a directive or regulation does not specify the liability model applicable to a legal person does not mean that the choice is left entirely to the discretion of Member States. While this is especially evident from the *Deutsche Wohnen* judgement, discussed later in this article, some inspiration could have been drawn from the jurisprudence of the Court prior to the judgement in *Deutsche Wohnen* too.

The ECJ explained in judgements from 1990 and 1991, in *Vandevenne* and *Hansen*, that the Community legislation on road-transport rules did not require legal persons to face strict liability for the actions of their employees. However, neither did Community legislation preclude such strict liability, so long as the penalties furnished are similar to those imposed in the event of infringements of national law of a similar nature and importance and are proportionate to the seriousness of the infringement.[*32]

In this arena, the ECJ has dealt predominantly with administrative fines for competition-related infringements. For example, the Court has explained rationale for when an undertaking may be held liable for the acts of an independent service provider supplying it with services.[*33] Also, the Court has found that applicability of Article 101 TFEU does not necessitate there having been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorised to act on behalf of the undertaking suffices.[*34] This does not necessarily imply that the ECJ has adopted the *respondeat superior* model of liability. The concept of a person being authorised to act on behalf of an undertaking is similar to that of a person having a leading role in a legal entity on the basis of a power of representing that legal person from the perspective of the criminal-law directives. The latter

31 For an overview, see Kärner's 'Interplay' (n 26) 46–49.

32 See the Court's judgements of 10 July 1990 and 2 February 1991, in cases C-326/88 *Hansen* and C-7/90 *Vandevenne*, respectively.

33 In its judgement of 21 July 2016 in case C-542/14 *VM Remonts and Others* EU:C:2016:578.

34 See the 7 February 2013 European Court of Justice judgement in case C-68/12 *Slovenská sporiteľňa* EU:C:2013:71, 25.

directives thus consider the power of representation sufficient in equating the mind and will of the natural person to that of the legal person as an expression of the identification model.

As for interpreting what constitutes an **intentional** or a **negligent** infringement, the Court has found that the conditions for showing intent or negligence are satisfied where the undertaking concerned cannot have been unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was contravening the competition rules of the establishing treaty.[*35] This conclusion led to surprising wording for Recital 42 to the ECN+ Directive, which states that these two notions 'should be interpreted in line with the case law of the Court of Justice of the European Union on the application of Articles 101 and 102 TFEU and not in line with the notions of intent and negligence in proceedings conducted by criminal authorities relating to criminal matters'. This formulation for the recital is erroneous, for it presupposes that the interpretation of the ECJ is always going to differ from that by national courts in handling of criminal matters. The interpretation issued by the ECJ dealt primarily with the question of error of law, which, at least in some Member States, does not bring in the intent of the offender.[*36]

From these examples it is not possible to ascertain which model of liability should be employed in applying quasi-criminal sanctions to legal persons. It could be argued that, for meeting the requirement of effectiveness of quasi-criminal sanctions, the imputation standard should be lower than that associated with the criminal-law directives. Indeed, the ECJ held in *Spector Photo Group* that administrative sanctions were chosen deliberately as a more effective tool for enforcement of Community law and stated that the effectiveness of such sanctions would be weakened were the imposition of sanctions to be contingent on systematic analysis of the existence of a mental element in a similar vein to that for criminal sanctions.[*37] There are, however, a few circumstances wherein directives or regulations encompassing quasi-criminal sanctions have pointed to the same model of liability as the criminal-law directives. Some examples are:

- Article 53 (7)–(8) of the directive on preventing the financial system's use for purposes of money-laundering or of terrorist financing (the AMLD)[*38];
- Article 28 (5)–(6) of the regulation on information accompanying transfers of funds and certain crypto-currency assets[*39];
- Article 92a of the regulation instrument pertaining to fisheries control[*40]; and
- Article 47 of the regulation on establishing a Community system to prevent, deter, and eliminate illegal, unreported, and unregulated fishing.[*41]

In conclusion, there is a lack of uniformity in the Union's punitive legislation on non-criminal fines for legal persons. Still, this does not necessarily mean that Member States are free to choose whichever liability models suit their national systems. The ECJ has the final say here – it is the Court's prerogative to draw the lines elucidating where the discretion of Member States ends and thereby delimit an effective, proportional, and dissuasive penalty system.

35 See the 8 June 2013 judgement in case C-681/11 *Schenker & Co. and Others* EU:C:2013:404, 37–38.

36 Kärner, 'Interplay' (n 26) 63.

37 See the European Court of Justice judgement of 23 December 2009 in case C-45/08 *Spector Photo Group* [2009] ECR I-12073, 37.

38 Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849. See OJ L2024/1640, 19.6.2024.

39 Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849. See OJ L150, 9.6.2023, 1–39.

40 Regulation (EU) 2023/2842 of the European Parliament and of the Council of 22 November 2023 amending Council Regulation (EC) No 1224/2009, and amending Council Regulations (EC) No 1967/2006 and (EC) No 1005/2008 and Regulations (EU) 2016/1139, (EU) 2017/2403 and (EU) 2019/473 of the European Parliament and of the Council as regards fisheries control. OJ L2023/2842, 20.12.2023.

41 Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999. OJ L286, 29.10.2008, 1–32.

4. The Estonian approach

4.1. The current landscape in Estonia – a single penal code with elements of administrative law

Since the 2002 reform of its penal law, Estonia has had a single penal code in place (its KarS). That reform eliminated the distinction created by a parallel Criminal Code and Code of Administrative Offences, which had been in force since 1986 and been incorporated into the legal order of the newly independent Estonia. The legal-policy decision behind the reform arose primarily from the fact that the two codes provided for the same prerequisites for punishability, with the only differences being in the system of sanctions – the central penalty for an administrative offence was a fine, and the application of imprisonment was ruled out – and in the procedure. For reasons of procedural economy, the powers to impose penalties in the first instance for administrative offences, as minor infringements, were entrusted to administrative officials, whose decisions could be challenged in court. Since the radical modernisation of criminal law envisaged by the reform's architects concerned itself largely with the concept of offences, they considered it expedient to handle the substantive parts of both codes in one go, via a merged instrument. However, an important difference between the two earlier codes became evident at this juncture: the range of subjects. Pre-reform criminal law did not recognise the liability of legal persons, and the latter could face punishment for breaches of their obligations in the case of administrative offences only if the law governing the relevant area featured specific provisions for this. At the same time, the general part of the Code of Administrative Offences did not lay down the conditions under which attributing a given infringement to a legal person could even be considered. It left the latter entirely to jurisprudence. In a nutshell, the Estonian legal order before the penal-law reform was remarkably similar to the current expression of German law, characterised likewise by a distinction between a criminal code (the German StGB) and a code of administrative offences (the OWiG), with the liability of legal persons being admissible only on the basis of the latter.

With enactment of Estonia's new Penal Code system in 2002, the acts punishable under both of the previous codes were brought together under the umbrella term 'offence'. The conduct criminalised under the previous system's Criminal Code was treated as criminal offences while what had been deemed administrative offences were now handled as misdemeanours (per Subsection 3(2) of the Penal Code). Criminal offences are codified in a special section of the Penal Code, and misdemeanours are governed by the laws pertaining to the sector whose requirements are backed by sanctions articulated in those laws (per subsections 3 (3–4) of the Penal Code). Notwithstanding the decodification of misdemeanours, their punishment must be based on the general principles of liability laid down in the general part of the Penal Code (per Subsection 1(1)). This requirement applies to, among other things, the grounds for liability of legal persons. Namely, the general part of the Penal Code equipped Estonia with a set of criteria for attribution of a punishable act to a legal person, for the first time in the country's legal history. While it did so uniformly, irrespective of whether the offence is a criminal offence or a misdemeanour, there is a clear tendency in Estonian legislative practice to transpose the penalties for legal persons under EU law primarily as attached to misdemeanours, notwithstanding the fact that the often extremely high fines for these offences would seem to presuppose their punishment as criminal offences in national law.

It can be assumed that, in taking this tack, the Estonian legislator has been guided by two main considerations. Above all, national legislation cannot ignore the fact that, as the foregoing discussion already has clarified, the EU legislator has in many cases given preference to sanctioning of infringements of certain requirements by means of administrative penalties. The penal-law reform, while drawing together the substantive provisions of the former Criminal Code and the Code of Administrative Offences, maintained a procedural distinction between criminal offences and misdemeanours. Since their respective procedural rules are still laid down in separate procedural codes – the Code of Criminal Procedure (KrMS) for criminal offences and the Code of Misdemeanour Procedure (VTMS) for misdemeanours – and because the powers of prosecution and imposition of the initial penalty for misdemeanours are vested in the relevant administrative authority (the Financial Supervisory Authority for financial offences, the Data Protection Inspectorate for data-protection offences, etc.), this permits one to argue that the ensuing penalty is an administrative penalty, a form of sanctions imposed by an administrative authority.

In addition to that factor, however, there is a second one. The more general procedural economy of such an approach cannot be denied. It brings savings by avoiding the creation of a conventional sector-specific

police investigation and prosecution office within the criminal-justice system by concentrating the supervision of each sector in the hands of a single specialised agency. At the same time, the transposition of EU penal-law norms as specific to the misdemeanour realm has subjected the general foundations for liability of legal persons that are identified in the general part of the Penal Code to considerable strain. On one hand, these extend in the same way to criminal offences, but, at the same time, they cover all misdemeanours, regardless of whether these are connected with subjects regulated by EU law.

4.2. The basis for liability of legal persons: The original model and further developments

As adopted in 2002, the Penal Code established the conditions for attributing an offence to a legal person on the principle of derivative liability, allowing a legal person to be punished only for an offence committed by its body or senior official (under Subsection 14 (1)). Only legal persons in private law could be punished, with their legal form being immaterial, while the liability of the state, local government entities, and legal persons under public law was excluded (per Subsection 14 (3) of the code). In this respect, the concept of legal persons' liability expressed bore similarity to the identification model discussed above. While the need to exempt certain legal persons from liability has not come under question, neither has it been a 'non-issue': the circle of persons whose actions could culminate in the liability of a legal person (or so-called associates) was widened quite soon after the introduction of the Penal Code. Citing a need to bring Estonian penal law into line with international requirements, amendments to the list of associates were proposed early on, and the list of associates soon was supplemented with the notion of a competent representative, in 2008.[*42] At the same time, case law started to extend the grounds for liability of legal persons, expressly with regard to misdemeanours. Because the law conceives of misdemeanours as minor wrongs, the Penal Code (via its Section 23) punishes only the commission of the misdemeanour – its execution, not its instigation or participation in it. Embracing such a solution did not fail to have an impact on the liability of legal persons, since in most cases it was not the members of the company's governing body or its top managers who broke the rules in a particular area but ordinary employees, who did so on their instruction. Relying on the theory of organisational supremacy (*Organisatsionsherrschaft*), borrowed from German penal law, Estonia's case law solved this problem by finding that a legal person may be held liable for an offence committed by an ordinary employee if that offence was committed by a member of its body or a senior official. Taking into account the trends described above and the requirements of EU law that have followed in the years since, and bearing in mind that the nation's courts still had not taken a position on the matter of the definition of a competent representative[*43], in 2023 the Government of the Republic initiated drafting for more thorough revision focused on liability of legal persons. Passed at the end of the same year, the new law provided for the incorporation of the above-mentioned case-law conclusions into the general Penal Code. That is, one of its most important aspects was the inclusion in the circle of associates of any person who committed the offence in question at the direction of an organ, manager, or competent representative of the legal person. The act of law also supplemented the landscape with elements of organisational liability both by articulating them for cases of offences of omission (in Subsection 14 (2) of the Penal Code) and by holding the legal person liable for any act if the offence occurred because of its inadequate organisation or supervision (under Subsection 14 (1) of the code).[*44] The lack of clarity as to whether the original wording of Section 14 of

42 Under the Act Amending the Penal Code and the Code of Criminal Procedure (RT I 2008, 33, 200). More information about the amendment to the law is available via P Pikamäe, 'Kes on juriidilise isiku pädev esindaja karistusseadustiku § 14 mõttes? [Who Is the Competent Representative of a Legal Person within the Meaning of Section 14 of the Penal Code?]' [2010](1) Juridica 3.

43 The case law of the Criminal Chamber of the Supreme Court of Estonia arrived at clarification of the concept of a competent representative only in its judgement 4-23-1254, of 28 December 2023, 15 years after legal circles encompassed the figure in question in their theory of jurisprudence. This indirectly attests to how little practical significance this amendment bore for the law. By considering any employee of a legal person who has committed an offence in the course of employment duties to be a competent representative, the Supreme Court rendered meaningless some of the amendments to the Penal Code directly prior to pronouncement of said judgement.

44 For further information, see M Kärner, 'Muudatused juriidilise isiku süüteovastutuses [Amendments to the Tort Liability of Legal Persons]' [2023](4–5) Juridica 391. An extensive English-language overview of the grounds for liability of legal persons has been provided by J Sootak and M Kärner, 'Corporate Criminal Law and Criminal Compliance in Estonia' in K Papathanasiou (ed), *Unternehmensstrafrecht und Criminal Compliance / Corporate Criminal Law and Criminal Compliance* (Jan Sramek 2023 227–70.

the Penal Code allowed a legal person to be held liable for offences arising from inadequate organisation/supervision had come under repeated criticism in Estonian legal literature.*[45]

4.3. Recent case law of the European Court of Justice as a further driver for developments in the liability of legal persons

Notwithstanding some additions stemming from organisational theory, the scope and content of which the case law has yet to clarify, Section 14 did not completely erase the link between an act of a natural person and the liability of a legal person, so it did not completely abandon the model of derivative liability. This relationship still proved to be a tricky one, and the compatibility between derivative liability and the requirements of EU law ended up becoming the subject of a reference for a preliminary ruling addressed to the European Court of Justice by a German court of first instance. At particular issue was compatibility with the rules of the General Data Protection Regulation on the liability of legal persons. Accordingly, the judgement of the European Court of Justice in this case, *Deutsche Wohnen*, can be seen as a landmark ruling in many respects. First of all, the grounds for liability of a legal person (in cases of either criminal or administrative liability) as required by EU law had seldom found their way into the case law of the European Court of Justice. This ruling gains further weight in that it is unequivocally clear that the positions of principle expressed in the judgement affect the legal order of any Member State that follows the model of derivative liability with regard to the liability of legal persons.

The reference for a preliminary ruling requested clarification from the European Court of Justice on two specific questions, which were mutually related. Firstly, the Court was asked whether Section 30 of the German Code of Administrative Offences – i.e., the portion of the OWiG that establishes administrative liability of a legal person in terms of a derivative model, thereby presupposing the identification of the natural person (the associate) who committed the offence – is compatible with Article 83 of the General Data Protection Regulation. Then, the Court was asked to examine whether, under the same provision, a legal person may be sanctioned as a controller under the GDPR only if the controller has acted wrongfully or, instead, the legal person's objective liability irrespective of fault could be considered also. As the ripples from the ruling spread, the Court's answers became well-known: following the Advocate General's recommendations, it answered the first question in the negative and the second in the affirmative.*[46] The European Court of Justice began by validating the doubts expressed in the reference for a preliminary ruling – the construction used in German administrative penal law was not compatible with the requirements of the General Data Protection Regulation in so far as the law imposed additional conditions for liability of the legal person serving as the controller under the terms of the GDPR, conditions not derived from said EU regulation; thereby, the law made it more difficult to reach the high standard of data protection mandated. The General Data Protection Regulation does not distinguish between natural and legal persons' liability for violations of its requirements, and nowhere does it state that the liability of legal persons follows only from infringements perpetrated by their organs and agents. On the contrary, liability is incurred for infringements committed by anyone acting in the interests of the legal person and in the course of its business. Therefore, any legal person may face an administrative fine for the infringements identified in Article 83 (4)–(6) of the GDPR, provided that said legal person can be regarded as a controller and that there is no need to demonstrate that the relevant offence was committed by an identified natural person.*[47] For its answer to the second question, however, the Court held that, since the substantive conditions under which the supervisory authority may impose an administrative penalty for violation of the requirements of the General Data Protection Regulation are exhaustively listed in the regulation itself, it follows from Article 83 (2) (b) of the GDPR that the prerequisites for application of an administrative penalty encompass, among other components, the conduct of a legal person in committing the infringement, intentionally or negligently. It does not follow from the text of the regulation that a legal person acting as a controller may be sanctioned also for an infringement not linked to fault.*[48]

45 For example, see Sootak, Kärner, and Kärner (n 15) 707–708; J Sootak, *Penal Law, General Part* (Juura 2018), 626–27 (the chapter by E Elkind).

46 *Deutsche Wohnen* (n 1), Opinion of AG Campos Sánchez-Bordona, delivered on 27 April 2023.

47 *Deutsche Wohnen* (n 1) 38ff.

48 Ibid 61ff.

The Court's interpretation, according to which the sanctioning of a legal-person controller that has breached the requirements of the GDPR shall not depend on identifiability of the natural person who acted, *de facto*, on its behalf, did not leave Estonian law unaffected. Similarly to Germany's Code of Administrative Offences, Section 14 of the Estonian Penal Code generally rendered the punishment of a legal person for an offence dependent on pinpointing of an identified natural person. According to a consistent body of case law, all the criteria for existence of the offence (the presence of the constituent elements of the offence, unlawfulness, and fault) must have been displayed in the conduct of the associate before the question of whether the offence was committed in the interest of the legal person may be considered.*[49] For the reasons listed above, the Criminal Chamber of the Supreme Court confirmed that the terms of Section 14, as in force until 31 October 2023, were out of step with EU law in that these regulations allowed fining of a legal person in misdemeanour proceedings for the infringements referred to in Article 83 (4)–(6) of the GDPR only if the infringement had already been ascribed to an identified natural person. On the other hand, the Supreme Court did not consider the amendments that entered into force on 1 November 2023 to be contrary to EU law.*[50]

5. Conclusions

The recent refinements to EU law, partly in connection with the case law described above, allow several conclusions to be drawn both as to the basis for liability of legal persons in Union law generally and about the direction in which the criminal or quasi-criminal/administrative law of the Member States could usefully be developed in light of it. First of all, it is worth underscoring that the *Deutsche Wohnen* interpretation, which speaks in favour of organisational liability of a legal person, is limited to the General Data Protection Regulation and the penal norms contained therein. As this article has brought to the fore, the development of EU law addressing the liability of legal persons is characterised by uneven evolution, particularly with regard to quasi-criminal law, which often gets grafted onto the regulations to ensure compliance with Union rules. This type of legislation is precisely what is at issue in the case of the GDPR; therefore, the Court treaded softly. It did not intend its interpretation of the basis for liability of a legal person in *Deutsche Wohnen* to be all-encompassing; rather, it focused on the application of a single Union act, which does not preclude alternative interpretations in other areas, interpretations that might favour other concepts of liability of legal persons. At least one new request for a preliminary ruling has arisen against the backdrop of this judgement, in another area: an Austrian court has asked whether the domestic concept of legal-personality-linked liability complies with what Union law demands in the sphere of acting against money-laundering and financing of terrorism.*[51] Across the various nations and their enforcers in individual fields of law, this patchy terrain inevitably entails having to grapple with several distinct concepts.

From another perspective, one could ask whether organisational liability in the abstract sense is embodied in the Court's interpretation of the GDPR, according to which sanctioning a legal person does not presuppose the identification of the natural person who has *de facto* committed the infringement but at the same time does require that the legal person as a controller have committed the infringement wrongfully. Since intentionality and recklessness are, by their very nature, purely human attributes (characterising the mental attitude of the actor toward his or her actions and those actions' consequences), a question naturally arises as to how the liability should be established in practice if the physical person who actually carried out the deed is not identified.*[52] This is why the classical idea of organisational liability is anchored in the concept of objective liability, leaving aside the natural person who carried out the act. There exists a genuine risk that interpreting the basis for liability of a legal person in light of the *Deutsche Wohnen* ruling is going to collapse because an important pillar is missing: doing so attempts to reconcile inherently contradictory phenomena. Clearly, the problem has not gone unnoticed by the European Court of Justice, which has

[49] Most recently, the Criminal Chamber of the Supreme Court in case 4-19-4632/23.

[50] Per the judgement issued by the Criminal Chamber on 20 June 2024 in misdemeanour case 4-23-742/78 (see paras 15 and 19–21.

[51] This is a request for a preliminary ruling in case C-291/24.

[52] For more information on the links between intent and negligence and on the foundations for liability of a legal person, see, for instance, E Samson, 'Kriminaalkaristus majandusettevõtetele [Criminal Punishment for Economic Enterprises]' [1998] (2) Juridica 58.

sought to explain the reasoning for the judgement's findings on intent and negligence by referring, *mutatis mutandis*, to prior case law according to which the conditions for vicarious liability are met 'where that controller could not be unaware of the infringing nature of its conduct, whether or not it is aware that it is infringing the provisions of the General Data Protection Regulation'. Where the controller is a legal person, the application of Article 83 does not require action or even knowledge on the part of the governing body of that legal person.[*53] Critically, one must not overlook the fact that, while knowledge is quintessential to both intent and negligence, this element is not sufficient in itself for distinguishing between intentional and negligent action, especially when the criterion referred to by the Court involves an error of law rather than an error of fact.[*54] The question of how legal knowledge is to be assessed if the knowledge of the entity's governing body is not to be taken as a yardstick remains likewise unanswered.

From the point of view of national legislators, the fragmented and non-systematic nature of EU penal law seems to imply that, at least in the arena of application of EU law, the principle of national codification of penal law is probably going to need abandoning in the near future. Sector-based differences in the system underpinning the basis for liability of legal persons require sector-specific national transposition of EU law on sanctions rather than establishment of general principles of criminal or quasi-criminal law. The above-mentioned judgement wherein the Criminal Chamber of Estonia's Supreme Court declared the general provision of the Penal Code for liability of legal persons to be contrary to EU law with regard to the General Data Protection Regulation illustrates this awkward situation well. This judgement led to two separate norms in the same general penal-law provision (in Section 14 of the Penal Code). The first of these *expressis verbis* provisions must be applied for the prosecution of a legal person under rules on national sanctions, while the second one, which follows from the interpretation of the Supreme Court, must be applied specifically in cases of infringements falling under the terms of the GDPR. Although such an approach – articulating new rules on the basis of case law – might well represent an emergency solution aligned well with an acute legal problem, how consistent it is with the principles of legal clarity and certainty is obviously highly debatable. The exceptional importance of those principles for penal law cannot be overstated.

53 *Deutsche Wohnen* (n 1) 76–77.

54 For examination of the distinction between the two, see, for example, M Bohlander, *Principles of German Criminal Law* (Hart 2009) 70–74 and also 119–21. – DOI: https://doi.org/10.5040/9781472564627.

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The Triumph of Soft Law in the Financial Sector:

Can Non-binding Law Have Binding Domestic Legal Effects?

Abstract. Examining the seemingly simple question of whether guidelines in the financial sector are mandatory reveals a highly complex landscape for supervision of the financial sector across the European Union, where international and national financial law enter collision and the participants come to the table with differing mandates/expectations. The article addresses the results, with focus on banking regulation, wherein the European Banking Authority and, in Estonia, the Financial Supervision and Resolution Authority are among the main guideline-issuers. The balance achieved is critical because the fines that the supervisory and resolution authorities can impose on banks for non-compliance with mandatory rules can reach 10% of these entities' total annual net turnover from the preceding business year. An effort to consider all of the relevant factors for understanding which side of the mandatory/advisory line the guidelines stand on, the article constitutes an attempt to initiate vital discussion of the environment created in the financial sector for soft law (i.e., guidelines), which may under certain circumstances take on a larger role than that soft law's legal nature allows.

Keywords: financial supervision, EBA guidelines, Finantsinspektsioon, European Central Bank, soft law, banking law

1. Introduction

For some time now, the financial sector has been thick with regulations. According to several estimates, the number of applicable financial laws and regulations in force within the financial sector has reached more than 600[*2], with which both financial-supervision subjects as defined in the Estonian Financial Supervision Act[*3] (FSAA) and other persons subject to specific laws applicable to the financial sector must comply in their activities.

The purpose of this article is to assess the influence of soft law (i.e., regulation that is not legally binding) in the financial sector. The discussion here analyses whether, under the umbrella of soft law, a legal framework

1 The author's views are his own and do not reflect the official position of the Estonian Financial Supervision and Resolution Authority.

2 For an informal assessment of the work done by the Estonian Financial Supervision and Resolution Authority within the regulatory framework currently in place for the financial sector, as of the beginning of 2022, see 'Finantsinspektsioon Is Twenty Years Old' (6 April 2022) <https://www.fi.ee/en/news/finantsinspektsioon-twenty-years-old> accessed on 1 April 2024.

3 RT I 2001, 48, 267; RT I, 29.3.2022, 8.

has been established that, whether directly or indirectly, imposes obligations that are binding on those subject to financial supervision. Taking into account the length requirements of the article, the author addresses this issue primarily through the lens of banking law.

The paper focuses on the right of the Estonian Financial Supervision and Resolution Authority (FI), derived from Article 57 of the FSAA, to issue advisory guidelines to explain the legislation regulating the activities of the financial sector and to provide guidance pertaining to subjects of financial supervision. The origins of these guidelines are multi-layered, involving both guidelines produced by the FI itself and guidelines authored by the relevant European Union (EU) supervisory authorities: the European Banking Authority (EBA), the European Securities and Markets Authority, and the European Insurance and Occupational Pensions Authority. Particular attention is given to the EBA's power to issue guidelines and recommendations, referred to throughout this paper as EBA Guidelines[*4], under Article 16 of the EBA Regulation.[*5]

One of the main tasks of the EBA, as set out in Article 8 (1) (a)–(b) of the EBA Regulation, is to contribute to the establishment of high-quality common regulatory and supervisory standards and practices and to the consistent application of legally binding acts in the field of credit institutions[*6]. This task, which shall remain subject to the provisions of Article 8 (2) (a)–(c) of the EBA Regulation, encompasses

- developing draft regulatory technical standards in the specific cases referred to in Article 10,
- developing draft implementing technical standards in the specific cases referred to in Article 15, and
- issuing EBA guidelines as laid down in Article 16.

All of the EBA outputs referred to have their own legal bases and consequences. The purpose of this article is not to analyse the EBA regulatory technical standards or the EBA implementing technical standards, as they have significantly different consequences than the guidelines, which the competent authority[*7] can decide whether to comply with or not. Therefore, the article is limited to analysis of the EBA Guidelines.

Attention is given to two key questions:

1. Are the EBA Guidelines mandatory? In the event of non-compliance, what consequences follow?
2. Does the decision to issue an FI guideline under Article 57 of the FSAA, which transposes an EBA Guideline, render the guideline mandatory for financial-supervision subjects?

2. The credit-institution-supervision model in overview

State financial supervision, as defined in the FSAA, oversees the subjects and activities outlined in the FSAA, including the Credit Institutions Act (CIA)[*8] and related legislation based on it.

The CIA governs the establishment, operation, termination, liability, and supervision of credit institutions. Proceedings under the CIA are subject to the provisions of the FSAA, the Administrative Procedure Act[*9] (APA), and Council Regulation 1024/2013 of the EU[*10] (which assigns the European Central Bank (ECB) specific tasks related to the prudential supervision of credit institutions).

For a better understanding of the legal background to the regulation dealing with the specific tasks of the ECB and its evolution, it is necessary to turn to Article 127 (6) of the Treaty on the Functioning

4 In the context of this article, it is not relevant to distinguish between the EBA's guidelines and the recommendations issued under Article 16 of the EBA Regulation (see n 5). This is why, for the sake of clarity, these are collectively referred to here as the EBA Guidelines.

5 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L331 [12–47].

6 The EBA Regulation's art 1(2) sets the EBA's scope of action, which encompasses credit institutions and the competent authorities to supervise them.

7 The competent authority is defined in art 4(2) of the EBA Regulation. Both the FI and the ECB are competent authorities under the respective framework.

8 RT I 1999, 23, 349; RT I, 20.6.2022, 11.

9 RT I 2001, 58, 354: RT I, 13.3.2019, 55.

10 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/[63–89].

of the European Union[*11] (TFEU) for a starting point. Under its terms, the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the ECB, confer specific tasks upon the ECB in connection with policies related to the prudential supervision of credit institutions and other financial institutions (with the exception of insurance undertakings).

In September 2012, the European Commission proposed the creation of a single supervisory authority for euro-area banks. This followed the meeting of 28–29 June of that year whereby the leaders of EU member states agreed to deepening of the Economic and Monetary Union co-operation as one of the elements for remedying the economic crisis.[*12] Commenting on the new proposal, President of the European Commission Jose-Manuel Barroso stated that it would restore confidence in the supervision of banks in the euro area. He also noted that the future should see bankers' losses no longer becoming the people's debt and thus casting doubt on the financial stability of entire countries.[*13] The European Parliament's approval of the proposal in October 2013 led to the adoption of the regulation on the specific tasks of the ECB.

In addition, the entry into force of Regulation 468/2014 of the European Central Bank on 4 November 2014[*14] created the framework for establishment of the EU-wide *Single Supervisory Mechanism* (SSM). Alongside creation of the SSM, the architects of the process decided to harmonise the relevant legal framework, thus paving the way for adoption of a common set of rules, the *Single Rulebook*. This brings together a body of rules covering, *inter alia*, capital and resolution rules for banks: the Capital Requirements Directive (2013/36)[*15] and the Capital Requirements Regulation (575/2013).[*16]

When one looks specifically at the regulation covering the tasks of the ECB, one finds that Article 4 of the ECB Regulation assigns key supervisory responsibilities to the ECB. In examining this context, it is important to understand the distinction with regard to the EBA Guidelines issued under Article 16. In exercising its mandate, the ECB directly supervises those credit institutions that are 'significant institutions' (SIs). The ECB is the authority that decides whether or not to follow the EBA Guidelines.

Less significant institutions (LSIs), directly supervised by their national competent authorities, apply the EBA Guidelines if national competent authorities so decide. The decision to issue the relevant guidelines as their own under Article 57 of the FSAA rests with the FI.

The discussion below evaluates the legal impact of those EBA Guidelines issued under Article 16 of the EBA Regulation and those issued by the FI. In addition, the paper examines the practical impact of these guidelines on the day-to-day activities of subjects of financial supervision.

3. The EBA Guidelines

In accordance with item 26 of the preamble to the EBA Regulation, the EBA should, in areas not covered by regulatory or implementing technical standards, have the power to issue guidelines on the application of EU law. In order to ensure transparency and to strengthen compliance by national supervisory authorities with these guidelines, there should be the possibility of the EBA publishing the reasons stated for supervisory authorities' non-compliance with these guidelines. In the literature, however, particular emphasis has been placed instead on transparency within the EU and on harmonisation of the banking framework across the various – often very different – areas of banking law.[*17]

11 See OJ C326, 26.10.2012, 47–390.

12 See 'Towards a Banking Union' (Commission press release, 10 September 2012) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_656> accessed on 1 April 2024.

13 Per 'Commission Proposes New ECB Powers for Banking Supervision As Part of a Banking Union' (Commission press release, 12 September 2012) <https://ec.europa.eu/commission/presscorner/detail/en/IP_12_953> accessed on 1 April 2024.

14 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L141[1–50].

15 OJ L176, 27.6.2013, 338–436.

16 OJ L176, 27.6.2013, 1–337.

17 Sabine Lautenschläger has expressed the view that these objectives have not been fully met, as there are still national differences in the application of the legal framework: S Lautenschläger, 'Single Supervisory Mechanism – Single Supervisory Law?' (speech at the European Banking Institute workshop, 27 January 2016) <https://www.bis.org/review/r160128a.htm> accessed on 1 April 2024.

Pursuant to Article 16 (1) of the EBA Regulation, the EBA shall issue guidelines and recommendations addressed to competent authorities or financial institutions[*18] with a view to establishing consistent, efficient, and effective supervisory practices and to ensuring common, uniform, and consistent application of EU law. According to the first sentence of Article 2a of the EBA Regulation, the EBA Guidelines do not merely refer to or reproduce parts of legislative acts. Article 16 (3) of the EBA Regulation empowers competent authorities and financial institutions to make every effort to comply with EBA Guidelines. Within two months of the issuing of any guidelines, each competent authority shall confirm whether it is compliant with this already or intends to comply with it. In the event that a competent authority neither complies nor intends to comply, it shall inform the EBA of this, stating its reasons.

The EBA may issue guidelines without prior public consultation and also without consulting the Banking *Stakeholder Group* (per Article 16 (2) of the EBA Regulation). In this case, the EBA must justify this choice. Therefore when to hold a public consultation on guidelines and when not to is left to the EBA's discretion. Looking at the current law from the perspective of a market participant shows that it allows for a scenario wherein the participant becomes aware of EBA Guidelines only when they are issued, without having had an opportunity to intervene in their preparation or otherwise influence the content by expressing an opinion.

Coming back to the right of a competent authority to declare that it will not follow some EBA Guideline, one finds the question of whether there are legal or social measures that the EBA can take in such cases to motivate the competent authority to comply. The answer lies in the possibility of applying indirect sanctions, which the EBA Regulation grants to the EBA. These sanctions are connected with that fact that, in addition to informing the EBA of its non-compliance or of not intending to comply, the competent authority must explain why it is responding thus to a specific guideline. The sanction arises in that the EBA, in turn, discloses the fact that said competent authority neither is complying nor intends to comply with the guideline issued and also has the right to publish the reasons cited.

With the associated terms, the EBA Regulation includes a soft but potentially quite unpleasant way of dealing with those competent authorities that opt not to follow the EBA Guidelines, in the form of stigmatisation.[*19] This type of response to a notification of non-compliance does not mesh in the best way possible with the general notion that the EBA Guidelines are voluntary.

Let us look at things the other way around. What is the effect of the EBA Guidelines when a competent authority notifies the EBA that it is complying with the guidelines issued? Situations wherein a competent authority chooses to comply with a guideline instrument have been addressed by the Court of Justice of the European Union (CJEU), in its judgement of 15 July 2021. The case, C-911/19[*20], pertained to the EBA's guideline document of 27 September 2011 (GL 2015/18)[*21], on product-oversight and governance arrangements for retail banking products, known as the Retail Banking Guidelines. The parties to the dispute were the professional association of French banks, *Fédération bancaire française,* and the banking-supervision authority of France, *L'Autorité de contrôle prudentiel et de résolution*.[*22] The CJEU's decision discussed several important legal questions related to the guidelines, among them whether the CJEU was even permitted to review the legality of the Retail Banking Guidelines under Article 263 TFEU[*23] and whether the Retail Banking Guidelines had legal force and could therefore have legal consequences. The CJEU answered these questions in the negative.[*24]

18 Financial institutions are defined in art 4(1) of the EBA Regulation.

19 Before 1 January 2020, the stigmatisation was even more effective, in that the EBA was obliged to inform the European Parliament, the Council, and the Commission of the guidelines issued while also indicating which of the competent authorities had not complied with them. Furthermore, the EBA was required to describe how, in light of its mandate, it ensured competent authorities' future compliance with its guidelines.

20 See the documents available on Case C-911/19 via <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62019CJ0911> accessed on 11 July 2024.

21 See 'Guidelines on Product Oversight and Governance Arrangements for Retail Banking Products' (22 March 2016) <https://extranet.eba.europa.eu/sites/default/documents/files/documents/10180/1141044/a114bf1f-14c7-40d4-9018-97c14b2a0052/EBA-GL-2015-18%20Guidelines%20on%20product%20oversight%20and%20governance.pdf?retry=1> accessed on 1 April 2024.

22 The FI issued the EBA recommendation with resolution no 4.1-1/108, of 3 August 2016; see the Estonian-language <www.fi.ee/sites/default/files/2018-08/Juhatuse_otsus_03082016.pdf> accessed on 1 April 2024.

23 Pursuant to art 263(1) TFEU, the CJEU shall review the legality of legislative acts; of acts of the Council, of the Commission, and of the European Central Bank (apart from recommendations and opinions); and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. Also, the CJEU shall review the legality of those acts of bodies, offices, or agencies of the Union intended to yield legal effects vis-à-vis third parties.

24 In its ruling in case C-911/19; see paras 35–50.

According to the Court, for verifying the applicability of Article 263 of the TFEU, it is necessary to examine the substance of the Retail Banking Guidelines and to assess its effects on the basis of objective criteria, such as the content of said act; the context in which it was adopted; and the powers of the institution, body, office, or agency that adopted it. According to the Court, the non-binding nature of the Retail Banking Guidelines is evident from both the content and the wording. The Court based its assessment also on Article 16 (3) of the EBA Regulation. This requires competent authorities to decide explicitly whether or not to comply with the guidelines and to inform the EBA of their decision and the reasons for it; therefore, competent authorities have the option of not following the EBA Guidelines.

The CJEU ruling referred also to Article 288 TFEU, under which, to exercise the EU's competencies, the various institutions shall adopt regulations, directives, decisions, recommendations, and opinions. The last two are not binding under the relevant provisions.[*25]

In the same ruling, the CJEU stated, *inter alia*, that such EBA Guidelines may direct competent authorities to take national measures aimed at altering aspects of the activities of financial institutions or compelling them to comply with the EBA's guidelines.[*26] In the case before the court, the French supervisory body had taken corresponding measures and published a notice on its website via which it, firstly, stated that it had complied with the guidelines and, secondly, specified that those guidelines applied to the credit institutions, payment institutions, and electronic-money institutions under its supervision – i.e., that it had transposed the guidelines issued by the EBA.[*27] Furthermore, the Court noted that the EBA Guidelines must be taken into account by national courts when they are resolving disputes related to the application of these, particularly where their purpose is to supplement the implementation of the binding provisions of EU law.[*28]

Thus the Court, on one hand, ruled out the specific EBA Guidelines at issue being binding, for reason of the right of the competent authority to choose whether or not to apply them, while, on the other hand, finding the guidelines to carry legal force very similar to that of binding EU legislation. If we consider the EBA's power to stigmatise a competent authority that declares itself not in compliance with the guidelines (under Article 16 (3) of the EBA Regulation) in conjunction with this, the Court's decision can be considered self-contradictory in its reasoning. This situation tends to support the conclusion that the legal framework around the EBA Guidelines creates an umbrella of soft law, yet it simultaneously keeps a shroud over the fact that such guidelines are in some sense expected to have a binding effect. Perhaps the mere fact that non-compliance with the EBA Guidelines yields a punitive stigma for the competent authority will open the door to a debate as to whether the guidelines are still merely advisory in nature or whether a certain regulatory component is already built into the transposition process.

Let us put aside the above criticisms at least for now. The CJEU has clearly stated that a guideline issued under Article 16 of the EBA Regulation is not binding EU legislation.

This conclusion cannot automatically be transposed to the national level, such as the FI's resolutions for issuing EBA Guidelines. Assessment of the domestic legal effects must take into account the law in force in a given Member State, inclusive of the process for transposing EBA Guidelines.

Discussion naturally turns then to evaluation of the process of the EBA Guidelines' transposition as a non-binding framework under the EBA mandate. In connection with this, the next section of the paper examines the legal meaning of such guidelines in the context of Estonian law.

4. Transposition of the EBA's Guidelines to FI guidelines

In general terms, the FI makes decisions on the EBA Guidelines via a process[*29] that involves

a) deciding to inform the EBA of whether or not the FI is in compliance with the guidelines and,
b) in the case of compliance, choosing to issue and disclose the relevant EBA Guidelines in accordance with Article 57 of the FSAA.

25 Ibid, para 42.

26 Ibid, para 70.

27 Ibid, para 26.

28 Ibid, para 71.

29 Illustration of the transposition of the EBA advisory guidelines by the FI is provided through the resolution on the issue of the Retail Banking Guidelines as challenged before the CJEU (n 22).

The first of these two possible steps entails issuing a resolution that addresses whether or not the FI is operating in accordance with the EBA Guidelines. It would be premature to claim that the scope of the impact of such a resolution by the FI is limited to the EBA and FI, as opposed to affecting external parties too. The impact of such a resolution is clearly passed on to the Estonian financial sector (in the case of the EBA Guidelines, usually to credit institutions) and may affect the use of tens to hundreds of millions of euros of capital.

With a resolution in the second category, the FI chooses how to transpose the EBA Guidelines nationally; i.e., it indicates what legal force the EBA Guidelines will have in the country. The FI's usual practice is to adopt the EBA Guidelines on the basis of Article 57 of the FSAA. That is, it issues them as FI guidelines.[*30] Leaving aside legal assessment of such a choice and under the assumption that the FI possesses the right to issue EBA Guidelines as FI guidelines, one still finds the question of what is at stake in terms of administrative law in the case of this type of FI guidelines.[*31] Is such an EBA Guideline, which is in its turn FI guideline, an administrative act or, rather, a measure? The answer to this question is of considerable importance, because it determines the requirements for the form of respective decisions, the legal effect thereof, and the opportunities for the persons concerned to defend their rights.

4.1. Guidelines issued by the FI

The FI is the administrative authority responsible for financial supervision and resolution tasks in Estonia. These tasks are performed in connection with Article 8 (1) of the APA and Article 4 (2) of the FSAA.[*32] State financial supervision includes the supervision of the subjects of state financial supervision and the activities provided for in the acts specified both in Article 2 (1) of the FSAA and in legislation established on the basis thereof. According to Article 2 (3) of the FSAA, financial crises' resolution means the conducting of the resolution proceedings and the implementation of the resolution tools or powers prescribed by the Financial Crisis Prevention and Resolution Act (FCPRA)[*33].

For ascertaining the legal nature of the FI's guidelines, the answers to two questions are crucial.

The first of these is whether the FI is exercising its financial supervision and resolution function when it decides to report its compliance with the EBA Guidelines and issues them in Estonia as FI guidelines. In order to exercise financial supervision, the FI must have been granted the relevant powers[*34] either by law or by regulation or administrative agreement based on the law.[*35] Article 3 (1) of the FSAA explains the purpose of financial supervision – i.e., contributing to the stability, reliability, and transparency of the financial sector. Article 6 of the FSAA specifies and grants to the FI all the necessary rights related to exercising that kind of right. Moreover, Article 57 (1) explicitly grants the right to issue advisory guidelines.

Proceeding on the basis of the reasoning above, one finds that the FSAA unambiguously demonstrates the mandate of the FI both as a financial supervisor and as a financial-crisis resolution body, to issue guidelines. In summary, the Management Board of the FI, acting as an administrative authority, holds the statutory responsibility articulated under Article 18 (1) of the FSAA. The board's role, then, includes informing the EBA about compliance with the EBA Guidelines and issuing guidelines in Estonia in accordance with Article 57 of the FSAA.

The second key question that arises is whether the FI's guidelines are an administrative act.[*36]

30 Available online <https://www.fi.ee/en/juhendid/pangandus-ja-krediit> accessed on 1 April 2024.

31 T Rauk, 'Regulatiivsus ja selle sisustamise problemaatika [Regulativity and Problems Related to Its Definition]' [2013] (6) Juridica 371.

32 A Aedmaa and others, *Haldusmenetluse käsiraamat* [Handbook of Administrative Procedure] (University of Tartu Press 2004) 41–42, with regard to para 2.1.

33 RT I, 19.3.2015, 3; RT I, 29.3.2022, 9.

34 Aedmaa and others (n 32) 43, with regard to para 2.3.1.

35 The Supreme Court's ruling of 30 April 2004 in case 3-3-1-77-03 states 'Assignment of tasks can be made either by law, or by regulation or administrative agreement based on law' in its para 26.

36 See also P K Tupay, 'Riigivõimu otsused koroonaviiruse ohjeldamiseks: kas garantiikiri Eesti riigi püsimiseks või demokraatia lõpp? [The Government's Decisions To Fight the Coronavirus: Guarantee for the Existence of the Estonian State or the End of Democracy?]' [2020] (3) Juridica 163, in its para 2.2.4.

The commentaries on the APA express the view that, irrespective of the form in which an administrative act is performed or of the administrative authority's own understanding of the document issued or its content, it is the actual content of the administrative act that gets assessed in the process of classifying it.[*37] In the legal literature[*38] it has been noted that, in the event of doubt as to whether a decision is an administrative act or not, the following characteristics must be checked. All of the following criteria must be met at the same time in the case of an administrative act:

- the subject acting is an administrative authority;
- the activity is carried out in a public-law relationship;
- the activity constitutes an expression of intent to regulate a legal relationship;
- the declaration of intent is unilateral;
- an individual case is being regulated;
- the regulation is addressed to a person external to the administration.

Length considerations render it necessary to assess only the regulatory-case-related components of the FI guidelines in this paper. These are considered next.

4.2. The FI guidelines' regulatory nature

According to the legal literature, only declarations of intention that are aimed at creating, altering, or terminating someone's rights or obligations can be considered to be legislation – the regulatory component of the legal relationship is essential.[*39] The regulatory character is even considered to be one of the most important components, in that it distinguishes an administrative act from a measure and from a procedural act, neither of which have this feature.[*40] Regulatory character is expressed above all else in a certain mandatory nature, the regulation of a situation in a specific case, which presupposes that a legal position established on a legal basis and protected by law is infringed.[*41] Legal scholars have pointed out that the activity of an administrative authority must have an objective, some intention to bring about a regulatory character.[*42] Hence, for an administrative act to be of a regulatory nature, it must be aimed at producing legal effects – i.e., creating, altering, or extinguishing rights or obligations; establishing legally binding facts; or changing the public-law status of a matter. Otherwise, it is a measure.[*43]

With Article 57 (1) of the FSAA, the legislator has made it clear that these are 'advisory guidelines […] to explain legislation […] and to provide guidance to subjects of financial supervision'. According to the explanatory memorandum[*44] accompanying the draft version of the FSAA, '[a]ll over the world, it is common for financial supervisory authorities to issue advisory *guidelines* to harmonize practices and implement good practices and best international practices. The right to issue advisory guidelines is provided for in the respective German and Finnish laws, for example'. While advisory guidelines are not legislation, they 'nevertheless have an important influence on the behaviour of market participants through the authority of the financial supervisory authority'.

It can be concluded from the above that FI guidelines either do not feature an unambiguous regulatory component or at least do not have one extensive enough as to lead to a desire to definitively regulate the legal relationship. This is clearly indicated by the wording of the relevant provision, as well as by the international legal framework on the basis of which the EBA issues its Guidelines (discretionary transposition) and the above-mentioned judgement of the CJEU, which deemed the EBA Guidelines to be non-binding.

There are arguments against this approach as well.

37 K Merusk and I Pilving (eds), *Halduskohtumenetluse seadustik. Kommenteeritud väljaanne* [Code of Administrative Court Procedure, Annotated Edition] (Juura 2013) 66 (in ch 1).

38 Aedmaa and others (n 32) 248, with regard to para 9.1; Merusk and Pilving (n 37) 66–76.

39 Aedmaa and others (n 32) 254, with regard to para 9.1.3; also see the Administrative Chamber of the Supreme Court's judgement in case 3-3-1-44-10, of 13 October 2010, para 12.

40 Rauk (n 31) 377, with regard to para 4.

41 Ibid 371, on para 2.

42 Ibid 372, addressing para 2.1; Merusk and Pilving (n 37) 68, with regard to para 3.

43 Ibid.

44 *Finantsinspektsiooni seadus*, 630 SE, comment on ch 7 in Estonian <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d538bb5a-f974-3041-8eba-eb6410ffe8b5/Finantsinspektsiooni%20seadus> accessed on 1 April 2024.

The **first** brings in the matter of stigmatisation by the EBA, which is reflected in Article 16 (3) of the EBA Regulation. When a competent authority declares that it will not nationally transpose some EBA Guideline, the ensuing stigmatisation, which may lead to public chastisement, implicates that competent authority. In other words, it can be understood as a kind of sanction mechanism applied to the competent authority, one that could motivate it to transpose the EBA Guidelines. That said, however much additional motivation to implement the EBA Guidelines this might involve, it has no regulatory impact on the addressee of the FI guidelines.

The **second** argument deals with the content of each specific FI guideline. An EBA Guideline issued via the FI guidelines may go beyond providing behavioural recommendations in its content, and certain obligations can be derived therefrom. This conclusion seems to be supported by case C-911/19 of the CJEU, as discussed above: points 26, 70, and 71 accord to the EBA Guidelines a certain effect that should be taken into account. If a scenario of this type coincides with the considerably broad mandate of the FI – for example, in the context of credit institutions (per Article 104 (1) of the CIA) – the institution may face a specific consequence in the form of a precept if it fails to comply with the FI guidelines. Failure to comply with the precept may, in turn, result in a non-compliance levy amounting to as much as 10% of the credit institution's net annual turnover under the definition in Article 104[1] of the CIA. However, such a situation implies a breach of the mandate under Article 57 of the FSAA and the issuance of an administrative act under the guise of the FI guidelines.

With regard to the scope of this article, and without evaluation of all EBA Guidelines issued by the FI under Article 57 of the FSAA, it can be concluded that the mandate given to the FI under Article 57 of the FSAA does not hold a regulatory component. Were such a regulatory nature to be established upon assessing the content of a specific FI guideline or a part thereof, it would no longer be a guideline within the meaning of Article 57 of the FSAA.

5. The FI guidelines as information measures and/or administrative rules

The conclusion developed above that those FI guidelines that transpose EBA Guidelines lack the nature of administrative acts raises a legitimate question as to what they actually are.

According to Estonian legal scholars, an administrative act is not an explanation describing or interpreting existing legal provisions that does not contain new legal provisions and is not legally binding on persons, such as explanations, recommendations, warnings, and evaluations.[*45] The absence of a regulatory nature unequivocally points to the possibility that this is a measure.[*46] According to Article 106 (1) of the APA, a measure is an act performed by an administrative authority that is not issuing of a legal act and that is not performed in civil-law relationships. The Supreme Court has counted as measures various activities of an administrative authority that do not have a regulatory element.[*47]

Also, it is clear from the case law of the Supreme Court of Estonia[*48] that FI guidelines do not become administrative acts merely because they are approved by a resolution of the Management Board of the FI pursuant to Article 57 (3) of the FSAA. As is noted above, the content of the decision is relevant in ascertaining whether this is an administrative act or, in contrast, some other administrative activity.

45 Aedmaa and others (n 32) 255, with regard to para 9.1.3.2; Merusk and Pilving (n 37) 69–70, addressing para f.

46 Ibid 77, about para c.

47 For example, the Supreme Court considered the warning notice of the FI (in the Administrative Chamber decision of 28 January 2021 on case 3-19-885) and the instructions on refusal to grant consent by letter and on making changes to the draft project (in that chamber's ruling 3-3-1-12-16, from 8 June 2016).

48 Ruling 3-4-1-6-10 of the Constitutional Review Chamber of the Supreme Court, of 22 November 2010, states in para 43: 'In determining the type of act, the Supreme Court cannot be guided solely by the legislator's preference expressed in the text of the provision delegating authority, but must assess the type of act according to its content.' Also, the Administrative Chamber of the Supreme Court has assessed an act with respect to its content in cases wherein the regulator has issued clear guidance (see the chamber's ruling on case 3-3-1-57-09, from 15 October 2009, paras 11–12). The Constitutional Review Chamber expressed the opinion that the type of act specified by the regulator 'does not prevent the court from assessing the type of act by reference to its content'.

It is worth reiterating that the guidelines issued by the FI on the basis of Article 57 (1) of the FSAA are advisory, both in spirit and by law.[*49] Such guidelines from the FI may be considered measures within the meaning of Article 106 of the APA. According to a more precise definition, they may be an information measure characterised by, *inter alia*, the processing and transmission of non-regulatory information, both within and beyond the institution, as well as the publication of information contained in the guideline.[*50]

FI guidelines might also be considered informal administrative rules. This interpretation receives backing from the Parliament (*Riigikogu*) reading[*51] of amendments to the APA[*52] that were designed to supplement Article 4 of the APA with a Section 3. The corresponding proposal provided for a possibility of issuing an informal administrative rule for the uniform application of discretionary powers, handling of undefined legal concepts, and the possibility of related assessment; for the equal treatment of parties to proceedings; for clarification of decision-making criteria or other important matters; and for guidance of legal or natural persons.[*53] According to the explanatory memorandum on the draft act, 'an administrative rule […] is a document for internal use that is not provided for in any legislation but that has widespread use in practice to clarify complex legal solutions, to create uniform practice within the institution, and to establish binding guidelines for the institution itself (e.g., the desire that institutions in different regions of the country understand the law in the same way and make the same good decisions)'[*54]. Informal administrative rules are not unknown in administrative proceedings today and have been applied by the courts far into the past[*55]. In established practice, an informal administrative rule is still primarily addressed to the authority itself; i.e., the rule is binding on the administrative authority that issued it and supports the exercise of discretion under specific circumstances.

The author does not exclude the qualification of an FI guideline as an informal administrative rule. However, several important differences in context between the case law thus far and the proposed amendments to the APA deserve attention. Namely, FI guidelines are not so much of an informal nature; they have a clear impact on the subjects of financial supervision in the specific field of relevance. It would also be difficult to disregard the EBA Guideline if the FI has confirmed compliance with it via a notice to the EBA and thereby has taken on at least an implicit obligation to comply with it (under Article 16 (3) of the EBA Regulation).

The conclusion arrived at from all of the arguments presented above is that the FI guidelines are generally information measures. It is well known that there are exceptions to general rules, and indeed FI guidelines exist that obviously have been promulgated for the purpose of regulating mainly internal FI processes/activities and that therefore do not have a direct impact on third parties. This is usually characteristic of those FI guidelines of the kind based on EBA Guidelines. This is because the respective authorities create, among other things, common European standards with their guidelines, including standards for the competent authorities. Such FI guidelines may be informal administrative rules.

Whether or not the FI's guidance constitutes an information measure as opposed to an informal administrative rule, it is subject to national judicial review. In the case of FI guidelines, the final assessment of the guidelines' nature might depend on whether the FI, in issuing it, has respected its mandate and limited itself to recommendations aimed only at clarifying, explaining, or interpreting existing law or, on the other hand, has gone beyond this and started to regulate the field more broadly. Efforts to answer that question must consider the practical factor of how the FI has applied the relevant guideline – whether it functions more as a regulatory tool than as an explanatory one.

49 See the explanatory memorandum to the draft Financial Supervision Act (n 44), specifically the comments on para 7.

50 Aedmaa and others (n 32) 468.

51 For reason of the expiry of the mandate of the previous membership of the *Riigikogu*, the draft was dropped from the procedure.

52 See the act for amendment of the Administrative Procedure Act and other, related acts, 634 SE, in Estonian at <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/21f6df90-a333-413a-a533-ebbf7e9deebe/Haldusmenetluse%20seaduse%20%20muutmise%20ja%20sellega%20seonduvalt%20teiste%20seaduste%20muutmise%20seadus> accessed on 1 April 2024.

53 Ibid; Art. 4(3) of the APA.

54 Per the explanatory memorandum on draft act 634 SE (n 52) with regard to cl 1 of s 1, para 6.

55 See the judgement of the Administrative Chamber of the Supreme Court in case 3-3-1-77-14, of 18 December 2014, para 18, and in case 3-3-1-81-07, of 16 January 2008, para 13.

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The Interplay between EU Competition Law and Professional Sports:

Recent Developments and Their Potential Impact on Small States

Abstract. In its December 2023 judgements delivered in the *European Superleague Company* and *International Skating Union v Commission* cases, the Court of Justice of the European Union concluded that the rules established by such sports governing bodies as FIFA, UEFA, and the International Skating Union with regard to prior authorisation of alternative competitions falling outside their jurisdiction were restrictive 'by object' under the union's competition law, thus forming a pathway to creating such alternative competitions in one respect. Analysing these rulings' potential impact on professional sports, the article discusses possible harmful effects that certain alternative competitions could have on sports in small states in particular. The author advocates taking the potential for such effects into account when national courts direct their attention to further assessing the governing bodies' pre-authorisation rules and their specific refusals to authorise certain alternative competitions.

Keywords: sports law, competition law, competition law and sports, CJEU

1. The context at large

On 21 December 2023, the Court of Justice of the European Union (hereinafter 'the CJEU' or 'the Court') delivered three landmark judgements on the interplay between professional sports and European law, especially competition law. Two of those judgements – in the cases *European Superleague Company* (or *ESL*) and *International Skating Union v Commission* (or *ISU*) discussed, *inter alia*, whether the rules established by sports governing bodies such as FIFA[*2], UEFA[*3], and the International Skating Union (ISU)[*4]

1 This paper presents the author's personal views, which do not reflect the official position of the Ministry of Justice of Estonia.

2 The International Association Football Federation is the international governing body of association football, beach soccer, and futsal.

3 The Union of European Football Associations is one of six continental bodies of governance in association football, governing football, futsal, and beach football for Europe, certain transcontinental countries, and some West Asian nations.

4 The International Skating Union is the international governing body for competitive ice-skating disciplines, among them figure skating, synchronised skating, speed skating, and short-track speed skating.

are in compliance with EU competition law when dealing with prior authorisation of alternative competitions falling outside the 'umbrella' of the governing body in question.

The *ESL* judgement in particular has received considerable public attention, while also eliciting official reactions from numerous states, alongside football clubs and fans, who have emphasised the importance of safeguarding the European Sports Model – a pyramid structure that forms the basis for organising most sports across Europe.[*5] Although the *ISU* judgement received much more modest coverage, its effects on the future of skating competitions might turn out similar to those that the *ESL* decision could well have on football.

In the course of analysing the potential impact of the *ESL* and *ISU* judgements on the future of professional sports, especially in 'small states', the article presents an argument that, even though the CJEU in some respects provided a pathway to the creation of alternative competitions beyond the jurisdiction of sports governing bodies, that does not necessarily mean that **any** such competition is going to be, let alone should be, approved. The paper focuses in particular on possible harmful effects that could arise for sports in smaller states from such competitions. A central conclusion is that these effects should be taken into account by the national courts that will further assess the compliance of the governing bodies' (now amended) rules and their specific refusals to authorise certain alternative competitions with competition law.

2. The cases contributing to the developments in question

2.1. The ESL case

In April 2021, a group of 12 leading European football clubs, acting through the Spanish company European Superleague Company, announced their wish to set up a new football competition project called the Super League (ESL). Both FIFA and UEFA objected to the project, and the two issued a joint statement refusing to recognise the ESL and announcing that any football club or player choosing to participate in the project would be expelled from FIFA/UEFA-affiliated competitions, among them flagship competitions such as the UEFA Champions League and the FIFA World Cup.[*6] Justification for the statement was anchored in the FIFA and UEFA statutes, which did not permit matches or competitions to take place without prior authorisation by the relevant governing body. In essence, their statutes granted them full discretion to either authorise or ban projects such as the ESL.[*7] The rules also contained a prohibition of FIFA and UEFA members' participation in any competitions not authorised by the governing bodies, on pain of sanctions.[*8]

In response, the European Superleague Company brought an action against FIFA and UEFA before the Madrid Commercial Court, arguing that, *inter alia*, the two bodies' rules on approval of competitions are contrary to the EU law. The Spanish court referred certain questions to the CJEU.[*9] The CJEU, in turn, concluded that both FIFA's and UEFA's rules on prior authorisation and the prohibition of participation in alternative competitions were restrictive of competition 'by object' and hence constituted a breach of Article 101 (1) (in the form of anti-competitive agreement) and Article 102 of the Treaty on the Functioning of the European Union (TFEU)[*10] (in the form of abuse of dominant position).[*11]

Following the CJEU ruling, the Madrid Commercial Court delivered its final decision on 27 May 2024: the national court endorsed the CJEU findings but did not pass judgement on the ESL as a specific project,

5 Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the European Union Work Plan for Sport (1 January 2021–30 June 2024) [2020] OJ C419.

6 'Statement by FIFA and the Six Confederations' (21 January 2021) <https://www.uefa.com/insideuefa/news/0265-1162b4daabdc-011165939444-1000--statement-by-fifa-and-the-six-confederations/> accessed on 10 March 2024.

7 FIFA Statutes 2021, art 71; UEFA Statutes 2020, art 49.1.

8 FIFA Statutes 2021, art 72; UEFA Statutes 2020, art 51.2.

9 'The FIFA and UEFA Rules on Prior Approval of Interclub Football Competitions, Such As the Super League, Are Contrary to EU Law' (CJEU press release 203/23, 21 December 2023) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-12/cp230203en.pdf> accessed on 10 March 2024.

10 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326.

11 Case C-333/21 *European Superleague Company (ESL)* ECLI:EU:C:2023:1011 [2023], [39].

stating that at the time of the ruling the project in its initial state had been abandoned[*12]. The Spanish court also acknowledged that, with UEFA having already amended its rules on prior authorisation, the decision did not affect the rules currently in force.[*13]

While the majority of clubs that had originally participated in the project ended up publicly withdrawing from the ESL[*14], Spanish clubs Real Madrid CF and FC Barcelona continue expressing public support for the initiative.

2.2. The ISU case

ISU was an appeal case that arose out of a complaint that two Dutch professional speed skaters filed with the European Commission. They claimed that the ISU's rules, which empowered said union to subject alternative skating competitions to its approval and to impose severe penalties on athletes who take part in unauthorised competitions, violated articles 101 (1) and 102 of the TFEU.

One such alternative competition was proposed in December 2011 by Icederby International, a Seoul-based theme-park developer that intended to organise an alternative international speed-skating event called the Dubai Icederby Grand Prix (hereinafter 'Icederby') in co-operation with a private company owned by the royal family of Abu Dhabi. Icederby had allocated a sum of EUR 1.4 million as prize money and would have paid 37,650 US dollars at minimum to any skater merely taking part in it, to a maximum of 130,000 US dollars.[*15] However, the project failed to go forward, because of the above-mentioned restrictions articulated in the ISU rules.

Some years later, in 2017, the European Commission decided in favour of the applicants. The decision was taken further via an appeal by the ISU to the General Court of the EU, which in 2020 dismissed the action pertaining to prior-authorisation rules. Thereby, it confirmed that these were unlawful.[*16]

Finally, the ISU submitted an appeal to the CJEU, which provided confirmation that the rules in question were indeed incompatible with EU competition law. The conclusions stated by the Court were fundamentally the same as those it articulated with regard to the FIFA/UEFA rules in *ESL*.[*17]

2.3. The future of alternative sporting competitions

The Court did not exempt the rules of sports governing bodies, such as FIFA, UEFA, and the ISU, from the application of Article 101 (1) and Article 102 TFEU. This could have been done on the basis of Article 165 TFEU, which provides that the EU shall 'contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function' as well as by following the case-law precedents from *Wouters* and *Meca-Medina*[*18] – in other words, taking into account the 'specific nature of sports' or applying public-interest-linked justifications.

The Court very clearly ruled out the possibility of Article 165 constituting objective justification for completely rescinding competition rules in the sports sector, stating that, in terms of the economic activity

12 As opposed to the initial 'closed competition' model, a more 'open', two-tier league structure is now being proposed, per A22 Management, introduced at <https://a22sports.com/en/> accessed on 28 June 2024. Also see LALIGA Group, 'The Madrid Commercial Court Ruling Does Not Endorse the Abandoned European Super League' (press release, 6 May 2024) <https://www.laliga.com/en-GB/news/madrid-commercial-court-ruling-does-not-endorse-the-abandoned-european-super-league> accessed on 28 June 2024.

13 'UEFA Statement on Today's Judgment of the Madrid Commercial Court No.17 in the European Super League Case' (27 May 2024) <https://www.uefa.com/news-media/news/028d-1afd49655461-f39aac5241e7-1000--uefa-statement-on-today-s-judgment-of-the-madrid-commercial-/> accessed on 28 June 2024.

14 As of 1 June 2024, Juventus FC was the last to withdraw officially from the ESL, with the BBC reporting 'Juventus withdraw from European Super League' on that date. By the time this article is published, the number of ESL supporters and their positions may have changed further.

15 In comparison, a long-track speed skater could earn as much as 109,000 US dollars and a short-track skater 31,900 US dollars in a season from ISU competitions: D Rossingh, 'Skater's Lawsuit May End Sports Bodies' Grip on Competition' (Bloomberg, 3 December 2014).

16 Case T-93/18 *International Skating Union v Commission* ECLI:EU:T:2020:610 [2020].

17 Case C-124/21 P *International Skating Union v Commission (ISU)* ECLI:EU:C:2023:1012 [2023], [33].

18 Case C-309/99 *Wouters and others* EU:C:2002:98 [2002] [97]; C-519/04 P *Meca-Medina and Majcen v Commission* EU:C:2006:492 [2006], paras 42–48.

that it generates, the sporting sector is subject to the rules of the TFEU just as any other sector of the economy is.[*19] The bodies' conduct might also have escaped the prohibition laid down in Article 101 (1) TFEU insofar as it satisfied a three-pronged test (the so-called *Wouters/Meca-Medina* test). The three layers to this proceed as follows: (i) the conduct must pursue a legitimate objective of public interest, (ii) the specific conduct in question must be genuinely necessary for pursuing that objective, and (iii) the conduct's competition-restricting effects must not eliminate all competition. However, the Court addressed this by stating that the *Wouters/Meca-Medina* test for competition constraints inherent to the pursuit of a legitimate objective is applicable only to 'by effect' restrictions of competition. As both FIFA/UEFA and the ISU rules were regarded as encompassing 'by object' restrictions of competition instead, the test could not apply to them.[*20] Restrictions 'by object' may only escape prohibition if they fulfil 'individual exemption' requirements under Article 101 (3) of the TFEU.

Although the conditions described above may seem to represent a decisive victory for new projects of such types as the ESL or Icederby, it is important to clarify two key points:

a) the Court did not state in its judgements that FIFA and UEFA may not impose prior-authorisation and sanctioning rules at all; it merely concluded that such rules must be subject to transparent and precise objective criteria with corresponding procedural rules.[*21] Also, the Court did not question the legitimate objectives pursued by sports governing bodies, acknowledging explicitly that some restrictions may be necessary. The Court neither approved nor prohibited specific projects (whether the ESL, Icederby, or any others);
b) the Court considered the rules of FIFA, UEFA and the ISU as they stood at the time of submission of the appeal or request for a preliminary ruling. Any determination with regard to amended versions would require assessing the rules again, in their newer form, on the basis of the criteria specified above under 'a)'.

3. The European Sports Model's importance for small states

The term 'small state' has thus far evaded consensus-based definition, and individual studies may approach it differently. In fact, there is substantial disagreement even over what type of criteria, quantifiable values or qualitative standards, would be more appropriate for assigning states to this category.[*22] Relying on statistical data for both size and population, one could cite such EU members as Malta, Luxembourg, Cyprus, Estonia, Latvia, Lithuania, Slovenia, Croatia, Ireland, and Slovakia[*23] and the non-EU countries Iceland, Montenegro, Kosovo, Albania, Moldova, and Gibraltar as small states; these states are classed thus for purposes of this article[*24]. Given that the European Sports Model and most European sporting competitions are not restricted to EU members, all of the nations listed above as small states may be relevant in consideration of current circumstances.

The European Sports Model rests on two fundamental principles: open competition (which features inclusion on the basis of sporting merits, also in conjunction with promotion and relegation between sports leagues) and solidarity (not least financial solidarity).[*25] The latter involves, alongside other elements, the facilitation of financial transfers between levels and between operators, with circulation specifically from

19 *ESL*, para 100; G Monti, 'EU Competition Law after the Grand Chamber's December 2023 Sports Trilogy: European Superleague, International Skating Union and Royal Antwerp FC' (Tilburg Law and Economics Center forthcoming discussion paper, 7 January 2024). – DOI: https://doi.org/10.2139/ssrn.4686842.

20 *ESL*, para 186; *ISU*, para 113.

21 *ESL*, para 144; *ISU*, para 33.

22 M Maass, 'The Elusive Definition of the Small State' (2009) 46 International Politics 65. – DOI: https://doi.org/10.1057/ip.2008.37.

23 Statista, 'Estimated Population of Selected European Countries in 2023' <https://www.statista.com/statistics/685846/population-of-selected-european-countries/>; Statista, 'Countries in Europe, by Area' <https://www.statista.com/statistics/1277259/countries-europe-area/> both accessed on 3 July 2024.

24 European Union Directorate-General for Communication, 'Facts and Figures on Life in the European Union' <https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/life-eu_en> accessed on 3 July 2024.

25 European Commission, *White Paper on Sport* (White Paper) COM (2007) 391 final.

the top to the bottom of the pyramid, thereby channelling revenue generated by elite competitions toward developing grassroots sports. The European Sports Model is followed by the exponents of most sporting disciplines.

While there are definitely certain differences in sports policies among various of the small states, it would be fair to state that strong links between sport and the community generally characterise small states and that sport evokes a strong feeling of nationhood. Also, in many small states, professional sport performance is seen as a resource that holds great value for striving toward a wide range of non-sportive objectives – such as social and political benefits connected with asserting national sovereignty and some degree of cultural distinctiveness.[*26] The latter is especially important to small states, whose claims to statehood may be contested/vulnerable or were so at some point in history.[*27]

At the same time, the narrow resource base of many small states, their limited domestic market, and the concentration of elite sport resources in a small set of sports all contribute to vulnerability and reflect small states' position in international sport policy as predominantly policy-takers rather than policy-makers.[*28] Although it can be argued that such vulnerability of small states should not be overemphasised and that they may differ in capacity (also with that capacity depending on the sporting discipline considered), it is still objectively justified to say that most of the small states may not exhibit the same extent of prestige, international visibility, and influence in certain contexts when it comes to both decision-making and participation in professional sports. In the majority of cases, small states are unable to invest as extensively in sports as bigger states can, so they are more reliant on the funding they receive from sports governing bodies. Therefore, it remains particularly important for small states that competitions not become elitist, exclusionary, and commercial-profit-oriented but continue to be rooted in merit, a level playing field, and financial solidarity. This is crucial to safeguard balanced competition among all the athletes and clubs, from big and small states alike.

In looking at the football sector, it is important to consider that, while revenues have increased over the past few decades, also the sector's differences in revenue are growing.[*29] For instance, the gap between the Big Five leagues and the other national leagues is widening. Similarly there is a large gulf between the Premier League and the other national leagues. In many countries, the number of clubs with a serious chance of winning national and European championships has declined over the years. The increasing differences in profit are leading to widening differences in expenditure on players, which, in turn, have led to a trend of erosion in the competitive balance between clubs and, subsequently, countries.[*30] When it comes to reflecting on alternative competitions such as the ESL's, it is crucial to understand that the intention of its creators, who already represent top European clubs (the clubs with the largest revenue streams), is not to create a closed and independent 'breakaway' league but to set up a competition rivalling UEFA's in the market for the organisation of European football competitions while continuing to be a part of the UEFA ecosystem by participating in national championships.[*31] It was rightly pointed out by Advocate General Rantos, in the opinion he issued in *ESL*, that, thanks to their participation in the ESL, the already top-performing football clubs could book significant additional revenue and simultaneously keep participating in national competitions, in which they would face other clubs – clubs unable to generate revenue on a comparable scale, let alone on a permanent and constant basis.[*32] Therefore, the additional revenue arising from participation in the alternative competitions could be regarded as conferring a significant competitive advantage by contributing to financing the signing and remuneration of new players, which is a decisive parameter of competitive sport.[*33] The acquisition of new players and increasingly attractive remuneration conditions would be expected to secure dominance by the leading clubs or even increase it, making them

26 B Houlihan and J Zheng, 'Small States: Sport and Politics at the Margin' (2015) 7(3) International Journal of Sport Policy and Politics 329, 332. – DOI: https://doi.org/10.1080/19406940.2014.959032.

27 H Sherwood, 'Palestinian Runner Uses Gaza Marathon To Prepare for London 2012 Olympics' (*The Guardian*, 29 February 2012); BBC, 'London 2012: Judoka's Kosovo Olympic Bid Turned Down' (25 May 2012).

28 Maass (n 22).

29 Deloitte, 'Deloitte Football Money League 2024' (16 March 2022) <https://www2.deloitte.com/uk/en/pages/sports-business-group/articles/deloitte-football-money-league.html> accessed on 25 March 2024.

30 H Beck, A Prinz, and T van der Burg, 'The League System, Competitive Balance, and the Future of European Football' [2022] Managing Sport and Leisure. – DOI: https://doi.org/10.1080/23750472.2022.2137056.

31 *ESL* (2022), Opinion of AG Rantos, para 107.

32 Ibid, para 103.

33 Ibid, paras 103–104.

stronger and even more difficult to defeat in competitions. We might find the same pattern emerging when we examine the nature of an alternative set of competitions among the best European clubs – those clubs and athletes already holding a position at the top of the sport gain additional possibilities to compete against each other, further improving their techniques and skills all the while. In simple terms, the strongest get even stronger, while the weaker and more vulnerable are forced to stay even further behind.

As for skating disciplines that fall under the jurisdiction of the ISU, the overall statistics for European speed-skating championships show that, overall, large and medium-size states have dominated the competitions over the years.[*34] The main statistics for European championships in figure skating manifest dominance by such states as Austria, Russia (until its 2022 ISU ban from attending all international competitions), and France, with smaller states lying a significant distance behind them. In international competitions, the presence of large non-European countries such as the United States, Canada, and China renders the position of even some of the larger European countries rather modest. Presumably, alternative competitions such as Icederby, following a show format at least partially and offering quite considerable monetary prizes, would want to attract the participation of top athletes from the most successfully performing countries. Assuming that the athletes taking part in such alternative projects would most likely continue participating in the traditional ISU competitions, one may again argue that such alternative competitions would bring participating countries additional revenue that they could then invest in high-standard professional training facilities, alongside opportunities for already top-performing athletes to hone their skills still further through additional experience. Negative effects on the fragile competitive balance between big and small states in skating disciplines would be bound to follow.

Arguably, alternative competitions bring benefits to consumers – in this case, on-site spectators and television-viewers both – by giving them an opportunity to attend new competitions or watch broadcasts thereof.[*35] However, this is not necessarily true, on account of the context of the erosion in the balance of the competition landscape, as discussed above. Balanced competition is one of the most fundamental concepts in sports economics, with notions of its importance being derived from the uncertainty-of-outcome hypothesis: fan interest in sporting contests depends crucially on the tightness of the competition.[*36] If competitive balance continues to degrade amid stratification, the outcomes of sports competitions are going to grow more predictable, thereby reducing consumers' pleasure in witnessing them. It is highly plausible that the present level of uncertainty of outcome is below the welfare-maximising level in most competitions and that it falling further will precipitate a further reduction in welfare.[*37] Therefore, even though alternative competitions such as ESL or Icederby events might, if successful, attract in-person spectators and other viewers by offering high-quality competitions involving 'star athletes', whether the impact on consumer welfare would be entirely positive remains debatable, in light of the simultaneous reduction in balance in the traditional competitions. This is particularly problematic if said decrease entails no longer being able to see one's national athletes or clubs perform or seeing them perform but only with a predictable negative outcome and with little likelihood of vying for, let alone winning, European or international titles. Also, it bears remembering that the attractiveness of competitions held by FIFA, UEFA, the ISU, and other sports governing bodies is a result of history, culture, and tradition. If an alternative competition ultimately goes against some of the values represented, the relevant discipline's popularity in general might well suffer. Hence, a substantial reduction in consumer welfare could emerge.[*38] The foregoing arguments are consistent with the resistance that many football fans have mounted against the ESL.[*39]

Let us return to the issues specific to small states, especially how the creation of alternative competitions in which – whether because of financial requirements or because the threshold for admission involves a prerequisite of being in the sport's top tier – they would not be able to participate could harm the positions

34 ISU, 'European Allround Championships Country Medal Table' <https://www.isu.org/speed-skating/entries-results/biographies-statistics> accessed on 12 March 2024.

35 *ESL*, para 176.

36 B Gerrard and BM Kringstad, 'The Multidimensionality of Competitive Balance: Evidence from European Football' (2022) 4 Sport, Business and Management 382. – DOI: https://doi.org/10.1108/sbm-04-2021-0054.

37 T van der Burg, 'Competitive Balance and Demand for Football: A Review of the Literature' (Beiträge de Hochschule Pforzheim series, no 179) <https://www.hs-pforzheim.de/fileadmin/user_upload/uploads_redakteur/Die_Hochschule/Oeffentlichkeit/05.Publikationen/Beitraege/Pforzheimer_Betraege_Nr._179_van_der_Burg.pdf> accessed on 3 July 2024.

38 Ibid 27.

39 Football Supporters Europe, 'European Fans Restate Opposition to Super League' (statement of 11 July 2022) <https://www.fanseurope.org/news/european-fans-restate-opposition-to-super-league/> accessed on 25 March 2024.

of their athletes and clubs on the European and international stage. The associated conditions could bring about a decline in the level of these nations' sport in general: the fact that their athletes do not count among probable participants or winners in major competitions might discourage small states' decision-makers from supporting their participation in these and from developing local sporting excellence in general. Consequently, the chances for a young person in such a country to become an elite athlete might be jeopardised in two respects. Firstly, national sports policy might not favour promoting elite sport. Secondly, factors such as limited resources from low socioeconomic status can limit youngsters' options for reaching high levels in the specific sport in which they are talented.[*40]

Therefore, while alternative competitions should not be completely ruled out, it is vital to make sure that they are kept consistent with qualification criteria based on sporting merits and equal opportunities, thus ensuring that all states, big and small, receive a chance to remain competitive in the relevant sporting discipline. In other words, alternative competitions should to the greatest extent possible follow the same values as the European Sports Model. Alternative competitions organised by the strongest for the strongest, to which small states may have very limited access, if any at all, might in the long run pose a risk to the future of professional sports in these states and to the balance of competitions in general.

4. Further actions

Although the focus of this article is on small states, attention to possible negative effects is by no means confined to their sphere. Various possible effects of alternative competitions (the ESL in particular) were acknowledged also by big states. Several interesting concerns have been identified.

In the wake of the *ESL* judgement, France rallied for support from fellow Member States for a joint statement supporting a guaranteed 'link between annual performance in domestic competitions and all European competitions'. The resulting statement has been signed by all EU members apart from Spain. President Emmanuel Macron's government has been urging the European Commission to draft legislation that deals with appropriate ways to safeguard the openness of competitions, sporting merit, solidarity, and values in sport.[*41] The government of the United Kingdom has articulated a commitment to regulatory reform specifically for men's elite football, which should have implications for any 'breakaway league'.[*42] In addition, top English clubs Manchester United, Manchester City, Chelsea, Tottenham, Arsenal, and Liverpool all appear to have turned their back on any further involvement in the ESL, and each has published a press release to this effect.[*43] Also, Germany's Bundesliga said in an official statement that it would continue supporting the European Sports Model and rejecting competitions other than those organised by corresponding associations and leagues.[*44]

Behind these statements of rejection might lie concerns about the same risks that small states face. After all, erosion to the landscape of competition is relevant also for smaller clubs and 'runner-up' athletes in big countries – for instance, less popular or relatively small football clubs. In England, while such clubs as Southampton and Everton are popular, their fan base and revenue base are far smaller than what top clubs such as Manchester United, Liverpool, and Arsenal command[*45]; Germany exhibits a vast chasm that separates the top clubs, Bayern Munich and Borussia Dortmund, from the rest in terms of both popularity

40 P Shippi, 'Social and Political Factors Affecting Sporting Success in Small Countries: The Case of Cyprus' (2012) 4 Biomedical Human Kinetics 38. – DOI: https://doi.org/10.2478/v10101-012-0007-z.

41 N Camut and A Walker, 'France Shoots To Kill the Football Super League, Once and for All' (Politico, 7 February 2024).

42 UK Department for Culture, Media & Sport, *A Sustainable Future – Reforming Club Football Governance* (White Paper, CP 799, 2023) 3.

43 Among the club statements made on the European Super League are 21 December 2023's Manchester United, 'Statement on European Super League' <https://www.manutd.com/en/news/detail/club-statement-reacting-to-european-court-of-justice-ruling-on-european-super-league>; Manchester City, 'Club Statement' <https://www.mancity.com/news/mens/manchester-city-statement-esl-63838777>, Tottenham Hotspur, 'Club Statement' <https://www.tottenhamhotspur.com/news/2023/december/club-statement/>; the next day yielded Arsenal, 'Club Statement' <https://www.arsenal.com/news/club-statement-2>; Liverpool FC, 'Liverpool FC Statement' <https://www.liverpoolfc.com/news/liverpool-fc-statement-7> all accessed on 18 March 2024.

44 Deutsche Fussball Liga, 'DFL Statement on the Super League Ruling' (21 December 2023) <https://www.dfl.de/en/news/dfl-statement-on-the-super-league-ruling/> accessed on 18 March 2024.

45 Statista, 'Most Followed Premier League Clubs in the United Kingdom in 2023' <https://www.statista.com/statistics/890430/fans-of-premier-league-clubs-in-england/> accessed on 3 July 2024.

and revenue*[46]; and additional revenues and experience gained from the ESL would make it even easier for an already top club to beat its domestic rivals, thus increasing its market power in the national market for top-level football and bringing harm to the national league's competitive balance and, accordingly, to consumer welfare as the chances for a smaller club's fans to see that club win a national title fall further.*[47] It is true that the UEFA Champions League exerts a similar effect, but one could argue that the ESL's detrimental effects on the competitive balance would be more severe because of scale: any proposal for the latter lets the participants take part in more matches against the strongest top clubs than the Champions League does.*[48] Another important difference is that the UEFA solidarity payments allocate a set percentage of the revenue from that association's top-level competitions (such as Champions League events) for distribution to non-participating clubs*[49], while alternative competitions may be designed to benefit only their participants and commercial actors.

However, in addition to actions taken by relevant actors in various states, as described above, competition law may yet prove to be an important tool of influencing the fate of alternative competitions, through the national courts.

4.1. Assessment of the amended rules of sports governing bodies in national courts

Importantly, as the discussion earlier in this article stressed, the CJEU judgements dealt with the FIFA, UEFA, and ISU rules that were in force at the time of the proceedings, with the Madrid Commercial Court pointing out, when acknowledging this fact in connection with *ESL*, that '[a]lready in 2022, before the CJEU final judgment, UEFA has issued the authorisation rules governing international club competitions, which set out detailed criteria implementing the respective provisions of the UEFA Statutes. Authorisation rules explain how European clubs can request authorisation for a new competition outside of UEFA's remit, as well as disciplinary measures which can be imposed for breaches of these rules'.*[50] The ISU is expected to follow suit, amending its rules likewise or devising appropriate implementing regulations. Proceeding from the CJEU judgements, one could reason that as long as the rules of the sport's governing body are **transparent, objective, non-discriminatory, and proportionate**, there is no restriction of competition by **object**, since the rules are not designed to exclude any alternative competition from the market. There might, however, still be a restriction **by effect**.

In this author's view, if the new sets of rules are designed well enough to guarantee that some alternative competitions satisfying the appropriate criteria are authorised, the national courts' application of the *Wouters/Meca-Medina* test in the event of disputes over new rules may again become possible. Hence, it would be up to competent national courts to decide whether the rules are indeed balanced enough and satisfy the criteria for exemption from the application of articles 101 (1) and 102 TFEU. Failing that, one could appeal to the efficiency defence under Article 101 (3) and Article 102 – though this might prove to be more difficult, given that the efficiency gains would have to be translated into actual economic benefits.*[51]

In both *ESL* and *ISU*, the Court recognised but did not question a dual function of a sports governing body insofar as its purpose is, on one hand, to regulate, organise, govern, and promote sporting competitions and, on the other hand, to carry out the economic activity of organising such competitions. Therefore, sports governing bodies are not classic monopolies: while from the 'outside' they may be regarded as economic operators competing with any market entrant willing to organise alternative competitions, on the 'inside'

46 Statista, 'Level of Interest in Bundesliga Clubs in Germany in 2020, by Club' <https://www.statista.com/statistics/595662/german-bundesliga-leading-clubs-based-on-popularity/>; GlobalData, 'Top 10 German Bundesliga Soccer Clubs in Germany in 2021 by Sponsorship Revenue' <https://www.globaldata.com/companies/top-companies-by-sector/sport/soccer-german-bundesliga-clubs/> both accessed on 3 July 2024.

47 Houlihan and Zheng (n 26).

48 T van der Burg, H Beck, and A Prinz, 'Why the European Court of Justice Should Rule against the European Super League' (*EUROPP*, 6 December 2022) <https://blogs.lse.ac.uk/europpblog/2022/12/06/why-the-european-court-of-justice-should-rule-against-the-european-super-league/> accessed on 14 March 2024.

49 UEFA, 'How UEFA Competitions Support the European Sports Model' (8 February 2024) <https://fr.uefa.com/insideuefa/news/028a-1a218d534e25-9e485d36877e-1000--how-uefa-competitions-support-the-european-sports-model/> accessed on 21 March 2024.

50 UEFA Authorisation Rules Governing International Club Competitions 2022.

51 *ESL*, para 189.

they contribute to so-called ecosystems within which another kind of competitive process is active – a competition between athletes and/or clubs and, ultimately, between countries. Hence, sports governing bodies are faced with two objectives – to ensure compliance with competition law as dominant undertakings conducting economic activities and effectively fill the role of regulatory bodies ensuring well-functioning competition between athletes or clubs on equitable, fair, transparent, and non-discriminatory terms. The challenge for the various sports' governing bodies, then, lies in adopting rules that allow reaching the first objective without irreparable harm to pursuit of the second. It should still be possible for sports governing bodies to rely on their rules to limit those alternative competitions that could, *inter alia*, pose a risk to financial solidarity and preservation of a level playing field for the various states. Restrictions of other sorts might be unavoidable in order to preserve the integrity, health, and safety of athletes and to ensure respect for the rules of specific competitions and the sporting calendar.

The national courts, when faced with legal challenges to such rules and charged with their interpretation, will have to keep all these important objectives in mind as they seek balance of their own. They need to ensure that the authorisation rules' threshold does not remain so high that no alternative competition has any real chance of getting authorised in practice but at the same time is not brought so low that the core standards and values discussed above could come under threat.

4.2. Assessments of 'refusals to authorise' in national courts

If the sports governing bodies manage to establish rules that are in full compliance with competition law (as described in Subsection 4.1, above), it is still unlikely that every new project will meet the criteria established and become authorised. Presumably, lawsuits filed with national courts will follow on the heels of the ensuing 'refusals to authorise' on the part of the sports governing bodies. Encountering challenges to such refusals, the national courts will again find themselves responsible for conducting an assessment of whether a specific refusal was justified or, in contrast, flouted appropriate authorisation rules. Presumably, proper evaluation of the correspondence of a certain alternative project with relevant authorisation rules is going to be necessary. All the important arguments regarding positive and negative effects that a proposed event could have on the well-being of athletes and on the essence and future of the relevant sporting discipline will once again come into play.

4.3. Claims of anti-competitive agreements under Article 101 (1) TFEU

All along, the ESL project has been based on agreements among representatives of big football clubs or at least on concerted practices of such big clubs. Icederby was intended for top speed-skaters, and competitors were particularly interested in participating because they would have been handsomely compensated for doing so. Similarly, the organisation of other alternative competitions presumably will more often than not be based on agreements between parties and for those parties having an objective advantage or even dominance on the relevant market that is due to their sporting performance and financial position.

Therefore, such projects themselves may be fundamentally incompatible with Article 101 (1) TFEU, as they imply that in every country involved the single club, few clubs, or individual athlete(s) participating in the alternative competition on the given country's behalf will grow much stronger, thereby giving other clubs and athletes (primarily from smaller countries) fewer chances to compete for customers.[*52]

At this juncture, it is worth addressing how competition between athletes or sports clubs differs from other forms of competition, forms more typically manifested in the market. Companies competing in a certain market are not normally provided with equal opportunities to begin with, and it is natural for less efficient competitors to eventually be driven from said market by more successful entities. Features particular to sporting activities set them apart from activities in other sectors of the economy. One characteristic trait of sport is a high degree of interdependence – athletes and clubs depend on one another for being able to organise themselves and for developing in the context of sporting competitions.[*53] Therefore, sporting

52 Opinion of AG Rantos in *ESL* para 32, *ESL* para 25.

53 Houlihan and Zheng (n 26) 41.

activities have been described as **co-opetitive**: participants both compete and co-operate.*[54] In contrast against companies, it is essential that athletes and clubs be provided with objectively equal opportunities from the outset. It is safe to assume that no state, big or small, would wish to see a home athlete or club be driven completely 'off the market' by means that have nothing to do with that participant's merit.

In line with this argumentation and upon failure to achieve results from the measures described in the two preceding subsections, small states may find it possible to seek protection from the courts under Article 101 (1) TFEU and/or corresponding national provisions, if an alternative competition that threatens to drive them from the market, as it were, does get approved. However, this is a more drastic measure, and one would hope that the situation does not develop such that it becomes necessary.

5. Concluding words

The European Sports Model is an essential pillar of the organisation of sports in Europe. The central values that it represents – equality of opportunities, fair play, and solidarity – must be propagated by sporting competitions. Among other nourishing effects, this system exerts an influence that gives small states a stronger opportunity to have their clubs and athletes compete at European and international level.

While the CJEU's judgements in *ESL* and *ISU* created solid potential for alternative competitions' creation in various sporting disciplines, further legal disputes and assessments of how well both amended rules from sports governing bodies and specific alternative competitions comply with competition law will eventually come into play.

When conducting such assessments, the national courts should take an open-minded approach. There are many factors and interests to be considered in endeavours to reach a fair decision regarding the future of any given alternative competition. Preserving equal opportunities and solidarity between big and small states is definitely one that should not be overlooked in this effort.

54 PI Colomo, 'EU Competition Law and Sports' (presentation at L'Institut d'études européennes, 12 March 2024) <https://chillingcompetition.com/wp-content/uploads/2024/03/ibanez-colomo-eu-competition-law-and-sports-3.pdf> accessed on 14 March 2024.

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Alternatives to Public Procurement:

Free Choice in Marketised Social Services – Legal Challenges Illustrated via Long-Term Care[*1]

Abstract. In light of Europe's ageing population, the article explores the legal dimensions to freedom of choice within marketised social services, especially in the context of long-term care. It offers critical analysis of the implementation of the free-choice model in Estonia within the framework of European Union public-procurement law and Estonian law on administrative co-operation. The landscape has been a legal 'no man's land' somewhat: this demand-based model with an unlimited number of providers falls outside the traditional public-procurement framework, and how the general principles for transfer of public tasks to the private sector might apply to a free-choice model, which does not entail explicit 'transfer', has remained unclear. Although the Estonian care reform of 2023 established a funding model, it did not resolve the legal uncertainties surrounding public–private co-operation and user rights. As care homes in Estonia are largely run by the private sector, vague legal regulation and weak state supervision pose a threat to access, the care services' quality, and their economic efficiency. Drawing on international comparisons with the Nordic countries, the article warns against uncritical adoption of market-based models, stressing the need to balance the roles of public authorities and private providers. The paper underscores the crucial role of legal professionals in ensuring that public–private co-operation for social services upholds both individuals' fundamental rights and public interests.

Keywords: marketisation, privatisation, social services, free choice, consumer choice, long-term care

[1] The paper is an English-language updated and revised version of a piece recently published in Estonian: M-L Viirsalu, 'Alternatiiv riigihangetele: turupõhine, isiku valikuõigusel põhinev sotsiaalteenuste korraldus. Õiguslikud väljakutsed pikaajalise hoolduse näitel' [2024](2) *Juridica* 148.

1. Introduction

In a rapidly ageing Europe, researchers are seeking solutions to the growing need for long-term care. Care services get delivered largely within welfare markets,[*2] characterised by competing providers and – increasingly – choice for the service-users.

The aim behind this article is to contribute to international discussion focusing on the legal aspects of free choice in the realm of marketised social services. While the topic has attracted interest for many years in academia within the Nordic region, this paper marks the first attempt to conceptualise the free-choice model (sometimes described as an 'open house', or a 'consumer-choice' model[*3]) and analyse its implementation in an Estonian setting, with the valuable comparative view in the background.

In July 2023, a long-awaited care reform came into force in Estonia.[*4] This was considered one of the most significant innovations in the social sector in recent decades, assumed to bring relief to the excessive care burden on families. Just like before the reform, local authorities, who bear the responsibility for organising care services in Estonia, continue to be free to arrange those services in any way they choose. Private providers handle more than 50% of the volume of residential-care services, yet awards of public service contracts cover an insignificant proportion of this figure and the legal relationships with many of the rest remain vague. Both the supervisory visits undertaken by the Office of the Chancellor of Justice and decisions of the Supreme Court have repeatedly indicated that the local authorities struggle to guarantee access to social services[*5], so there were hopes that the care reform would bring legal clarity, especially with regard to those public–private co-operation mechanisms involving personal choice but also for untangling the complex legal relationships that form the basis for protection of the fundamental rights of the service users. Upon closer examination, however, one can notice that the reform was amounted to little more than creating a funding model.[*6]

The article examines the free-choice model in the context of both the European Union's public procurement law and current Estonian law, with special focus on administrative co-operation law. With growing concerns over the dominance of profit-oriented private providers, the article also addresses the potential conflict between social goals and business interests.[*7] The task of this article is not however to evaluate the justification of the marketisation, but to contribute to legal clarity for the cases wherein public authorities have decided to implement a market model. The necessarily limited scope of the article dictates that the closely related topic of bringing balance to the positions in these triadic legal relationships (possibly a need for a special consumer law) must remain a subject for subsequent articles.

2 KPMG for the European Commission, 'Study on the Long-Term Care Supply and Market in EU Member States, Final Report' (Publications Office of the European Union 2022) <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8448&furtherPubs=yes> accessed on 3 July 2024. For a critical take on welfare markets, see M Maucher, 'Social Services of General Interest at the Crossroad of Competition on Social Markets across Europe and the Guarantee and Realisation of the Common Good' in TP Boje and M Pot Potůček (eds), *Social Rights, Active Citizenship and Governance in the European Union* (Nomos Verlagsgesellschaft 2011) 61. – DOI: https://doi.org/10.5771/9783845230290-61F Martinelli, 'Social Services Disrupted: Changing Supply Landscapes, Impacts and Policy Options' in F Martinelli, A Anttonen, and M Mätzke (eds), *Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in Times of Austerity* (Edward Elgar 2017) 393. – DOI: https://doi.org/10.4337/9781786432117.00031.

3 Known predominantly under the *Zulassungssystem* notion in German-speaking environments.

4 Since 1 July 2023, the local authority has financed the staff costs and other expenses of care workers, whereas the recipient of the service pays the accommodation and catering costs and the other costs related to the provision of the service, per Section 221 of the Social Welfare Act, available in English translation: <https://www.riigiteataja.ee/en/eli/ee/519012024004/consolide/current> accessed on 3 July 2024.

5 For instance, see RKPJKo 5-18-7, 9.12.2019 (dealing with the duty to guarantee social services); RKPJKo 5-22-10, 6.2.2023 (addressing the duty to guarantee child-care service).

6 Unlike most other European countries, Estonia has not created a long-term care insurance system. Long-term care is financed from taxes.

7 KPMG for the European Commission (n 2).

2. Handling of public duties in the social-services market

2.1. Historical and socio-political context

The development of public services in Estonia after regaining of independence was strongly influenced by the Nordic tradition; except for the financing model of the social protection system, that was based on the German model.[*8] Manifesting this mixed approach, the country's first Social Welfare Act (SWA), adopted in 1995, was considered a 'combination of Scandinavian and Finnish laws suitable for the Estonian context'.

With the widespread proliferation of the New Public Management ideology in the 1980s, transfer of public services to the private sector picked up pace in nearly all of the developed countries. Most visibly in the UK[*9] but also in the Nordic countries[*10], legislators and policymakers wove key elements of the market economy into social policy, thereby offering the recipients, or 'consumers', of the services greater freedom of choice and an avenue for demanding higher quality from the providers, who now operated in a climate of competition.

For Estonia, the shift toward liberal social policy occurred in connection with the launch of European Union projects. Influenced by experts from the UK, known for its neoliberal economic policy, Estonia's social-security system took on more of the characteristics of private-law relations.[*11] As for international tendencies, the development of social-service organisation within the last couple of decades has shown great variety; however, a few overarching trends can be observed[*12]:

(a) vertical reallocation of responsibility from the central government to the local level;
(b) horizontal reallocation of responsibility – i.e., reducing the state's direct involvement while increasing the role of for-profit and not-for-profit service providers;
(c) supporting the latter by public authorities' actions and with a regulatory framework.

These patterns create reason to believe that the manner of arranging social services is going to become even more complex and fragmented as the future unfolds.[*13]

2.2. The private sector's involvement in the performance of public duties: A right *versus* an obligation of the state

Traditionally, the involvement of private entities in the performance of public duties was considered an anomaly requiring justification or at least was regarded as an exception to a rule. In contrast, the neoliberal school worked from the opposite starting point, questioning the right of a public authority to perform a public duty if the market was ready to handle it.

The principle of subsidiarity[*14], supported by Georg Jellinek, the quintessential representative of the liberal school, holds that the state may intervene in public duties – and indeed must do so – if and only if its objectives cannot be reached through societal means, and only to the extent that the state can protect the affected interest better.[*15] For those holding this viewpoint, the performance of public tasks falls within the scope of the civil rights and liberties of private actors, without requiring any special justification.[*16] From

8 M Mikkola, 'Eesti sotsiaalse õiguse areng ja koostöö Soomega [The development of the social law in Estonia and cooperation with Finland]' [2004] Riigikogu Toimetised 12 <https://rito.riigikogu.ee/wordpress/wp-content/uploads/2004/12/Eesti-sotsiaalse-%C3%B5iguse-areng-ja-koost%C3%B6%C3%B6-Soomega.pdf> accessed on 3 July 2024.

9 C Schmitt and H Obinger, 'Verfassungsschranken und die Privatisierung öffentlicher Dienstleistungen im internationalen Vergleich' (2010) 51 Politische Vierteljahresschrift 643, 643, 648.

10 For Sweden, Denmark, Finland, and Norway, see G Meagher and M Szebehely (eds), 'Marketisation in Nordic Eldercare: A Research Report on Legislation, Oversight, Extent and Consequences' (Department of Social Work at Stockholm University 2013).

11 Mikkola (n 8).

12 H Wollmann and G Marcou (eds), *The Provision of Public Services in Europe: Between State, Local Government and Market* (Edward Elgar 2010) 240.

13 M Vabø and others, 'Is Nordic Elder Care Facing a (New) Collaborative Turn?' (2022) 56 Social Policy & Administration 549, 549. – DOI: https://doi.org/10.1111/spol.12805.

14 J Isensee, 'Gemeinwohl im Verfassungsstaat' in *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol 4 ('Aufgaben des Staates') (CF Müller 2006) s 71, marginal 111.

15 Ibid s 73, marginal 63.

16 Ibid s 73, marginal 67, alongside H Butzer's marginal notes 64–67 in s 74.

this perspective, rights are less infringed if the state only ensures the performance of the task while leaving direct execution within the private sector's sphere of responsibility. In addition to this, the rationalising argument emphasises efficiency and economic viability, suggesting that the state should direct its limited resources only to tasks that cannot be managed on private initiative and to situations wherein the market fails to provide a satisfactory solution that serves the general interest.[*17]

In academic discussions, these understandings form the basis for the concept of the 'ensuring state' (*Gewährleistungsstaat*)[*18], or as the 'regulatory welfare state' among English-speaking scholars. Although the precise legal content of the 'ensuring state' concept remains debatable, the latter notion can be considered a constitutional reflection of the European social market economy model, designed to align the public interest with the idea of market competition.

2.3. Competition as a foundation for choice

Competition in so-called welfare markets varies in its form. In **competition for the market** (*Wettbewerb um den Markt*[*19]), a monopolistic situation exists in the setting of providing the public service in question. For instance, a public-tender process might precipitate dividing the market among providers in such a way that non-contract-winning providers cannot compete in certain arenas for certain spans of time. This situation has been referred to also as 'limited competition'.[*20] In contrast, **competition in the market** (*Wettbewerb im Markt*) refers to the scenario wherein multiple service providers compete for the custom of end users in the relevant market. Legally, creating competition for a market entails designing rules for access to that market while appropriate competition in a market requires the legislator to regulate the competition and its functioning.

Where a public-procurement process has resulted in several service providers sharing the market, a **supply-based system** is in place. In this case, selection of a service provider is executed by the purchasing authority. A market of this sort has been denoted also as 'exclusive' or 'selective'.[*21] This can be distinguished from a **demand-based system**[*22], also referred to as a 'non-selective' or 'inclusive' one[*23]. This contrasting set of conditions displays a considerable amount of choice on the part of the service users; meanwhile, providers have no guarantee of service volume, since the money moves with the consumers.

The latter can be seen as a logical development for service systems influenced by neoliberal ideology, which have transformed a relatively passive 'beneficiary' into a 'customer' with agency. In the new image, of so-called *Homo economicus*[*24], a motivated, autonomously acting individual strives to make rational choices from a position of solid knowledge.

In practice, the expansion evident in the right of choice has not been an end in itself but primarily a means to promote the market economy, to boost competition among service providers. If there are competing providers, a broader scope for choice represents potential for growth through competition to offer higher quality and, when prices are not fixed, friendlier pricing.

17 Ibid s 73, marginals 67–68.

18 C Franzius, 'Die europäische Dimension des Gewährleistungsstaates' (2006) 45 Der Staat 547; B Friedländer, M Röber, and C Schaefer, 'Institutional Differentiation of Public Service Provision in Germany: Corporatisation, Privatisation and Re-municipalisation' in S Kuhlmann and others (eds), *Public Administration in Germany* (Palgrave Macmillan 2021) 291–92. – DOI: https://doi.org/10.1007/978-3-030-53697-8_17.

19 M Fehling and M Ruffert (eds), *Regulierungsrecht* (Mohr Siebeck 2010) s 21, comment 14.

20 Ibid.

21 M Burgi, M Dreher, and M Opitz, *Gesetz gegen Wettbewerbsbeschränkungen – GWB – 4. Teil* (4th edn, CH Beck 2022) s 130, comments 19–20.

22 KH Sivesind, HS Trætteberg, and J Saglie, 'The Future of the Scandinavian Welfare Model: User Choice, Parallel Governance Systems, and Active Citizenship' in KH Sivesind and J Saglie (eds), *Promoting Active Citizenship: Markets and Choice in Scandinavian Welfare* (Springer 2017) 297. – DOI: https://doi.org/10.1007/978-3-319-55381-8_8.

23 Burgi, Dreher, and Opitz (n 21) s 130, comment 20.

24 CC Walker, A Druckman, and T Jackson, 'A Critique of the Marketisation of Long-Term Residential and Nursing Home Care' (2022) 3 The Lancet Healthy Longevity e298, 301. – DOI: https://doi.org/10.1016/s2666-7568(22)00040-x.

2.4. A revolution of choice and neutrality of competition

The concept of free choice has no specific definition. Choice presents itself in multiple institutional frameworks[*25], including publicly provided or procured service systems that do not necessarily involve real competition. However, choice can be enhanced when competition is incorporated.

The emphasis in this article is on exploring demand-based systems wherein service-users have a right to choose from among several providers (public, for-profit, or not-for-profit) who compete with each other while providing services without quota-related or other limits. In the social services sector, the rise of the liberal notion of competition and freedom of choice is a rather new phenomenon on the international stage, one that burst into the spotlight especially in the last two decades. Probably among the main reasons for this is that, in contrast against many other fields of general public interest – such as electricity, telecommunications, and transport – public–private co-operation in the field of personal social services is rather complicated to manage, on account of complex issues of ensuring reliability, defining quality standards, conducting monitoring, and measuring service outcomes.[*26]

The term 'choice revolution' originated in Sweden, where, as in other Nordic countries, a system affording choice in social services' organisation was tested as early as the 1990s.[*27] In 2007 in Denmark[*28] and in 2009 in Sweden[*29] and Finland[*30], laws were enacted to regulate the right of individuals to choose between distinct sets of service providers (public, for-profit, and not-for-profit) in particular sectors; likewise, the roles and responsibilities of the providers were regulated. This move was rooted in assumptions (bound up with economic theory) that the needs of the population are met most fully when all providers are given equal opportunities in the market.[*31] A broad-based selection of service providers was presumed to support quality, efficiency, and innovation.[*32]

In Estonia, (an implicit) 'choice revolution' has taken place in the organisation of technical aids and social rehabilitation: a person needing the service can freely choose a service provider from among all providers who meet the requirements set for it and who hold a corresponding activity licence. Said freedom and requirements extend also to public-law providers and to state and local government institutions (per the SWA, Subsection 1^1 (2)).

In international experience, **competitive neutrality** has not proved to manifest balanced development.[*33] The field of long-term care services has witnessed especially serious concerns about service provision growing more and more consolidated in private hands. This trend of increasing concentration with profit-oriented (incl. international) business enterprises is highly evident in Finland and Sweden, for instance.[*34] While competition is typically expected to improve performance, the opposite has been observed

25 F Blank, 'When "Choice" and "Choice" Are Not the Same: Institutional Frameworks of Choice in the German Welfare System' (2009) 43 Social Policy & Administration 585. – DOI: https://doi.org/10.1111/j.1467-9515.2009.00682.x.

26 T Klenk and R Reiter, 'Post-New Public Management: Reform Ideas and Their Application in the Field of Social Services' (2019) 85 International Review of Administrative Sciences 3, 3, 6. – DOI: https://doi.org/10.1177/0020852318810883; H Blöchliger, 'Market Mechanisms in Public Service Provision' (2008) OECD Economics Department Working Papers 626; Friedländer, Röber, and Schaefer (n 18) 298.

27 P Blomqvist, 'The Choice Revolution: Privatization of Swedish Welfare Services in the 1990s' (2004) 38 Social Policy & Administration 139, 139, 141.

28 In Denmark, a choice system was created initially in the field of home-care residential care services – see the Retsinformation page 'Lov om friplejeboliger' for 2007 <https://www.retsinformation.dk/eli/lta/2007/90> accessed on 3 July 2024.

29 The system of choice in Sweden is regulated by the act of law on the system of choice: 'Lag (2008:962) om valfrihetssystem' (2008) <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008962-om-valfrihets-system_sfs-2008-962> accessed on 3 July 2024.

30 In Finland, the choice system is regulated by the Act on Health and Social Service Vouchers (*Laki sosiaali- ja terveydenhuollon palvelusetelistä*), 24.7.2009/569 <http://www.finlex.fi/fi/laki/ajantasa/2009/20090569> accessed on 3 July 2024.

31 Sivesind, Trætteberg, and Saglie (n 22) 300.

32 See the reasoning behind the law proposals 2008/09:29 (for Sweden's *Lag om valfrihetssystem*) 18 and Finland's SOTE proposal (s 1.2) – available via, respectively, <https://www.regeringen.se/rattsliga-dokument/proposition/2008/10/prop.-20080929> and <https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Sivut/HE_47+2017.aspx> both accessed on 3 July 2024.

33 Sivesind, Trætteberg, and Saglie (n 22) 302.

34 A Anttonen and O Karsio, 'How Marketisation Is Changing the Nordic Model of Care for Older People' in F Martinelli, A Anttonen, and M Mätzke (eds), *Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in Times of Austerity* (Edward Elgar 2017) 219. – DOI: https://doi.org/10.4337/9781786432117.00020; C Wehlander, 'När medför en offentlig finansiering en skyldighet att följa LOU?: Studie med särskilt fokus på EU-begreppen SGEI och NSGI [When does public funding entail an obligation to comply with the LOU?: Study with special focus on the EU concepts of SGEI and

in the field of care services. Greater competition reduces profits, thereby pushing quality downward[*35] since, with the salaries of the personnel already being low, ways of becoming more cost-effective or innovative are limited.[*36] Studies have shown, furthermore, that service providers intent on earning profits for the business (such as those owned by private-equity firms and publicly traded companies) perform worse.[*37] This most likely holds for aspects of quality that are difficult to measure and monitor, such as the service users' inclusion in meaningful activities for purposes of enhancing their personal ability to participate.

After decades of neoliberal-agenda-impelled shifting of social-service provision toward marketisation, increased worries about 'supplier opportunism' and about losing control over the provision of the services have started to trigger reverse developments. Critics of the so-called open-house service approach have argued that having a large number of providers makes it hard to maintain a sufficient regulatory overview of the service landscape and for individuals to choose a suitable, high-quality provider; that the lack of a turnover guarantee for providers could, by contributing to their financial uncertainty, possibly hinder investment efforts and flexible deployment of personnel; and that concluding contracts with every single care provider that meets the threshold requirements is likely to exacerbate administrative burdens.

Perhaps the most noteworthy example from recent times of back-pedalling on marketisation of social services comes from Finland: when a full-choice model was proposed under which the private sector would have been authorised for exclusive provision of social and health services, it was declared unconstitutional.[*38] As for Norway and especially Denmark, scholars have argued that the strong societal role of the countries' third sector, including participation in policymaking[*39], alongside exemptions to general competition[*40], has enabled them to resist market pressures. The strength of non-governmental organisations (NGOs) lies in their proactive work to develop personalised services. Also, their activities are driven more by public interests and the society's values than profit-oriented companies' are.[*41] Denmark's national strategy for strengthening the capacity of civic organisations has been cited as a positive example and even copied elsewhere.[*42] In several choice systems for social services, not-for-profit providers have been accorded a clear legal advantage in recent years.

Another downside associated with the free choice system is increased inequality.[*43] Ability and capacity to make informed choices are not equally distributed across society, and developers of choice models who wish to safeguard against this additional source of potential for inequality should include a 'non-choice option' – that is, if an individual cannot or does not wish to make a choice, the administrative authority ought to direct that person to a service that meets the relevant personal needs.[*44] In light of the Swedish example, it can be suggested that the implementation of the choice model should be left to the discretion of local authorities, as this model seems inherently better-functioning in some conditions than others (e.g., in densely populated areas, as opposed to rural areas, where the public authority often must compensate for a lack of competition).

NSGI]' (Konkurrensverket 2018) 65 <https://www.konkurrensverket.se/globalassets/dokument/informationsmaterial/rapporter-och-broschyrer/uppdragsforskning/forsk-rapport_2018-5_nar-medfor-en-offentlig-finansiering-en-skyldighet-att-folja-lou.pdf> accessed on 3 July 2024.

35 J Forder and S Allan, 'The Impact of Competition on Quality and Prices in the English Care Homes Market' (2014) 34 Journal of Health Economics 73, 82. – DOI: https://doi.org/10.1016/j.jhealeco.2013.11.010.

36 Walker, Druckman, and Jackson (n 24) 299–300.

37 R Broms, C Dahlström, and M Nistotskaya, 'Provider Ownership and Indicators of Service Quality: Evidence from Swedish Residential Care Homes' (2024) 34(1) Journal of Public Administration Research and Theory 150. – DOI: https://doi.org/10.1093/jopart/muad002.

38 The reasoning of the constitutional committee of Eduskunta is available via <https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/PeVL_26+2017.aspx> accessed on 3 July 2024. See s 3.3 in particular.

39 SB Segaard, N Brookes, and JB Pahl, 'What Shapes National Responses to EU Public Procurement Policy? The Case of Health and Social Services in Norway, Germany and England' (2020) 24 Scandinavian Journal of Public Administration 43.- DOI: https://doi.org/10.58235/sjpa.v24i1.8623.

40 M Szebehely and G Meagher, 'Nordic Eldercare – Weak Universalism Becoming Weaker?' (2018) 28 Journal of European Social Policy 294, 301. – DOI: https://doi.org/10.1177/0958928717735062.

41 Anttonen and Karsio (n 34) 229.

42 Vabø and others (n 13).

43 Szebehely and Meagher (n 40) 294.

44 For Finland, see the Act on Health and Social Service Vouchers (n 25) s 6. For Sweden, see Act 2008:962 (n 24) ch 9, s 2.

3. Arrangement of social services within the context of European Union public-procurement law

The political, economic, and cultural diversity across EU member states has shaped an extremely varied landscape of arranging social services.[*45] Both the Procurement Directive (2014/24/EU) and the Union's concession-contracts directive (2014/23/EU) respect 'welfare autonomy'[*46], i.e the extensive powers that Member States have, organising the selection of service providers in the manner they deem most appropriate while respecting cultural differences, embracing sensitivity of social services, and honouring their limited cross-border impact (under recitals 114 and 54, respectively). The recitals to these instruments underscore that the directives should not be construed as encompassing or promoting liberalisation to services of general economic interest and that Member States remain free to organise the provision of compulsory social services either as services of general economic interest or as non-economic services of general interest, with a mixture of the two being possible also (see the comments accompanying Annex IV of Directive 2014/23/EU and Recital 6 of Directive 2014/24/EU).[*47]

Assessing whether a particular service is of economic interest is not subject to clear guidance from the EU treaties or procurement directives, but one can conclude from European Court of Justice (ECJ) practice that the crucial factor is **the specific organisational model, not the service's intrinsic nature**.[*48] Importantly, if the Member State itself defines the service in question as a non-economic one of general interest, its organisation falls entirely outside the scope of internal-market and competition rules (per Recital 6 of Directive 2014/24/EU).

However, even when choosing to arrange its social services as, alternatively, economic services of general interest, a Member State still is granted considerable discretion, in line with Article 14 of the Treaty on the Functioning of the European Union (TFEU) and its Protocol 26, on services of general interest. Though flexible options exist within the lines of the public-procurement system (e.g., a framework agreement[*49]), it is important to note that, under the terms set forth in Directive 2014/24/EU's Recital 114, Member States may completely waive application of the public procurement procedure and 'organise social services in a way that does not entail the conclusion of public contracts' – for example, merely through 'financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination' (this idea is reiterated in Recital 54 of Directive 2014/23/EU with regard to concessions).

It used to be that the open-house model, characterised by granting authorisations to all partners meeting the requirements, was considered a special form of public procurement.[*50] The matter was clarified, however, by the ECJ ruling in the *Falk Pharma* case[*51], wherein the Court confirmed that 'selectivity' is a constitutive element of public procurement. For sectors such as social services, where service quality and meeting specific user needs take precedence over solely economic considerations, there is reason to believe that a conscious choice has been made to leave space for the development of innovative and locally adapted service systems (e.g., utilising customer-choice and service-voucher models). In cases of selecting particular partners under a contract, the authorities may employ a simplified procedure expressly for social and other specific services (following the so-called light regime) set up within the system for public procurement[*52].

45 KPMG for the European Commission (n 2).

46 L Zhu, 'SGI: An EU Expression of State Functions' in *Services of General Economic Interest in EU Competition Law* (Springer 2020) 56. – DOI: https://doi.org/10.1007/978-94-6265-387-0_2; D Schiek, 'Social Services of General Interest: The EU Competence Regime and a Constitution of Social Governance' in UB Neergaard and others (eds), *Social Services of General Interest in the European Union* (TMC Asser Press 2013), along with the latter volume more generally. – DOI: https://doi.org/10.1007/978-90-6704-876-7_4.

47 For Estonia, see Viirsalu (n 1).

48 L Hancher, Y de Vries, and FM Salerno, *EU State Aids* (5th edn, Sweet & Maxwell 2018) ch 10, s 1.

49 Directive 2014/24/EU, specifically art 33; Public Procurement Act of Estonia (PPA) (2017) ss 29ff.

50 M Burgi, *Vergaberecht: systematische Darstellung für Praxis und Ausbildung* (CH Beck 2016) 170–71.

51 Case C-410/14 *Falk Pharma*, 2.6.2016, para 38.

52 Directive 2014/24/EU, arts 74–77; PPA, s 126.

In some cases, it may be difficult to distinguish predefinition of the applicable quality standards from criteria for selection of providers.[*53] The directive at issue makes reference to the European Quality Framework for Social Services, a voluntary mechanism developed by the Social Protection Committee[*54]. In the *Tirkkonen* ruling[*55], the ECJ clarified that simply **predefining quality standards does not constitute a public contract**, provided that the contracting authority has not cited any award criteria for the purpose of comparing and classifying admissible tenders. The Court stated that even the matter of whether interested operators are given a deadline after which candidate providers shall no longer be considered is irrelevant to ascertaining whether the scheme in question constitutes a public procurement. Regarding the award of contracts for social services, the ECJ addressed obliging the operator to have a location ready to serve the place where the services are to be provided, from the time of submission of the tender onward. Namely, the Court found that, although imposing this condition could help guarantee the proximity and accessibility of social services, it is clearly disproportionate to the objective (in that the situation might be different at the time of fulfilling the public contract). The ruling notes that the associated difference in treatment is compatible with the principle of equal treatment only in so far as it may be justified by a legitimate objective.[*56] This factor should be kept in mind with regard to all aspects of organising a service under a free-choice model and setting conditions for the operators.

Additionally, while Directive 2014/24/EU allows reserved contracts for social services (see Sec. 77 and also Section 127 of the Public Procurement Act of Estonia, PPA), the ECJ has recently dealt with the question of whether it is permissible to deviate from competitive neutrality by reserving the right to participate in procedures for awarding public contracts for social-services provision exclusively to private not-for-profit organisations. In the *ASADE* case, the Court stated that excluding private profit-making entities from the procedure for granting of public contracts for supplying such social services is not contrary to the principle of equality, as long as the exclusion genuinely contributes to pursuit of the social purpose articulated and to reaching the objectives, of pursuing the greater good of the community and budgetary efficiency, on which the relevant system is based.[*57] Furthermore, NGOs that are not strictly volunteering-based and that make profits from the provision of services must reinvest the profits from the associated operations with a view to reaching the social objective of general interest pursued thereby.[*58] Accordingly, treating NGOs differently from for-profit providers can be deemed objectively justified.

However, it is not entirely clear whether permissibility of favouring the not-for-profit sector should be extended to consumer-choice and voucher models that lie beyond the scope of public-procurement rules. According to the last sentence of Recital 114 of Directive 2014/24/EU, a system based on personal choice must adhere to the principles of transparency and non-discrimination. Interpretation in light of the TFEU and its protocol on services of general interest (which lays down additional shared values from the service-user's point of view: service-related diversity, high quality, safety, acceptable pricing, equal treatment, universal access, and promotion of users' rights) allows us to argue that differential treatment of for-profit and non-profit-making providers could indeed be justified when the organisation of the service is based on free choice, on the condition that this model is necessary for safeguarding the rights of the service-users and public interests. Everything that is considered acceptable under the 'light regime' should be acceptable in the even more lightweight frame of simple authorisation schemes.

53 With regard to concessions, see J Wolswinkel, 'Concession Meets Authorisation: New Demarcation Lines under the Concessions Directive?' (2017) 12 European Procurement & Public Private Partnership Law Review 396, 401. – DOI: https://doi.org/10.21552/epppl/2017/4/6.

54 'A Voluntary European Quality Framework for Social Services' (adopted on 16 November 2010) <https://ec.europa.eu/social/BlobServlet?docId=6140&langId=en> accessed on 3 July 2024.

55 Case C-9/17 *Tirkkonen*, 1.3.2018, paras 32–35.

56 Case C-436/20, *ASADE*, 14.7.2022, paras 103–110.

57 Ibid para 91.

58 Ibid para 95.

4. The free-choice model in the context of Estonia's Administrative Cooperation Act

Internationally, the need for long-term care is gaining status as a recognized social risk*[59], and most likely falls within the material scope of Subsection 28 (2) of the Estonian Constitution, which regulates the protection of individuals against social risks. The Constitution does not forbid involving private entities in protection of social rights (see its Subsection 28 (3)), and the state is widely acknowledged as possessing broad discretionary power to decide on how public tasks should be performed. However, there are constitutional boundaries restricting the transfer of public duties, derived from constitutional principles and social basic rights.*[60] To specify those boundaries, mandatory requirements for the involvement of the private sector in the performance of public duties have been set out in the Administrative Cooperation Act (ACA).*[61]

From a comparative perspective, it is interesting to note that the rules for delegation of administrative tasks have been accorded constitutional rank in Finland. The Finnish Constitution*[62] states the following in its Section 124: 'A public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, a task involving significant exercise of public powers can only be delegated to public authorities.' With the principles explicitly set forth in its fundamental law thus, the Finnish system can be considered stricter than the Estonian one in this regard. That also explains the recent rejection of the fundamental social-services reform that had proposed a full-choice model.*[63]

As for the corresponding Estonian regulation, according to the ACA's Section 5, an administrative duty may be delegated to a private person only if:

(1) the performance of the administrative duty by the legal or natural person is financially justified, taking into consideration, *inter alia*, the transaction costs (incl. expenses associated with administrative supervision);
(2) granting authority to perform the administrative duty is not going to impair the **quality** of the performance thereof; and
(3) the grant of authority to perform the administrative duty will not harm **public interests or the rights of persons** in respect of whom that administrative duty is to be performed.

Additionally, Subsection 126 (7) of the PPA contains terms that overlap somewhat with the regulations presented above: 'When awarding the contract, the authority or entity may have regard to considerations of service quality, continuity, accessibility, affordability, availability and comprehensiveness, the specific needs of different categories of users, including specific needs of disadvantaged persons, the involvement of users and innovation."

Although the legislator has not explicated the relations between these two norms, the ACA, with its Section 5, clearly offers better protection of public interests and the fundamental rights of the service-users (also because PPA considerations are subject to the discretion of the authority) so therefore should be applied in the delegation of social services.

Exercise of the free-choice model in the domain of residential-care services has led to administrative malpractice that jeopardises the rights of the services' users. Namely, municipalities let the individual choose a private service provider from the market but do not contribute sufficiently to making sure there are enough service places. The 'care poverty' or 'care deserts' problem linked to this issue tends to run rife in

59 European Commission, 'Long-Term Care Report: Trends, Challenges and Opportunities in an Ageing Society, Volume I' (Publications Office of the European Union 2021) <https://op.europa.eu/en/publication-detail/-/publication/484b0ceb-cd83-11eb-ac72-01aa75ed71a1/language-en/format-PDF/source-search> accessed on 3 July 2024.

60 N Parrest, 'Constitutional Boundaries of Transfer of Public Functions to [the] Private Sector in Estonia' (2009) 15 Juridica International 44; *Suomen perustuslaki*, 11.6.1999/731 <https://www.finlex.fi/fi/laki/ajantasa/1999/19990731> accessed on 3 July 2024.

61 RT I 2003, 20, 117; RT I, 17.11.2021, 7, available also in an English-language version <https://www.riigiteataja.ee/en/eli/ee/502012024007/consolide/current> accessed on 3 July 2024.

62 *Suomen perustuslaki* (n 60).

63 See n 32.

free-choice systems such as that in place in the UK, where the authorities have failed to 'shape' the market so as to guarantee service-users access to services of good quality.[*64]

In Estonia's case, there are municipalities that have refrained from admitting any legal (contractual) relationship with a service provider other than partial financing – i.e., paying the bills. A question naturally arises: how is it possible to ignore the legal obligation to guarantee existence of the service, access to it, and quality in its provision?

A large amount of the confusion lies in the fact that the ACA, adopted more than 20 years ago, does not, at least not *expressis verbis*, encompass regulation of a free-choice model. The ACA presumes that authorisation to fulfil a public duty exists. In the case of employing the free-choice system, it is unclear what constitutes the act of authorisation if this cannot be derived from the legislation or in the absence of a contractual relationship. One thing is clear, though: it is not the activity licence that constitutes authorisation to fulfil a public task.[*65] As of today, doubt remains as to whether the mandatory considerations specified by the ACA should apply also to the delivery of public services in the free-choice system.

It is crucial to note that social-policy literature discusses 'choice model' and 'outsourcing' as two alternative, mutually distinct concepts. One being demand-driven and the other supply-driven, the differentiation makes sense. At the same time, a choice-based model can be interpreted as one form of outsourcing (in a broad sense). This allows an interpretation under which the ACA applies directly to the current, demand-driven organisation of residential-care services.

Without going too deeply into the details[*66], one can state in summary that, as residential care is continuously regulated as an administrative duty, escaping the obligation to justify the delegation would be unconstitutional.[*67] Residential care could logically fall outside the scope of the ACA only if an individual chooses to live in a care home without there being an objectively assessed need for the service. In this hypothetical case, the service provider would be meeting a market need, not performing an administrative duty.

The regulation of the ACA must be revised in such a way that the fundamental principles for delegation apply irrespective of the scheme selected. From the comparative perspective, a German legislative proposal for regulating **co-operation agreements** for contract-based public–private partnerships (*Kooperationsvertrag*)[*68] deserves attention. This was designed to regulate the requirements of the so-called functional privatisation. According to the proposal, cooperation agreements with the private providers must only be allowed if the authority can guarantee retaining **sufficient influence on the proper performance of the public duty**.[*69] Underpinning this reasoning is a fundamental awareness that the state must not rely on private markets so heavily that it could lose control.

5. Free choice or no choice?

In Estonia, a sector-specific 'choice revolution' took place with the marketisation of the field of technical aids and social rehabilitation services in 2016.[*70] Legally, the subjective right to the service/aid was replaced with a right to take on an obligation to pay a fee in exchange for the service/aids . It remains unclear whether the associated revision was purely shimmering wordplay or, on the other hand, fruit of a genuine intention

64 C Needham and others, 'How Do You Shape a Market? Explaining Local State Practices in Adult Social Care' (2023) 52(3) Journal of Social Policy 640. – DOI: https://doi.org/10.1017/s0047279421000805.

65 If there is no clear co-operation agreement between the municipality and the private provider, then the administrative decision of the municipality granting the service (per the SWA's s 21(1)) could be implied as the act of (missing) authorisation.

66 Discussed further in the preceding publication: Viirsalu (n 1) s 4.

67 Another way to escape the considerations pertaining to delegation is to employ such means as establishing a civil-law contract instead of a public contract between the authority and the private provider, because this explicitly falls outside the scope of the ACA (s 1 (3)).

68 Legislators have proposed that a new norm be added to the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), for s 56a.

69 H-J Knack (ed), *Verwaltungsverfahrensgesetz (VwVfG): Kommentar* (11th edn, Carl Heymanns 2020) before its s 54, comment 86.

70 See M-L Viirsalu, 'Eraõiguslik sotsiaalõigus: vastutuse muutumine sotsiaalse rehabilitatsiooni õigussuhete kolmnurgas [Privatising social law: changing responsibility in the social rehabilitation legal triad]' [2017](2) Juridica 82.

of the legislator to limit the public duty to solely monetary obligations and step back from a responsibility to ensure access and quality connected with the services.

Whatever the financial compensation might be, it has no meaning if the service needed is neither on the market nor supplied by any public providers. A free-choice system makes sense only where there is true choice available. It should be stressed that the objective of social rights is not to improve the economic well-being of the individuals alone but also to offset or compensate for market deficiencies – i.e., to offer assistance that would not be sufficiently available via market mechanisms at acceptable pricing or quality. However, if a municipality chooses to fulfil its public duties (often through a blend of models), its responsibility cannot not, by any means, be limited to providing financial support for the care service. Yet the state, lacking the resources necessary for exercising effective state- and administrative-level supervision, does not push the municipalities enough to honour their constitutional obligations.

According to Sections 14 and 28 of the Constitution of Estonia, the legislator is obliged to create a clear legal framework under which local governments can organise care services on the basis of public interests and fulfil the obligation to guarantee fundamental rights. If choice, competition, and private interests enter the picture, that regulatory framework must establish clarity as to the rights, duties, and responsibilities of all parties involved in the service triad. A free-choice system implemented via mere financial compensation (i.e., a monetary benefit instead of a right to the service) could hypothetically be considered constitutional in a situation 1) wherein said service's quality and availability are sufficiently regulated either by law or through co-operation agreements and 2) in which the absence of administrative procedure is compensated for by a 'consumer law' – that is, a functionally equivalent private-law-based procedure. Currently, in stark contrast against the Nordic legal systems considered above, the Estonian case falls short of meeting these prerequisites .

6. Conclusions

Under a free-choice model as described in the article, a beneficiary is permitted to select a personally preferred service provider from among all providers in the relevant market who meet the legal requirements and hold a corresponding activity licence. The key element of this market-based model for arranging social services is that it is based on the demand of the consumer. With this 'open house', the foundations do not rest on supply as they do in traditional public procurement.

In Estonia, the implementation of residential-care service is sometimes mistaken for a 'free market', although in actuality it continues to be a public duty. A loosely defined regulatory framework, non-existent user rights, and an overburdened – and hence rarely applied state supervision have fuelled administrative malpractice and questionable interpretations of the law. Some municipalities see their legal relationship with the private providers engaged as being limited to just paying the bills. Thereby, the duty to ensure quality, continuity, and cost-effectiveness of the service and the obligation to protect the service-users' procedural rights has remained unclear.

The extensive freedom left to the municipalities in the manner of organising the services can demonstrate its worth only when supported by legal clarity. One would expect greater legal clarity to also save on resources and contribute to equal treatment of the service users.

The Administrative Cooperation Act requires an analysis to be carried out prior to the transfer of public tasks to a private provider. This shall ensure that the transfer of public tasks does not end up violating neither individual-level fundamental rights nor collective-level public interests. With this paper I contend that the requirement of reasoning must be extended to any application of the market-based choice model that entails executing public tasks. Though the ACA, by assuming that the public authority is the one to select the private service provider, does not explicitly cover a free-choice model that falls outside the sphere of public-procurement procedure, interpreting the law as applying also to a free-choice model is justified. It is crucial to agree upon the regulative leeway afforded with regard to the private actors to avoid the 'escape' of the public authorities into the private law. The principles of the rule of law and the social state, alongside constitutional social rights, require functional equality in the protection of the service users' rights, regardless of whether the service is provided by a private legal entity or by a public one. The 'enabling state' does not just enable the private provision of public services; it also bears a constitutional responsibility to

guarantee (*Gewährleistungspflicht*), which requires retaining sufficient ability (competence and resources) to influence the proper fulfilment of the public task.

International comparisons attest that balanced development in long-term care demands more than giving the public, business, and third sector equal opportunities to provide the care services. If the public sector decides to rely on private initiative, the political and regulatory environment must actively engage and empower the not-for-profit sector that is driven more by public interests and social values. There is empirical evidence that in the realm of personal (human) services, this contributes to achieving high service quality, reaching aspects of quality that typically prove difficult to measure and supervise.

Although empirical studies increasingly highlight negative consequences of delegating public services to the private sector,[*71] the academic literature warns also against overly generalised conclusions about its effects. After all, success depends on numerous non-legal factors (such as market conditions, the institutional framework, and service-transaction costs) in addition to the legal setting.[*72] Nevertheless, the current situation in Estonia's residential-care market is an example of a true **market failure** since the demand for the service exceeds the supply and the lack of service placements leaves the municipalities dependent on private providers and their conditions, including rapid rise in care home prices.

Looking at the international experience, one can derive the conclusion that market-based choice models tend to thrive in areas with denser competition and are suitable predominantly for empowering informed clients who are willing and able to compare between service providers and to 'vote with their feet' (which, in turn, relies on sufficient, healthy competition). Therefore, while the free-choice model may prove viable for some services, it is not a panacea – it might not be an optimal solution for the residential-care service users.

Whether to provide choice and to what extent is, consequently, a matter primarily for social policy, not for the law. That said, considering that the organisation of social services is bound to grow even more complex in the coming years, with public and private law increasingly intertwined, lawyers must be prepared. Legal professionals need to take responsibility for ensuring that all forms of public–private co-operation, especially the innovative solutions, are adequately linked with the rest of the legal system, without forgetting the underlying aim: safeguarding the individual service-users' fundamental rights and, simultaneously, public interests.

71 S Overman, 'Great Expectations of Public Service Delegation: A Systematic Review' (2016) 18 Public Management Review 1238. – DOI: https://doi.org/10.1080/14719037.2015.1103891.

72 OH Petersen, U Hjelmar, and K Vrangbæk, 'Is Contracting Out of Public Services Still the Great Panacea? A Systematic Review of Studies on Economic and Quality Effects from 2000 to 2014' (2018) 52 Social Policy & Administration 130, 130. – DOI: https://doi.org/10.1111/spol.12297.

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Life after *Irgita* (C-285/18) – More Questions Than Answers[*1]

Abstract. The principles governing public procurement – equal treatment, non-discrimination, transparency, proportionality, etc. – serve upholding the fair use of public resources and ensuring compliance with EU-level law. Sometimes, the open market is not the most efficient option, particularly when the public sector possesses the necessary resources. To address this, the EU's procurement directives permit deviations from established public procurement rules for in-house transactions or horizontal co-operation within the public sector. These involve determining whether to utilise internal resources or external ones, however, recent European Court of Justice cases have revealed uncertainties with regard to the process of this 'make or buy?' decision. While Member States retain freedom in evaluating how to meet their needs, that freedom is not unlimited and must be balanced with adherence to general principles of EU law. The article addresses the doubts that persist notwithstanding the Court's analysis, most notably in *Irgita* (C-285/18). In light of a clear need for clarity related to the addressees of the key rule, its applicability, and the impact of general principles of EU law on the make-or-buy decision, the discussion tackles these matters as pressing questions.

Keywords: public procurement, the make-or-buy decision, in-house transaction, horizontal co-operation, EU public procurement law

Introduction

The rules of public procurement are rooted in the principles of equal treatment, non-discrimination, transparency, and proportionality, to guarantee use of public resources that is fair, transparent, and efficient and to ensure compliance with the principles of the Treaty on the Functioning of the European Union (TFEU).[*2] Public contracts with a value above a set threshold must be concluded in line with co-ordinated procurement-procedure rules, for ensuring that those principles receive practical effect and that public procurement is open to competition.[*3]

1 This work was supported by the Estonian Research Council (under grant PRG1449).

2 These rules are set forth in several instruments: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance [2014] OJ L94/1; 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 L94/65; 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 L94/243.. These are referenced jointly as the procurement directives.

3 Directive 2014/24/EU, art 1.

Procuring goods, services, or construction works on the open market may not always be the most efficient way to use public resources, especially when the public sector already has what is needed.[*4] It is unreasonable to procure from the open market merely on grounds of a generic notion that the open market should generally be preferred. This is why the EU's current procurement directives allow deviation from the established procurement rules when the contracting authorities wish to provide or organise services themselves through entities in the public sector under the control of the contracting authority (via in-house transactions or vertical co-operation) or collaborate for these within the public sector (in horizontal co-operation).[*5]

The decision as to whether the contracting authorities already have the resources themselves, all of the necessary resources are otherwise available in the public-sector realm, or something still needs to be sourced from the market is made at a stage prior to public procurement. This decision has been called a 'make or buy?' decision.[*6] Since it represents the contracting authority's choice of externalising vs. internalising aspects of its activities,[*7] the 'make' in 'make or buy?' encompasses both an in-house transaction and horizontal co-operation undertaken by contracting authorities.[*8] It should be noted that the definition employed in this paper for 'make' encompasses only the two exceptional models of public–public co-operation – vertical and horizontal – that have been excluded from the scope of the procurement directives. The so-called purest form of 'make', wherein the contracting authority has, for example, engaged the required personnel directly and provides the services for itself, is not included since it is beyond doubt that a contracting authority in these conditions need not turn to the market and has no obligation to adhere to the corresponding EU law.[*9] Services for which the contracting authority has its own staff and things that said contracting authority already owns are not covered by public procurement rules in any case.[*10]

While incorporating the option to choose 'make' was much anticipated by contracting authorities and Member States alike, in practice the make-or-buy decision still is accompanied by confusion.[*11] As Member States have begun to restrict and modify the articulations of whether and when contracting authorities are allowed to opt for 'make', the question of whether individual EU members even are allowed to impose such additional conditions has recently become the subject of several European Court of Justice (ECJ) cases,[*12] with the first to receive the Court's attention being *Irgita*.[*13]

4 William A Janssen, 'Swimming against the Tide: The Harmonisation of Self-Organisation through Article 12 Directive 2014/24/EU' (2019) 14 Eur Procurement & Pub Private Partnership L Rev 145, 145; Carri Ginter and Ivo Pilving, '§ 12. Sisetehing ja hankijatevaheline koostöö' [In-House Transactions and Co-operation between Contracting Authorities]' in Mari Ann Simovart and Mart Parind (eds), *Riigihangete seadus: kommenteeritud väljaanne* [Public Procurement Act: Commented Edition] (Juura 2019) 171–72.

5 Directive 2014/24/EU, arts 5, 12; Directive 2014/23/EU,arts 5, 13; Directive 2014/25, arts 7, 28–30; Kristian Pedersen and Erik Olsson, 'Commission v Germany – a New Approach to In-House Providing?' (2010) 1 PPLR 33, 34, 39; Case C-26/03 *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] EU:C:2005:5, paras 48–49; Case C-107/9*8 Teckal Srl v Comune di Viano, Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] EU:C:1999:562, paras 50–51.

6 William A Janssen, *EU Public Procurement Law & Self-Organisation: A Nexus of Tensions & Reconciliations* (Eleven International 2018) 10, 15; Mario Sõrm, Carri Ginter, and Mari Ann Simovart, 'Transparency Obligations for Make or Buy Decisions' [2023] (1) PPLR 1, 2.

7 Stephanie Hötte, 'Ode to Liberty? – The Determination of Services of General (Economic) Interest and the "Make-or-buy" decision' (2020) 45 European Law Review 487, 491.

8 Sõrm, Ginter, and Simovart (n 6) 12–14; Hötte (n 7) 493–94.

9 Sõrm, Ginter, and Simovart (n 6) 12.

10 Directive 2014/24/EU, art 1(2).

11 Janssen (n 6) 251–92; Hötte (n 7) 506; William A Janssen and Erik Olsson, 'On Competition, Free Movement and Procurement: Irgita's Public Cooperation Conundrum' (2020) 15 Eur Procurement & Pub Private Partnership L Rev 2, 2. – DOI: https://doi.org/10.21552/epppl/2020/1/4.

12 Case C-285/18 *Kauno miesto savivaldybė, Kauno miesto savivaldybės administracija v UAB 'Irgita', UAB 'Kauno švara'* [2019] EU:C:2019:829; Case C-11/19 *Azienda ULSS n 6 Euganea v Pia Opera Croce Verde Padova* [2020] EU:C:2020:88; Joined Cases C-89/19 to C-91/19 *Rieco SpA v Comune di Lanciano, Ecolan SpA (C-89/19), Comune di Ortona, Ecolan SpA (C-90/19), Comune di San Vito Chietino, Ecolan SpA (C-91/19)* [2020] EU:C:2020:87; Case C-835/19 *Autostrada Torino Ivrea Valle D'Aosta – Ativa SpA v Presidenza del Consiglio dei Ministri, Ministero delle Infrastrutture e dei Trasporti, Ministero dell'Economia e delle Finanze, Autorità di regolazione dei trasporti* [2020] EU:C:2020:970; Joined Cases C-383/21 and C-384/21 *Sambre & Biesme SCRL (C-383/21), Commune de Farciennes (C-384/21) v Société wallonne du logement (SWL)* [2022] EU:C:2022:1022; Case C-796/18 *Informatikgesellschaft für Software-Entwicklung (ISE) mbH vs Stadt Köln* [2020] EU:C:2020:395.

13 *Irgita* (ibid), paras 29.2–29.3.

The Court has explained in its case law that, although the nature of the exception itself cannot be changed by national legislation,[*14] the Member States are free to choose how they meet their own needs (per the principle of free administration). However, this freedom is not unlimited – 'due regard to the fundamental rules of the TFEU, in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency' should be exercised.[*15] Over the history of its decisions, the Court has employed a wide range of wordings when speaking of such principles and rules of EU law[*16], reflecting a variety-rich landscape; accordingly, the term 'general principles of EU law' is used in this article for the sake of clarity. Also, though there are many, quite different central principles of EU law to which ECJ case law refers (the protection of fundamental rights,[*17] direct effect,[*18] freedom to conduct business,[*19] etc.), the term as employed in this paper is confined primarily to the principles of equal treatment, non-discrimination, mutual recognition, proportionality, and transparency, all of which the ECJ cites by name in relevant case law.

Regrettably, the Court's analysis does not afford enough clarity. Problems have arisen in connection with how to understand and implement the ECJ's instructions, because many questions that have needed resolution were not appropriately addressed.[*20] This article proposes answers to the some of the most pressing questions that have remained:

(i) who the addressees of the Court's rule[*21] that the general principles of EU law shall be followed in the context of make-or-buy decisions are;
(ii) when the obligation to follow those general principles of EU law shall apply; and
(iii) how the general principles of EU law influence the activities of Member States or contracting authorities in connection with make-or-buy decisions.

The paper does not delve into the matter of the relationship between the principle of free administration and EU law[*22] or the issue of legal remedies[*23] associated with make-or-buy decisions, both of which have been raised in addition. These questions deserve specific analysis, and there are plans to make them a part of further, related research.

1. The 'who' question

From reading *the* case law of the ECJ, it is unclear whose activities the Court has aimed to regulate – Member States', contracting authorities', or those of both. Perhaps it is unsurprising, then, that the opinions of commentators seem to head in different directions.

14 Ginter and Pilving (n 4) 171.

15 *Irgita* (n 12), para 48.

16 For example, the Court has spoken of 'general principles', 'fundamental rules', 'fundamental principles', some 'particularly important' principle(s), 'essential principles', 'overarching principles', etc. For details, consult Päivi J Neuvonen and Katja S Ziegler, 'General Principles in the EU Legal Order: Past, Present and Future Directions' in Katja S Ziegler and others (eds), *Research Handbook on General Principles of EU Law: Constructing Legal Orders in Europe* (Edward Elgar 2022) 9–11. – DOI: https://doi.org/10.4337/9781784712389.00007.

17 Niall O'Connor, 'Whose Autonomy Is It Anyway? Freedom of Contract, the Right to Work and the General Principles of EU Law' (2020) 49 Industrial Law Journal 285, 291. – DOI: https://doi.org/10.1093/indlaw/dwz024; Case C-29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] EU:C:1969:57.

18 Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Administratie der Belastingen* [1963] EU:C:1963:1.

19 Joined Cases C-184/02 and C-223/02 *Kingdom of Spain and Republic of Finland v European Parliament and Council of the European Union* [2004] EU:C:2004:497 51.

20 See, for example, Janssen and Olsson (n 11) 2–3, 12; Janssen (n 4); Wojciech Hartung, 'In-House Procurement – the Discretion of Member States Confirmed, the Relationship with Competition Law Remains Open: Case C-285/18 Irgita, Judgment of the Court of Justice of the European Union (4th Chamber) of 3 October 2019' (2019) 14 Eur Procurement & Pub Private Partnership L Rev 262, 266–67. – DOI: https://doi.org/10.21552/epppl/2019/4/10; Sõrm, Ginter, and Simovart (n 6).

21 Here and in the rest of the article, any reference to 'the Court's rule' or 'the rule' points to the ECJ's conclusion that general principles of EU law must be followed also in the taking of make-or-buy decisions.

22 Janssen (n 4) 150–54; Hötte (n 7) 507; Janssen and Olsson (n 11) 4–5; Carri Ginter, Kadri Härginen, and Mario Sõrm, 'In-House Transactions: Lost in Translation?' (2020) 30(3) PPLR 117, 126–28; Sõrm, Ginter, and Simovart (n 6) 10–12.

23 Janssen (n 6) 251–54.

At this juncture, it should be noted that, in the legal literature, the make-or-buy decision seems to exist at two distinct layers. It is considered to be both a policy choice made by a Member State[*24] and a choice specific to a contracting authority[*25]. These two layers get discussed mostly in a 'mixed' manner that does not distinguish clearly between them. The *case law of the ECJ* is no exception. That is one of the factors in why the Court's instructions might be difficult to understand.

1.1. Member States

In *Irgita*, the Court focused primarily on the Member States as the addressees of the mandate to follow the general principles of EU law.[*26] This is logical when one considers the facts of the case and the questions being analysed.[*27] The main 'take-away' from the decision is that the Member States have the freedom to choose and regulate how their contracting authorities meet their needs; i.e., they are free to decide whether to alter the regulation pertaining to when a contracting authority is allowed to opt for 'make', at least within the limits of the general principles of EU law.[*28]

It appears that the main addressees of the Court's rule expressed in *Irgita* are the Member States in their legislative role, since they are the ones able to impose additional conditions on conducting in-house transactions, through national regulation. Whether to do so or not is a policy choice that the Member State must make for itself.[*29] At this level, make-or-buy decisions are policy choices or even 'state measures' the execution of which is possible only via legislative powers.[*30] This reasoning gains further support from the Court's conclusion that the additional conditions at issue must be in accordance with the principles of transparency and legal certainty.[*31] Furthermore, that conclusion was reiterated in *Rieco*.[*32]

The list of addressees received clarification in *Autostrada*, in which national, regional, and local authorities were named.[*33] The non-national entities too hold an obligation to follow the general principles of EU law, in that they are responsible for the legislation at their respective levels.

Therefore, the consistent element found in the case law is that the rule is addressed to those who are acting in a legislative capacity. Hence, a link has been established between the obligation to comply with the general principles of EU law and the national legislature's ability to impose additional conditions on opting for 'make'. This conclusion extends to conditions that have merely been altered or modified by the Member State.[*34] In that case too, the national rules for choosing 'make' may differ from the rules laid down in the procurement directives.

1.2. Contracting authorities

Little uncertainty surrounds the impact of EU law's general principles on make-or-buy decisions **as policy choices**. That is quite clearly explained. The picture for contracting authorities, in contrast, is considerably muddier.

The *Autostrada* decision merely identifies the contracting authorities as those who must follow the policy decisions of the national legislators/policymakers.[*35] With *Irgita*, the ECJ stated that, even if the

24 Sõrm, Ginter, and Simovart (n 6) 3, 7.

25 Janssen (n 6) 15.

26 The Attorney General did not examine this question in his opinion in *Irgita* at all. In other cases, no opinion of the Attorney General was drafted, since the results were orders of the ECJ.

27 One of the main questions analysed in *Irgita* was whether art 12(1) of Directive 2014/24 must be interpreted as precluding a rule of national law whereby a Member State imposes conditions on the possibilities for a contracting authority's execution of an in-house transaction that are not laid down in said article.

28 *Irgita* (n 12), paras 45–49.

29 Sõrm, Ginter, and Simovart (n 6) 3, 7.

30 Ibid 7.

31 *Irgita* (n 12), paras 51–57.

32 *Rieco* (n 12), paras 37, 38.

33 *Autostrada* (n 12), paras 49–50.

34 See also Janssen (n 4) 150–54.

35 *Autostrada* (n 12), paras 49–50.

conditions for an in-house transaction are met and the activities involved therefore lie beyond the scope of the procurement directives, the Member States and their contracting authorities remain obliged to show due regard for the principles of equal treatment, non-discrimination, mutual recognition, proportionality, and transparency (the general principles of EU law specified in the ruling).[*36]

Therefore, not only should the national rules for in-house transactions and co-operation be in accordance with the general principles of EU law, but also the decisions of the contracting authorities are covered by this requirement. By dint of this conclusion, the general principles of EU law directly influence the framing for contracting authorities' activities.

With EU law exerting an influence in this way, the situation could imply that the balance between the principle of free administration and the internal-market rules is tipping more toward the EU. If such a shift is desired, subjecting the choices of the contracting authorities to the general principles of EU law is understandable, since these choices clearly affect the internal market.

The language visible in subsequent case law too indicates that contracting authorities are intended to count among the addressees of the Court-stated rule. Choices made in favour of one particular way of providing services at a stage prior to public procurement must likewise comply with the general principles of EU law.[*37]

2. The question of when

The second question is when the obligation to consider the general principles of EU law in make-or-buy decisions applies to the Member States and contracting authorities.[*38]

2.1. Conditions limiting the 'make' alternative

It is evident from the case law that an obligation to consider the general principles of EU law is in force when the Member States (or other national legislators) have introduced additional criteria that contracting authorities must fulfil if wishing to opt for 'make'.

Firstly, well-recognised case law states that 'the fundamental rules of the TFEU *generally* apply to the economic activities of public bodies, even in cases […] outside the ambit of the directives on public procurement[,] provided that those public bodies do not carry them out themselves, including by means of in-house transactions'.[*39] There is no need for the value of the economic activity to be over a certain threshold[*40]; however, some cross-border interest should be evident.[*41] Accordingly, the freedom a Member State may exercise when imposing additional requirements on when contracting authorities are allowed to apply the 'in-house' exception is not unlimited, naturally.[*42]

This reasoning is consistent with case law treating other matters related to public procurement law. For instance, if those Member States that have stipulated additional criteria in their national law that relevant entities '*must satisfy in order to be allowed to participate in reserved public procurement procedures',*

36 *Irgita* (n 12), para 61.

37 Ibid, para 50; *Azienda ULSS* (n 12), para 54; *Rieco* (n 12), para 38. The exception in this regard is the *Autostrada* decision, which makes no mention of the choice of the contracting authority (also see the discussion above).

38 Magdalena Jaś-Nowopolska and Hanna Wolska, 'Impact of the Judgement of [the] CJEU in Case C-285/18 on In-House Transactions in Poland' [2021] (1) Przegląd Prawno-Ekonomiczny 63, 72. – DOI: https://doi.org/10.31743/ppe.10348; Janssen (n 4) 151; *Irgita* (n 12), Opinion of AG Hogan EU:C:2019:369, paras 51–53.

39 *Irgita* (n 12); Opinion of AG Hogan (ibid), para 51.

40 Ibid, para 52.

41 Case C159/11 *Azienda Sanitaria Locale di Lecce, Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] EU:C:2012:817, para 23; Case C-336/12 *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S* [2013] EU:C:2013:647, para 26.

42 *Irgita* (n 12); Opinion of AG Hogan (n 39), paras 51, 53.

these conditions must similarly respect the general principles of EU law.*[43] That meshes with the conclusions of several commentators.*[44]

When a Member State has decided to restrict the opportunities of its contracting authorities to resort to their own resources, it has, in essence, voluntarily limited their right to exercise freedom of administration.*[45] This, in turn, implies that said Member State has voluntarily expanded the scope of EU law, the area of application of public procurement rules.*[46]

The idea of limiting the possibility of opting for 'make' so as to favour public procurements is inherently in accordance with internal-market objectives, as public procurement helps ensure the efficient use of public funds.*[47] That said, a question arises here as to why compliance with the general principles of EU law needs additional attention from the Member States, as any restrictive additional conditions should already be in accordance with objectives associated with the internal market.

It is clear from the foregoing discussion that there is no question over whether the obligation to consider the general principles of EU law applies when the Member State has altered the conditions or added its own via national law such that there are stricter limits to the possibility of opting for 'make'.

2.2. Conditions that favour choosing 'make'

Relaxing the conditions for when an in-house transaction or horizontal co-operation is permitted is clearly out of the question, not to mention removing them altogether. Such an undertaking would render regulation of the in-house- and horizontal-co-operation exceptions utterly meaningless and stand in stark contradiction to the *Teckal criteria*.*[48]

However, the notion that a Member State could add conditions that render the 'make' option more appealing, encouraging recourse to the public sector in preference to the open market, is not unheard of.*[49] When hearing *Azienda ULSS n. 6 Euganea*, the ECJ faced the question of whether it is acceptable for the local regulation to allow a procedure for public procurement of medical-transport service to commence only if partnership between entities within the public sector to this end (horizontal co-operation) proves impossible.*[50] In that case, the ECJ once again referenced the principles reiterated in *Irgita*. Namely, as long as the national legislation is in accordance with the general principles of EU law, the Member State is allowed to give preference to horizontal co-operation.*[51] Of course, this allowance obtains on condition that the preference criteria specified *do not narrow the scope envisioned under* the procurement directives and therefore do not '*jeopardise the objectives of the internal market*'.*[52]

2.3. Contracting authorities' choice

At first glance, there is no rational justification for applying the rule to follow the general principles of EU law only for those make-or-buy decisions of contracting authorities made in Member States that have imposed additional or amended conditions on make-or-buy decisions. Many Member States have transposed the rules from the procurement directives to national law without any additions or other amendments.*[53] The contracting authority must still check whether the conditions set in the procurement directives are fulfilled. Ultimately, the impact of choosing 'make' on the internal market is similar across the board.

43 Case C-598/19 *Confederación Nacional de Centros Especiales de Empleo (Conacee) v Diputación Foral de Gipuzkoa* [2021] EU:C:2021:810, paras 32–33.

44 Janssen and Olsson (n 11) 10.

45 Janssen (n 4) 145; Sõrm, Ginter, and Simovart (n 6) 3.

46 Janssen (n 4) 145; Sõrm, Ginter, and Simovart (n 6) 3; Irgita (n 12); Opinion of AG Hogan (n 39), para 49.

47 Ibid.

48 Ginter, Härginen, and Sõrm (n 22) 119.

49 Aleksandra Sołtysińska, 'Providing Compliance with the Condition of Economic Dependence in In-House Contracts' (2022) 17 Eur Procurement & Pub Private Partnership L Rev 158, 167. – DOI: https://doi.org/10.21552/epppl/2022/3/5; Sõrm, Ginter, and Simovart (n 6) 4; *Azienda ULSS* (n 12), paras 47, 54.

50 *Azienda ULSS* (n 12), paras 46–47.

51 Ibid, para 54.

52 Sõrm, Ginter, and Simovart (n 6) 4.

53 Janssen (n 4) 146.

One argument for such a distinction could follow from, for example, a make-or-buy decision possibly entailing some additional risk to the functioning of the internal market. However, reasoning on this foundation is not justified. Subjecting the range of circumstances wherein a contracting authority may opt for the in-house exception to additional conditions already reduces risks to the internal market. There is no logic in imposing another set of additional conditions (linked to the general principles of EU law) in those situations wherein the Member States have already limited the 'make' possibilities available to contracting authorities.

The other argument, a more convincing one, is that the general principles of EU law should be imposed on the make-or-buy decisions of contracting authorities when the contracting authority has limited its own right of self-organisation – for example, by having previously concluded a contract covering the same subject matter as a result of a public procurement procedure.[*54] In this situation, the contracting authority has itself decided to follow the rules of the procurement directives with regard to the contract.

This would mean that the obligation to consider the general principles of EU law is not universally applicable to all make-or-buy decisions but pertinent only for those for which the contracting authorities themselves have, by choosing to operate under the EU law, chosen to be subject to the procurement directives in a situation wherein they should not have done so.

Also among the possible interpretations that the literature identifies behind the *case law* of the ECJ is that, while neither the procurement directives nor the EU treaties regulate make-or-buy decisions, '*EU law might apply to the execution of the desired activity*'.[*55] The general principles of EU law hold for the (performance of the) transaction, which itself is concluded on the basis of the exception granted for in-house transactions.[*56] Given the Court's instructions, this is the least plausible interpretation.

3. The question 'how'

One of the most important questions inevitably surfacing as one reads the *Irgita* judgement is what effect this obligation to follow the general principles of EU law in make-or-buy decisions has on Member States and contracting authorities in practice. There seems to be a common understanding that the Court's decision ushers in some positive obligations.[*57] However, there is much confusion as to what those obligations are.[*58]

It has been rightly noted that the Court would not reiterate the obligation to follow general principles of EU law if there were no positive obligations that the Court would like the Member States and contracting authorities to adhere to.[*59] Unfortunately, we find that the ECJ's decisions fall short of supplying clear instructions for honouring the relevant principles.

Above all, answering this question has practical value. If the rule's addressees do not know their obligations, complying with them is going to be tricky. In addition, which obligations must be adhered to might differ, depending on the addressee.

3.1. The goal

The idea that transactions or decisions beyond the scope of the procurement directives are nevertheless subject to the general principles of EU law is neither new nor revolutionary. This is evident, for example, from the case law on in-house and concessions operations.[*60]

54 Janssen and Olsson (n 11) 10; Jaś-Nowopolska and Wolska (n 38) 72.

55 Hötte (n 7) 491.

56 Susie Smith, 'In-House Transactions under Article 12 of Directive 2014/24: The ECJ Decision in Irgita' (2020) 2 NA49–NA54 PPLR 4.

57 Ibid 5; Sõrm, Ginter, and Simovart (n 6) 4–5; Janssen and Olsson (n 11) 8; Jaś-Nowopolska and Wolska (n 38) 71.

58 *Irgita* (n 12), para 48.

59 Sõrm, Ginter, and Simovart (n 6) 8.

60 Case C-324/98 *Telaustria Verlags GmbH, Telefonadress GmbH v Telekom Austria AG* [2000] EU:C:2000:669, para 60; Case C-573/07 *Sea Srl v Comune di Ponte Nossa* [2009] EU:C:2009:532, para 38; Case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] EU:C:2005:487, paras 16–17; Case C-410/04 *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari, AMTAB Servizio SpA* [2006] EU:C:2006:237, para 18; Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen, Stadtwerke Brixen AG* [2005] EU:C:2005:605, para 46.

Jurisprudence features several attempts to explain why *make-or-buy* decisions, opting for 'make' in particular, cannot reasonably be entirely free of obligations. Advocate General Sanchez-Bordona highlighted in one opinion[*61] that the exclusion of in-house transactions from the public procurement framework bears a risk of undermining the objective of creating a thriving internal market in this area: the more that some contracts get excluded, the less room remains for the formation and development of an internal market in public procurement.[*62] Inappropriate use of the mechanisms provided for by the procurement directives could also lead to 'shrinking' of the market on the demand side and reduce the number of suppliers that the market could sustain.[*63] Furthermore, abuse of a dominant position on the part of contracting authorities cannot be ruled out.[*64] Internalisation restricts market access for private operators[*65] in any case, especially for small and medium-sized enterprises (SMEs).[*66] It should be noted that Sanchez-Bordona recognised that positive effects too are possible – for example, 'incentivising private operators to offer better contract terms'.[*67]

All the effects mentioned above sound highly plausible. When the Member States favour the 'make' option, potential for impacts on the functioning of the EU internal market is quite evident. A market that could be open to domestic and foreign economic operators disappears once a 'make' route has been chosen. Were all Member States or contracting authorities to choose to meet their needs by means of public resources, the internal market would be non-functional. Legal regulation of public procurement is necessary if the internal market is to be 'complete'[*68] and non-distorted.

Public procurement is also among the important mechanisms contributing to reaching the EU's strategy-level objectives – sustainable, inclusive growth; efficient use of public-sector funds; etc. – and thereby facilitating such outcomes as the participation of SMEs in public procurement while also supporting the potential for contracting authorities to support the common goals of society.[*69] Therefore, more frequent recourse to the exceptions permitted for in-house and horizontal co-operation is bound to render public procurement a less efficient measure in this respect.

3.2. The obligations

Legal literature posits several possible sets of positive obligations that the Member States and contracting authorities must adhere to. For example, it has been proposed that contracting authorities should consider the impact of a decision to 'make' on the other market participants[*70] or announce any intention to opt for 'make',[*71] but consensus in this regard is lacking.

3.2.1. Transparency

The principle of transparency has been analysed more thoroughly than the others in the context of make-or-buy decisions. Scholars have highlighted it as the general principle of EU law that is most likely to entail certain positive obligations,[*72] although most commentators would not prefer such an implication informing practice.[*73]

61 *Informatikgesellschaft* (n 12), Opinion of AG Sanchez-Bordona.

62 Ibid, para 31.

63 Ibid, para 33.

64 Ibid.

65 Wojciech Hartung, Katarzyna Kuźma, and William A Janssen, 'Article 12 Public Contracts between Entities within the Public Sector' in Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar 2021) 131. – DOI: https://doi.org/10.4337/9781789900682.00021.

66 *Informatikgesellschaft* (n 12), Opinion of AG Sanchez-Bordona, para 35.

67 Ibid, para 34.

68 *Stadt Halle* (n 5), paras 23, 44.

69 Directive 2014/24/EU, Recital 2; Directive 2014/25/EU, Recital 4.

70 Sõrm, Ginter, and Simovart (n 6) 5–8; Janssen and Olsson (n 11) 6–7; Jaś-Nowopolska and Wolska (n 38) 71.

71 Janssen and Olsson (n 11) 8.

72 Sõrm, Ginter, and Simovart (n 6) 9.

73 Ibid; Janssen and Olsson (n 11) 8; Jaś-Nowopolska and Wolska (n 38) 72.

The ECJ explicitly analysed a Member State's obligation to follow the principles of transparency and legal certainty.[*74] The position it took in consequence is that 'the conditions to which the Member States subject the conclusion of in-house transactions should be made known by means of rules that are sufficiently accessible, precise and predictable in their application to avoid any risk of arbitrariness'.[*75]

For Member States, applying the principle of transparency to make-or-buy decisions is pivotal to respecting the rights of contracting authorities and economic operators both. The rights of a contracting authority come to the fore when its right to opt for 'make' has been restricted, whereas the rights of the economic operator are more relevant when the national legislator has implemented regulations that lead to a preference for in-house transactions or horizontal co-operation. However, the fundamental issue in every case is that additional rules or rule amendments adopted by the Member State must be accessible and understandable to all. In this setting, the positive obligations that the Member States must adhere to in their legislative role seem clear, logical, and aligned with the goal set (i.e., the aim of making sure that all contracting authorities and other market participants know the rules for 'make').

It is more difficult to answer the question of **which** transparency obligations contracting authorities have in the domain of make-or-buy decisions. One possible obligation identified is a duty of notifying the market as a whole about the intent to conclude an in-house or horizontal co-operation transaction[*76], though this is not scholars' preferred solution and would fly in the face of the principle of free administration.[*77]

Although such conclusions have a logic behind them, it is difficult to agree with them completely when factoring in the views of the ECJ. The Court's rulings considering make-or-buy decisions would not have repeated the rule of honouring the general principles of EU law if there were no obligations that the contracting authorities could, and indeed must, fulfil.[*78] On those occasions when their make-or-buy decision might have a cross-border impact, transparent action on the part of the contracting authorities is all the more necessary. Otherwise, it would be nearly impossible to guarantee meeting the objectives of the internal market.

3.2.2. Equal treatment and non-discrimination

The principles of non-discrimination and of equal treatment are mutually distinct, though closely related. Perhaps more accurately, one could construe these as two sides to a single principle, though[*79]: in essence, equal treatment dictates that 1) comparable situations must not be treated differently and that 2) mutually distinct situations must not be treated in the same way unless such treatment is objectively justified.[*80]

These principles could be guaranteed in the actions of contracting authorities and other market participants via national legislation, through transparency[*81]; as indicated above, this is possible when, for example, the rules are equally available to everyone and the regulation is applied uniformly. The national rules should not unnecessarily promote favouring one economic operator over another. All contracting authorities (at least those within any given sector) should be able to exercise these exceptions on the same basis.

When we turn our attention to the decisions of contracting authorities in this arena, it is hard to see exactly what the obligation to follow general principles of EU law could entail. Opting for 'make' inherently entails market participants not being on equal footing with the party entering an in-house or co-operation transaction with the contracting authority.

One possible expression of the principle of equal treatment might be to oblige the contracting authority to notify the larger market of any planned 'make' decisions (as explained above). Notifying the market

74 *Irgita* (n 12), paras 51–57.

75 Ibid, para 55.

76 Janssen and Olsson (n 11) 8.

77 Ibid; Sõrm, Ginter, and Simovart (n 6) 9–14.

78 Sõrm, Ginter, and Simovart (n 6) 8.

79 Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK, Volume 1* (3rd edn, Sweet & Maxwell / Thomson Reuters 2014) 621; Michael Steinicke and Peter L Vesterdorf (eds), *EU Public Procurement Law: Brussels Commentary* (Beck 2018) 294; *Parking Brixen* (n 61), para 48.

80 Joined Cases C-21/03 and C-34/03 *Fabricom SA v État belge* [2005] EU:C:2005:127, para 27; Case C-304/01 *Kingdom of Spain v Commission of the European Communities* [2004] EU:C:2004:495, para 31; *Conacee* (n 43), para 36.

81 *Parking Brixen* (n 61), para 49.

would give the various market players information that might be important for them and, thereby, a chance to act when they think that their rights are being violated. Notification should be required only with regard to those 'make' decisions that might have cross-border implications or where the contracting authority had chosen at some earlier point to follow the rules stated in the procurement directives. A universal requirement of notification (covering all 'make' decisions, to ensure adherence to the equal-treatment principle) would be contrary to the very purpose of an in-house transaction. That is, exercising the right to choose 'make' would become unduly complicated in practice.

3.2.3. Mutual recognition

The principle of mutual recognition is represented in specific parts of individual procurement directives.[*82] These focus on the obligation *to 'recognise qualifications obtained in another Member State even though the enterprise or person who claims to possess the qualifications does not hold the documentation otherwise required in the first Member State'*.[*83]

In examining this within the context of legislative aspects of the make-or-buy decision, it is hard to see a place for the principle of mutual recognition anywhere. The whole idea of regulating make-or-buy decisions revolves around the choice of the Member States to either limit 'make' or grant it some priority over 'buy'. If 'make' is selected, contracting authorities are free to accept any qualifications they find fitting – though, of course, within the limits arising from professional/certification/education requirements and the contract's subject matter.

3.2.4. Proportionality

Applying the final principle cited, proportionality, means that the rules laid out by the Member States or contracting authorities must not go beyond what reaching the objectives' set forth in the TFEU necessitates.[*84]

This principle is relatively easy to apply to make-or-buy decision-making in national legislation. In cases wherein the Member States limit contracting authorities' possibilities for selecting 'make', it is important that the limits set be proportional and not exceed what is necessary for achieving the aim for the regulation. For instance, the Member State's goal could be to promote competition and entrepreneurship in one specific field. Here, a proportional restriction would not limit, let alone ban, exercising the in-house-sourcing or horizontal-co-operation-agreement exception in every field. It would cover only the field whose market operations the Member State wishes to encourage. Estonia has done just that in the waste-management sector: the state does not allow appealing to either of the two exceptions here[*85], because it seeks to promote equal treatment of all economic operators and support competition in this specific field.[*86]

In circumstances wherein the national regulation implemented favours a choice of 'make', the Member State's analysis must go further. The Member State should consider the national perspective and the overall viewpoint of the EU, since such an implementation could harm the internal market. If the legislator's goal is to promote, for example, co-operation among public authorities or to apply safeguards such that the quality of certain services is sufficiently high, the regulation must allow preferential use of the exceptions only in respect of the target services.

Ascertaining any concrete obligations of a contracting authority with regard to the principle of proportionality is much more challenging, because the contracting authority's room for choosing 'make' is already limited via the legislative rules. The authority is free to opt for 'make' only when the criteria for appealing to the in-house or the horizontal-co-operation exception are evidently met. Though contracting authorities usually do retain the option of deciding whether to exercise the exception or instead conduct a public procurement procedure for the service or work needed, it seems that the principle of proportionality does not entail any additional obligations for the contracting authorities.

82 Directive 2014/24/EU, art 42(3)(b).

83 Steinicke and Vesterdorf (n 80) 12.

84 *Conacee* (n 43), para 42.

85 The Waste Act (*Jäätmeseadus*): RT I 2004, 9, 52...RT I, 17032023, 37, s 1(5).

86 'XI Parliament, VII Session, Regular Session of the Plenary Assembly', para 15 <https://stenogrammid.riigikogu.ee/201011241400#PKP-24347> accessed on 29 March 2024.

4. Conclusions

The obligation to follow the general principles underlying EU law rests not only with the Member States but also with the local governments when they are acting in their legislative role. In addition, the choices of the contracting authorities are subject to the general principles of EU law. For the Member States, the obligation to follow this rule encompasses situations in which the Member State limits or broadens the range of contracting authorities' opportunities to choose 'make'. For those authorities, in turn, the general principles come into play when a cross-border interest might be touched by the make-or-buy decision or when the contracting authority decided earlier on to follow the rules set by the procurement directives.

It is clear that the Court expects Member States and contracting authorities to fulfil positive obligations so as to ensure that the general principles of EU law are effectively taken into consideration. For Member States, these obligations are relatively apparent. Their legislation regarding 'make' must be transparent, so that the conditions and possible obligations are clearly understandable to all. This, in turn, helps the Member States guarantee equal treatment at the level of the contracting authorities and any relevant market participants. Limiting or broadening with additional conditions should never exceed what is necessary to reach the goal behind the further conditions. The states thus make sure that said conditions are proportional.

In contrast, identifying the obligations that fall on the contracting authorities is far more challenging. The most logical and appropriate duty would be to publish notices of the intent to choose 'make'. Beyond this, it proves tricky to name specific obligations that are appropriate for the contracting authorities without at the same time rendering taking advantage of the exception for in-house or horizontal co-operation entirely meaningless. If the ECJ has a goal of ensuring that the contracting authorities honour some positive obligations, one would hope that the Court at some point issues guidelines in connection with this as well.

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The Author's Right of Integrity in Public Contracts in Estonia Based on Architectural Work[*1]

Abstract. The paper presents analysis of whether an author's moral rights are transferable or licensable in public contracts. At present, the European Union lacks a unified approach to regulating intellectual-property rights in public procurement: its public-procurement directives leave open the option of assigning these rights to a particular contracting entity and do not set minimal or default conditions for handling them in case the public contract does not specify intellectual-property rights' allocation. The paper delves into the question of whether moral rights are transferable/licensable and of how moral rights should be regulated in public contracts in Estonia through the lens of analysis based on legal literature. Specific attention is given to case law on moral rights in Germany, France, and Spain, in aims finding a mechanism for moral rights' regulation that is suitable for the Estonian setting. These first steps of examination reveal that the essence of moral rights precludes them being transferable since moral rights are bound to the personality of the author. Initial analysis shows also that moral rights in Estonia are only partly licensable, with only those moral rights that overlap the author's economic rights proving licensable, while the rights connected to the author's personality are not subject to licensing. For these reasons, courts need to weigh how authors might exercise their moral rights such that any transfer of their those rights cannot enable authors to interfere with the exercise of the economic rights. This entails limiting the exercise of moral rights, a matter that merits deeper examination.

Keywords: intellectual property, public procurement, public contracts, copyright, moral rights, exercise of moral rights

1. Introduction

The Berne Convention for the Protection of Literary and Artistic Works[*2] underlines that, in addition to economic benefits, copyright encompasses rights of a moral kind. This state of affairs arises from the fact that the work reflects the personality of its creator, just as the economic rights reflect the author's need to survive.[*3]

1 This article was supported by an Estonian Research Council grant (PRG1449).

2 Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979) <https://wipolex.wipo.int/en/text/283698> accessed on 8 July 2024.

3 S Ricketson and JC Ginsburg, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (WIPO 1978) 41.

According to Article 6*bis* (1) of the Berne Convention, the author has two general types of moral rights: a right to claim authorship and a right of integrity. Countries that are signatories of the Berne Convention must guarantee authors those two types of moral right in their legal systems. Since the Berne Convention sets the floor but not a ceiling for the protection of moral rights, the catalogue of moral rights can be more comprehensive than what is set forth in that convention. In the context of Estonia, the catalogue of the author's moral rights is noteworthy for its comprehensiveness. Section 12 of the Estonian Copyright Act[*4] enumerates these moral rights, thereby supplying a specific list more extensive than what the Berne Convention mandates.

One of the most prominent legal challenges associated with moral rights in procurement of architectural work has its roots in the copyright doctrine (discussed below), which treats copyright as an 'extension of the personality of the author'.[*5] In Estonia, a scenario commonly arises in which an architect assigns all of her economic rights to the contracting authority, while moral rights in situations of public contracts remain unaddressed[*6]. Consequently, circumstances emerge wherein the persistence of the author's moral rights renders contracting authorities unable to assert their economic rights fully. These moral rights, particularly the right of integrity and the right of protection of the author's honour and reputation[*7], empower authors to contest any perceived infringement. One possible result is that authors can quite effectively impede the contracting authority's exercise of economic rights by claiming violations of their moral rights.

In Estonia, neither statutory provisions nor case-law precedents impose specific limits on the author's exercise of moral rights. Consequently, it becomes crucial to determine appropriate contract-based restrictions in settings of public contracts. The aim with these limitations is to balance the rights of authors with the interests of contracting authorities. This scenario involves the intersection of two legal domains: public-procurement law and copyright law. Public-procurement law seeks to enhance competition and ensure efficient utilisation of public resources[*8], while copyright law aims to foster creativity and innovation and to safeguard the rights of creators – the authors.[*9] In practical terms, the contracting authority's activities requires the use of architectural work though the author's moral rights must remain guaranteed. Achieving this delicate balance necessitates thoughtful consideration of both the author's rights and the contracting authority's needs.

Allocation of copyright in settings of public contracts remains within the purview of the contracting authority. The European directives on public procurement do not dictate how copyright connected with public contracts is to be distributed when those contracts remain silent on the issue.[*10] This is true not only for the European Union level. It holds also within most EU countries' national legal framework for public procurement[*11], Estonia's included. The author's economic rights are the ones that can be transferred and licensed – that is, used by third parties, contracting authorities among them.[*12] Meanwhile, the EU has no uniform approach or harmonised practice for transferring or licensing moral rights.[*13] In many countries (mainly those subscribing to the *droit d'auteur* doctrine) are inalienable, moral rights are

4 RT I, 29.6.2022, 16. English translation available <https://www.riigiteataja.ee/en/eli/527122022006/consolide> accessed on 8 July 2024.

5 T Aplin and J Davis, Intellectual Property Law: Text, Cases, and Materials (2nd edn, Oxford University Press 2013) 52.

6 The term 'public contract' refers to a contract for pecuniary interest, which might be a concession contract, the subject matter of which is supplies, services, or works and which is awarded to an economic operator by a contracting authority or other entity in the manner set forth in the Estonian Public Procurement Act, s 8(1): RT I, 6.7.2023, 78. English translation available <https://www.riigiteataja.ee/en/eli/515122023006/consolide> accessed on 8 July 2024.

7 Per the Copyright Act (n 4), specifically s 12(1) sub-ss 3, 5.

8 See the Public Procurement Act (n 6), s 3.

9 The purpose of the Copyright Act is defined as 'to ensure the consistent development of culture and protection of cultural achievements, [along with] the development of copyright-based industries and international trade, and to create favourable conditions for authors, performers, producers of phonograms, broadcasting service providers, producers of first fixations of films, [and] makers of databases' (s 1(1)).

10 European Commission, 'Economic Benefits of Leaving IPR Ownership Rights in Public Procurements with the Suppliers Instead of the Procurers' (2017) 3; 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 (Directive 2014/24/EU) art 42; 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 (Directive 2014/25/EU) art 60.

11 'Economic Benefits' (n 10) 3.

12 Copyright Act, s 46(1).

13 I Stamatoudi and P Torremans, *EU Copyright Law: A Commentary* (2nd edn, Edward Elgar 2021) 10–11. – DOI: https://doi.org/10.4337/9781786437808; E Mägi, 'Arhitekti isiklik õigus teose puutumatusele ning au ja väärikuse kaitsele [The

non-waivable, imprescriptible, and non-transferable, because they are conceived of as inherently linked to the personality of the author. In contrast, countries applying the copyright doctrine usually regard moral rights as waivable or transferable.[*14] As for the alignment of the EU, transferring all the author's moral rights is not possible in any legal system.[*15] Since Estonia belongs to the *droit d'auteur* tradition, moral rights are non-transferable.[*16] Estonia also lacks consensus on how third parties may use moral rights. This makes it difficult for contracting authorities to regulate the allocation of the author's moral rights under public contracts. Additionally, the author of the architectural work is usually a natural person,[*17] while public contracts get concluded between the contracting authority and the tenderer, who is usually a purely legal entity. In consequence, no direct contractual relationship exists between the actual author and the contracting authority. Furthermore, public contracts more often than not are concluded under standard terms and conditions[*18]; it is almost impossible for either the legal entity or the author to pursue changes to their content.

The topic of legal allowability of transactions encompassing moral rights is not a new one for Estonian legal literature. Several authors have addressed it.[*19] The analysis they have undertaken seems to serve as a solid knowledge base for the examination presented here. This article draws on the preceding research and situates it in the context of architectural work with emphasis on the public-procurement perspective. Its discussion focuses on legal aspects of moral rights, especially the right of integrity within the domain of architectural work[*20], which is defined for the purposes of this article as mainly works of architecture and landscape design (buildings, similar structures, parks and green areas, etc.). The starting thesis was that exercising the author's right of integrity can indeed be limited under public contracts through standard terms and conditions. For proving this, it is essential to ascertain the extent of the legal permissibility of opting for one or another model/conceptualisation of the exercise of moral rights for an agreement that regulates these in transactions pertaining to moral rights. The answer aids in assessing which limitations could be legally set by a public contract with regard to the author's moral rights. The argument presented is intended to show that acceptable contract-based limitations exist that could be stipulated in a public contract such that it strikes a balance between authors' rights and contracting authorities' needs.

The study, employing conventional legal methodology, focused predominantly on the Estonian legal framework in the absence of a standardised or harmonised practice for the exercise of the author's moral rights by third parties across the EU.[*21] The approach in other EU member states, such as Germany, France, Italy, and Spain, serves as a reference point for identifying the most appropriate technique for integrating the author's moral rights into the Estonian legal system. Examples from another Member State are cited where

Architect's Right to Integrity of the Work and Right of Protection of the Author's Honour and Reputation]' [2011] (10) Juridica 760, 760.

14 S von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008) 53. – DOI: https://doi.org/10.1093/oso/9780199207206.001.0001.

15 F Fontaine and P Celeyron, 'Beyond the Cliché: Are Authors' Moral Rights under French Law As Inflexible As They Are Said To Be?' (2017) 12(9) Journal of Intellectual Property Law & Practice 775. – DOI: https://doi.org/10.1093/jiplp/jpx089; Mägi (n 13) 766.

16 The moral rights of an author are inseparable from the author's person and are non-transferable, under the terms of the Copyright Act, s 11(2). This is in line with the Constitution of the Republic of Estonia, s 39 of which states that 'authors have the inalienable right to their creative works' and that 'the state shall protect the rights of authors'. The Constitution of the Republic of Estonia, RT I, 15.5.2015, is available in English translation at <https://www.riigiteataja.ee/en/eli/530122020003/consolide> accessed on 8 July 2024.

17 For purposes of this article, the author is understood to be a natural person, even though there is some debate as to whether artificial intelligence might replace input of architects. See, for example, M Matoso, 'Will Artificial Intelligence Replace Architects?' (2023) <https://www.archdaily.com/1007802/will-artificial-intelligence-replace-architects#:~:text=AI%20can%20help%20architects%20design,and%20reduce%20its%20environmental%20impact> accessed on 8 July 2024.

18 Civil Chamber of the Supreme Court decision 2-15-15662 [2017] para 21.

19 See, for instance, H Pisuke, 'Moral Rights of [the] Author in Estonian Copyright Law' (2002) 7 Juridica International 166; M Rosentau, 'Intellektuaalse omandi õigused infotehnoloogias. Autori isiklikud õigused [Intellectual Property Rights in Information Technology: The Personal (Moral) Rights of the Author]' [2007] (9) Juridica 651; A Kelli and others, 'The Exercise of Moral Rights by Non-Authors' (2014) 6(6) Journal of the University of Latvia Law 108.

20 The Estonian Copyright Act lists architectural graphics, letters of explanation that specify the content of a project, additional text and programmes, 'architectural works of plastic art', works of architecture and landscape architecture (buildings and other constructions, parks, green areas, etc.), urban-developmental assemblages, and complexes as copyright-protected works (s 4(3) cl 14).

21 Stamatoudi and Torremans (n 13) 10–11; Mägi (n 13) 760.

that state's regulation pertaining to the author's moral rights is similar to that in Estonia and where legal discussions have emerged that clarify matters of regulating the author's moral rights in public contracts in the context of architectural work. Furthermore, parallels from France, Germany, and Italy possess value in that these countries are the strongholds of the Continental European moral-rights tradition, which Estonia follows. Drawing from this analysis, the study produced a framework proposed as suitable for the author's moral rights under public contracts.

2. Frameworks for moral rights

2.1. The international framework for moral rights

The genesis of international agreements' protection of moral rights arrived with their inclusion in the Berne Convention upon its revision in 1928 in Rome.[*22] Namely, the Berne Convention, which sets the minimal standards for authors' protection, articulated that, in addition to economic benefits, copyright extends to rights of a moral nature. The concept of copyright as a natural right of the personal creator of literary or artistic works, anchored in awareness that such works reflect the personality of their creator just as the economic ones reflect her need for a livelihood[*23], has profoundly influenced the structure and contents of the Berne Convention.[*24]

Article 6*bis* (1) of the Berne Convention stipulates the following: 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.' The specification of rights provided in Article 6*bis* (1) of the convention indicates that, in essence, the author has two types of moral right: firstly, a right to claim authorship and, secondly, a right of integrity. Signatory countries must guarantee authors both kinds of moral rights in their legal system, though the national catalogue of moral rights may be more comprehensive than what is listed in the Berne Convention.

No other international treaties set forth either minimal standards for moral rights, as the Berne Convention does, or additional standards for them. The TRIPS Agreement[*25] refers to the Berne Convention and states an exception regarding further implications of Article 6*bis* by stating: 'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.' The TRIPS Agreement is not alone in citing the Berne Convention; for instance, the WIPO Copyright Treaty[*26] too refers to it[*27].

All member states of the EU have subscribed to the Berne Convention, so their national copyright legislation already meets the minimum standard mandated for protection in accordance with its Article 6*bis*. The moral rights of authors, however, have not been harmonised across the EU, on account of the divide between civil-law countries and common-law countries.[*28] This bifurcation stems from the fact that most national copyright laws of the world are governed by one of two main systems of protection: the Anglo-Saxon or Anglo-American 'copyright system' and the Continental European 'author's rights' or *droit*

22 I Harding and E Sweetland, 'Moral Rights in the Modern World: Is It Time for a Change?' (2012) 7(8) Journal of Intellectual Property Law & Practice 565, 566. – DOI: https://doi.org/10.1093/jiplp/jps077.

23 Ricketson and Ginsburg (n 3) 41.

24 A Kur and T Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Edward Elgar 2013) 21.

25 Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> accessed on 8 July 2024.

26 This is a special agreement under the Berne Convention that deals with the protection of works and the rights of their authors in a digital environment. In addition to the rights recognised under the Berne Convention, they are granted certain economic rights here. The treaty also deals with two specific sorts of subject matter that are to be protected by copyright: computer programs, whatever the mode or form of their expression, and compilations of data or other material ('databases'). WIPO Copyright Treaty (1996) <https://wipolex.wipo.int/en/text/295166 accessed on 5 March 2023.

27 Its art 1(4) states: 'Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.'

28 In this respect, Brexit could facilitate the harmonisation of moral rights. Please see the discussion by Stamatoudi and Torremans (n 13) 11.

d'auteur system.[*29] The term 'moral rights' itself is a translation of the French[*30] concept of *droit moral*, in which 'moral' refers to non-pecuniary interests in property. Moral rights are personal rights in a work, anchored in the notion that when something happens to a work this constitutes an attack on the person or personality of its author.[*31] In England, copyright law grew from an awareness of the economic value of an author's works rather than any ideological respect for the author. By the early twentieth century, it was clear that bridging the gap separating jurisdictions such as France and the UK demanded international consensus.[*32] A gap still exists, however, which is why the moral rights of authors are not harmonised at EU level.

2.2. The context of moral rights relevant for architectural work in Estonia

Estonia recognises a relatively extensive catalogue of the author's moral rights. The Copyright Act lists the author's moral rights in its Section 12[*33]. These consist of the right of authorship, the right of the author's name, the right to integrity of the work, the right to make additions to the work, the right of protection of the author's honour and reputation, the right to disclosure of the work, the right to supplement the work, the right to withdraw it, and a right to request that the author's name be removed from a work that is being used. Through this list, the Copyright Act lays out a set of moral rights more extensive than the Berne Convention requires.

Since this article focuses on works of architecture procured under a public contract, it gives attention mainly to the right of integrity, which the Berne Convention's Article 6*bis* defines in the manner presented above as the right to object to any modification of the work (or to other derogatory action related to that work) that would be prejudicial to the author's honour or reputation. The Estonian Copyright Act grants the author the right to contest any changes made without the author's consent (under the right of integrity of the work); to permit the addition of other authors' works to the author's work (part of the right to make additions to the work); and to contest any misrepresentation of the work, inaccuracies in its reproduction, or in its title or the designation of the author's name, and any assessments of the work that is prejudicial to authorial honour and reputation (all falling under right of protection of the author's honour and reputation). Thus, exercising the right of integrity as expressed in the Copyright Act does not necessitate the change in the author's work having been prejudicial to her honour or reputation. This divergence from the Berne Convention, which does state such a requirement, is not in violation of the convention – remember that the Berne Convention specifies a minimum for the protection afforded authors, so the catalogue of moral rights can be more extensive than that set forth in the latter. The Copyright Act's parallel to the right of integrity articulated in the Berne Convention consists of the following moral rights: the right of integrity of the work, the right to additions to the work, and the right of protection of the author's honour and reputation. The protection of these three rights confers on the author the same rights granted under the terms for the right of integrity articulated in the Berne Convention.

The above-mentioned rights are especially relevant in the context of the author's moral rights in architectural output. Therefore, this article attends mainly to those particular moral rights of an author. In practice, it could be difficult to differentiate which moral right might be infringed upon when a contracting authority makes changes to an architectural work – this could constitute abridgement of the right of integrity of the work, the right of additions to the work, and/or the right of protection of the author's honour and reputation as delineated in the Copyright Act. Also, changes of such a nature might prompt the author to exert her right to withdraw the work or request removal of the author's name from the work in use; however, the author's exercise of those rights is at her own expense, and the author must compensate for damage caused to the contracting authority that used the work.[*34] Therefore, it is unlikely that an author

29 Per von Lewinski (n 14) 33.

30 France is often called the birthplace of moral rights, and the notions of 'author's rights' (*droit d'auteur*) and 'moral rights' (*droit moral*) originate from France, according to Kelli and others (n 19) 113.

31 Harding and Sweetland (n 22) 565.

32 Ibid 566.

33 These are found in s 12 of the English-language translation available at <https://www.riigiteataja.ee/en/eli/527122022006/consolide> accessed on 8 July 2024.

34 According to the Copyright Act's s 12(2), the right of supplementation of the work, to withdraw the work, and to request that the author's name be removed from a work that is being used shall be exercised at the author's expense, and the author is

will exercise those two rights in the real world; one would presume that this would prove disproportionately expensive for the author. The same is true for the right of supplementation of the work.

Other moral rights relevant in the context of architectural work are the right of authorship, the right of the author's name, and the right of disclosure of the work. Regulation of the first two is relevant in the realm of public contracts because the author of an architectural work might want to appear in public as the creator of the work and claim recognition; alternatively, the author might not wish to do so.[*35] The right of disclosure is relevant for architectural work in that it can hardly be assumed that some architectural work acquired through public procurement has been published before (from a practical point of view, after the first lawful publication, the right of disclosure is not relevant anymore: disclosure of the work encompasses only the first release of the work, where the work is deemed published if, with the consent of the author, it is placed at the disposal of the public[*36]). For this reason, the contracting authority should have the author's consent to publish the work, so as to avoid any spectre of infringing on the author's right of disclosure of the work.

In the context established by the Copyright Act, it is crucial to recognise that certain moral rights of authors overlap with their economic rights. Let us take for an example one of the author's economic rights articulated in the Copyright Act: the right of alteration to the work – i.e., rights to carry out adaptation, modification (rearrangement), and other changes to the work.[*37] Making modifications to the work is included in the author's moral rights too; it is intimately bound up with rights such as that of integrity of the work, that of additions to the work, and that of protection of the author's honour and reputation. This overlap poses challenges for legal practice, since economic rights are transferable[*38] while moral rights are not.[*39] Consequently, situations arise wherein a contracting authority acquires all of the economic rights but is prevented from fully exercising them by the potential for infringement of the author's moral rights linked to modifying a work of architecture. In such cases, the author may request restoration of the original work.[*40] To address this overlap in arenas of law, Estonian literature on jurisprudence recommends copyright agreements' inclusion of a clause stipulating that authors shall not use their moral rights to restrict the exercise of transferred economic rights.[*41] This approach is consistent with the principle of good faith.[*42]

Given the expansive scope of moral rights and their occasional intersection with economic rights under the Copyright Act, authors retain an ability to challenge the contracting authority's exercise of economic rights by asserting violations of their moral rights. Consequently, it is crucial to delineate an author's moral rights precisely and consider any potential restrictions that could impinge on their exercise.

In Estonia, both legal provisions and case law maintain a non-limitation stance with regard to an author's exercise of moral rights. While the Estonian Supreme Court has specifically addressed violations related to the right of integrity in works of architecture, it has not explicitly restricted the author's ability to exercise these moral rights.[*43]

Furthermore, the right that authors possess in Estonian law to protect their honour and reputation is distinct from the right of integrity.[*44] This protection has a clear influence on practice, with contracting authorities often expressing concerns about its potential impact on their economic rights.[*45] The key question

required to compensate for damage caused to the person who used the work.

35 One more aspect to consider is how to identify the author of an architectural work. However, since procured architectural work should not be treated differently from other architectural work and for reason of space limitations, this topic is not analysed further in the paper.

36 Copyright Act, s 9(1).

37 Copyright Act, s 13(1) cl 5.

38 Copyright Act, s 11(3).

39 Copyright Act, s 11(2).

40 The Copyright Act's s 81^7(2) foresees the following remedies if, in consequence of a violation of copyright legislation, a work is altered: '1) restoration of the work or object of related rights in the original form; 2) alteration of copies of the work or object of related rights by specific means, or 3) destruction of pirated copies.' The act's s 81^7(3) specifies that 'the provisions of clauses 2 and 3 of subsection 2 of this section do not apply to works of architecture'.

41 Rosentau (n 19) 664.

42 As expressed in the Law of Obligations Act, s 6(1): RT I, 6.7.2023, 116. An English translation of the act is available <https://www.riigiteataja.ee/en/eli/527122023005/consolide> accessed on 8 July 2024.

43 Civil Chamber of the Supreme Court decision 3-2-1-39-03 [2003].

44 Copyright Act, s 12(1) sub-ss 3, 5.

45 See, for example, Rosentau (n 19) 652; E-L Ventsel, *Arhitekti isiklik õigus teose puutumatusele* [The Architect's Right of Integrity] (Tartu Ülikool 2020) 41.

revolves around interpreting this right and identifying any limitations to its scope. Ascertaining whether a given change or other action is damaging to an author's honour or reputation necessitates evaluating case-specific circumstances. Ultimately, it is up to the author to identify and claim such harm, but the associated criteria must be assessed from the perspective of a reasonable person rather than solely in reliance on the author's viewpoint.[*46] Otherwise, authors could assert that their honour and reputation have suffered harm without the contracting authority being left with any way of countering their argument.

3. Exercise of the author's moral rights by third parties

3.1. The various models for the exercise of the author's moral rights

Copyright in a work arises upon that work's creation by its author.[*47] Moral rights and economic rights constitute the content of copyright.[*48] Since the copyright in a work is created with the creation of the work[*49] and no registration or deposit of the work or completion of other formalities is required for either the formation or the exercise of copyright,[*50] it is not necessary to regulate this aspect of matters in the public contract. Only the transfer or licensing of copyright must be regulated, not copyright creation.

The Berne Convention does not directly stipulate whether moral rights are transferable or licensable. The WIPO-issued *Guide to the Berne Convention* explains that some laws expressly state that moral rights cannot be assigned and that the author may not waive them.[*51] Consequently, the determination of this aspect of the landscape lies within the field of discretion of the signatories to the Berne Convention.

The EU has not adopted a uniform approach to transferring or licensing moral rights, there is no harmonised practice for this, etc.[*52] A gulf is evident, as noted above: moral rights in many countries, mainly those following the *droit d'auteur* tradition, are taken to be inalienable, non-waivable, imprescriptible, and non-transferable because of an inherent link to the author's personality under said rubric, while countries adhering to the copyright doctrine, in contrast, deem those rights usually waivable or transferable.[*53] It bears reiterating that full transfer of all the author's moral rights is impossible, in any legal system,[*54] with Estonia naturally following suit in finding moral rights non-transferable.[*55] In Estonia, the treatment of moral rights remains subject to uncertainty. Specifically, whether these rights can be licensed, made subject to consent for others' use, and/or waived is unclear. While legal precedent sheds some light on this matter, gaps persist. In one instance, the Supreme Court did not categorically exclude the possibility of licensing moral rights, yet the specifics of how such licensing might occur have gone unspecified.[*56] In another judgement, that court emphasised that alterations to a work shall be made only by the author herself or by someone authorised by the author.[*57] Here too, the court did not prescribe a definitive form for granting corresponding authorisation – whether through a licence or via explicit consent. Finally, the Supreme Court has acknowledged the feasibility of waiving an author's rights too. The court clarified that, under tort law, a defendant might have legitimately interfered with the plaintiff's copyright on the basis of oral consent, even without a formal written agreement permitting this. Consequently, when an author consents to third-party modifications of her work, a prospective plaintiff relinquishes the right to seek damages from a prospective

46 Civil Chamber of the Supreme Court decision 2-21-5449 [2023] para 11.

47 According to sentence 1 of the Copyright Act's s 11 sub-s 1.

48 Copyright Act, s 11 sub-s 1.

49 Copyright Act, s 7 sub-s 1.

50 Copyright Act, s 11 sub-s 3.

51 Ricketson and Ginsburg (n 3) 42, with reference to art 6bis6.

52 Stamatoudi and Torremans (n 13) 10–11; Mägi (n 13) 760.

53 von Lewinski (n 14) 53.

54 Fontaine and Celeyron (n 15) 775; Mägi (n 13) 766.

55 Recall that an author's moral rights are inseparable from the author's person and non-transferable, per the Copyright Act, entirely in accordance with the Constitution of Estonia; see n 17.

56 Civil Chamber of the Supreme Court decision 3-2-1-67-07 [2007] para 17.

57 Decision 3-2-1-39-03 (n 43) para 26. The court referred to the Copyright Act's s 12(1) cl 3 (on the right of integrity), which employs the language 'the author of a work has the right to make or permit'.

defendant for copyright infringement.[*58] Nonetheless, the precise mechanisms for granting such consent remain open for debate in Estonian jurisprudence.

A licence is permission to carry out an act that would have been prohibited without the consent of the proprietor of the copyright. The licence enables the licensee to use the work without accusation of infringement. So long as the use falls within the lines of the terms of the licence, the licensee is immune to such action by the copyright-owner.[*59] There are two fundamental types of licence: exclusive and non-exclusive.[*60] In the case of a non-exclusive licence agreement, the licensor may also exercise the right that is the object of the agreement or grant the right of use to other persons, besides the licensee.[*61] An exclusive licence agreement grants the licensee the right to exercise the rights arising from intellectual property to the agreed extent and precludes the right of use by other persons and the licensor to the same extent.[*62]

Within the realm of Estonian legal literature, several jurists have found that granting an exclusive licence for moral rights is presumably impossible.[*63] The author of this article concurs with their view. Providing an exclusive licence for moral rights should not be feasible, as these rights are explicitly non-transferable by law. Moreover, an exclusive licence would yield the same outcome as outright transfer of moral rights – rendering the author unable to exercise them for all practical purposes. In its essence, such an arrangement is tantamount to actual transfer of moral rights. Furthermore, allowing non-exclusive licensing for moral rights should be approached with caution on account of an aspect of rationale seen as fundamental for safeguarding copyright: the argument of personhood. From its perspective, a creative work serves as an embodiment of the creator's personality; consequently, maintaining control over the work becomes vital to securing and maintaining the creator's control over her very personality.[*64] Moral rights, as extensions of the author's personality, serve precisely this purpose. For instance, the right of authorship is inherently tied to the individual author. Therefore, there would be incongruity to permitting third parties to claim authorship when moral rights are licensed. Such licensing would empower a third party to exercise these rights – whether asserting authorship, objecting to modifications that harm their honour or reputation, or engaging in other acts. This divergence from anchoring in the essence of moral rights, which inherently connects them to the author's personhood, must not be countenanced. In summary, expressing an author's personality through moral rights should remain inviolable and immune from third-party intervention.

In examining whether third parties may exercise an author's moral rights, a critical consideration arises with regard to the interplay of waiver and consent. Specifically, can authors voluntarily relinquish their moral rights or grant consent to third parties to waive those rights? Estonian legal literature has established that moral rights must be addressed individually – each right necessitates a distinct agreement on its exercise.[*65] That legal scholarship has drawn on insight from case law in France and Germany, from which several key principles have emerged. Firstly, authors cannot legally relinquish or abandon the rights of attribution and integrity altogether. These fundamental moral rights remain inviolable even in a context of licensing or contractual arrangements. Secondly, advance blanket waivers are unenforceable. Authors cannot sign away their moral rights without specificity. Instead, a nuanced approach is required – one that considers the unique circumstances of each situation. Thirdly, highly tailored waivers that entail reasonably foreseeable limitations to the author's moral rights are generally valid.[*66] In such a light, these targeted waivers strike a balance between protecting the author's creative expression and accommodation of practical considerations. France, Germany, and Estonia are among the countries protecting moral rights extensively.[*67]

58 Civil Chamber of the Supreme Court decision 3-2-1-124-06, para 11; Law of Obligations Act, s 1045(2) cl 2: 'The causing of damage is not unlawful if the victim consents to the damage being caused, except in the case where the grant of such consent is contrary to law or good morals.'

59 L Bently and others, Intellectual Property Law (5th edn, Oxford University Press 2018) 295.

60 Copyright Act, s 48[1] sub-s 1 para 2; Law of Obligations Act, s 370 sub-ss 1, 2.

61 Law of Obligations Act, s 370 sub-s 1.

62 Law of Obligations Act, s 370 sub-s 2.

63 Rosentau (n 19).

64 Aplin and Davis (n 5) 52.

65 Rosentau (n 19).

66 CP Rigamonti, 'Deconstructing Moral Rights' (2006) 47(2) Harvard International Law Journal 354, 377; consult also the case law cited.

67 Kelli and others (n 19) 113.

Authors should have the legal option of agreeing to not assert their moral rights or to waive them, provided that the agreement is specific and considers each moral right of the author individually. Moral rights are intrinsic to the creator of an architectural work. Since these rights are closely tied to authors' personal identity, the authors must decide when and how to exercise them. In drafting of an agreement, addressing each moral right separately lets the author tailor the approach. This technique honours the core principles of private law, which emphasises individuals' autonomy and recognises freedom of contract as a fundamental value.[*68] Notably, the Copyright Act underscores this perspective by using the term 'permit' in relation to both the right of integrity and the right of additions to the work.[*69] Consequently, the clauses employed should be precise, explicitly mentioning each moral right. In practice, an author can consent to limitations to her moral rights without necessarily relinquishing them entirely. Consent applies to specific actions; a waiver should follow the same rationale. For instance, an author might agree not to assert moral rights in a particular situation rather than waive them completely. In one illustration, an author could agree not to be publicly acknowledged as the creator of a work or could insist on being credited by her full name. This approach maintains consistency both with the primary justification for moral rights[*70] and with the relevant case law in France and Germany[*71]. Regulation of the exercise of moral rights should not create undue restrictions if each right is addressed individually. This approach empowers authors to make context-specific decisions on their moral rights in relation to a specific architectural work. Regulating each moral right separately in a contract would furnish room for both concepts, a waiver and consent.

3.2. Contracting authorities' exercise of the author's moral rights

Regulating each moral right separately in a public contract is problematic for two reasons: 1) public contracts are concluded between a contracting authority and a tenderer; 2) there is usually no possibility of negotiations between a contracting authority and the tenderer, not to mention an author.

A public contract is a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities, where the parties have as their object the execution of work, the supply of products, or the provision of services.[*72] In regulation of the author's moral rights, inclusive of the right of integrity in a public contract, it is important to delineate who is the author of said work – i.e., who owns the moral rights to it. The author of a work is the natural person or persons who created the work.[*73] The tenderer (generally a legal entity only) is not the work's author. Therefore, it must be kept in mind that the author and the contracting authority are not entering into a public contract with each other.

In the context of public contracts, architects – authors of works of architecture – are typically members of the tenderer's team. They may be employees of the tenderer or under contract to the tenderer. When creation of a work takes place under an employment contract or in the public's service as part of direct duties, the author retains copyright in the work. However, the economic rights related to using the work for the specified purposes and to the extent outlined by those duties are transferred to the employer unless specifications in the contract indicate otherwise.[*74] Importantly, moral rights remain with the author irrespective of the legal relationship between the tenderer and the author.

From a practical standpoint, it is the contracting authority's responsibility to establish the framework for the author's moral rights within a public contract. Tenderers, on the other hand, must verify that the author of the architectural work agrees to the contract conditions before submitting their tenders. If the author does not consent to these terms, the tenderer cannot proceed with the submission. It is impermissible for a tenderer to exercise the author's moral rights on the author's behalf without the author having provided prior confirmation that it may do so.

68 Ibid 112.

69 Copyright Act, s 12(1) cls 3, 4.

70 The so-called argument from personhood is that, work being an embodiment of the creator's personality, control over the work is essential to securing authorial control over the author's personality. See Aplin and Davis (n 5) 52.

71 Both fall under the *droit d'auteur* doctrine.

72 Directive 2014/24/EU, art 2 para 5; Directive 2014/25/EU, art 2 para 1; Public Procurement Act, s 8(1).

73 Copyright Act, s 28 sub-s 2.

74 Copyright Act, s 32 sub-s 1.

Addressing the regulation of an author's moral rights within a public contract presents several challenges. While one approach could involve the author signing the public contract alongside the tenderer and contracting authority, this method is complicated: Public contracts are formalised in writing between economic operators and contracting authorities[*75], and their terms are established on the basis of procurement documents and the winning tender[*76], where the tender represents tenderers' commitment to the contract, binding them to its terms.[*77] However, authors are not tenderers[*78] and therefore cannot directly sign a public contract. Furthermore, it would be legally impossible for an author to sign only the portion of the contract that is related to her moral rights. The tripartite agreement required – involving the contracting authority, tenderer, and author – represents an extremely impractical solution, especially when multiple authors are involved. Such complexity raises even more questions about the parties to the contract and their responsibilities. The most obvious, perhaps, is that legal norms permit only the contracting authority and tenderer to be parties to a public contract. Consequently, the idea of authors too signing a contract of this nature is not viable.

An alternative approach would be for the author and the tenderer to start by regulating the exercise of the author's moral rights between themselves. This should equip the tenderer with the right to agree on behalf of the author to exercise that author's moral rights in a public contract with the contracting authority. One implication in this scenario is that the tenderer is the author's representative under the public contract. A transaction may be carried out through a representative: a transaction executed by a representative is valid in respect of the principal on the condition that it was carried out by the representative in the name of the principal and provided that the representative possessed the corresponding authority of representation.[*79] A transaction that by law or mutual agreement must be carried out in person may not be carried out through a representative.[*80] Granting authority for representation of the principal requires the principal to provide a corresponding manifestation of intention to the representative, to the person with whom the transaction that requires the authority is to be carried out, or to the public.[*81] The scope of the authority to represent the principal is determined solely by the principal. The meaning that the person who was granted the authority or the person who otherwise relies on the manifestation of intention had to understand that manifestation of intention or the conduct of the principal as conveying is interpreted to be the meaning of the authority conferred in fact.[*82]

Authors should have the legal option to either refrain from asserting their moral rights or waive them, provided that such agreements are specific and consider each of the author's moral rights individually. Since moral rights are intrinsically tied to an author's personal identity, the decision on when and how to exercise them rests with the author. In practical terms, authors can consent to restrictions on their moral rights without necessarily relinquishing them entirely. Consent is connected with specific actions, and waivers follow a similar rationale. In this context, the author could, alternatively, consent to the terms and conditions of the public contract, thereby granting the tenderer the authority to agree with the terms and conditions regulating the author's moral rights. Importantly, regulating the exercise of moral rights is not a transaction that, by law, must be conducted in person. While the author must decide how to address the exercise of these rights, there is no legal requirement for in-person execution. Therefore, if the author provides specific confirmation to this effect, the tenderer can effectively manage that particular exercise on the author's behalf.

Given that the tenderer's submission must adhere to the conditions outlined in the procurement documents,[*83] the author's consent to these conditions, which include those expressed within the public contract, follows a similar pattern of reasoning. Specifically, the author should confirm that the tenderer has

75 Directive 2014/24/EU, art 2 para 5; Directive 2014/25/EU, art 2 para 1; Public Procurement Act, s 8(1).

76 Public Procurement Act, s 120(1).

77 Public Procurement Act, s 110(1).

78 A tenderer is an economic operator who has submitted a tender or preliminary tender to the contracting authority in a public procurement, according to the Public Procurement Act, s 7(1).

79 Act on the General Part of the Civil Code, RT I, 20.6.2022, s 115(1). English translation available <https://www.riigiteataja.ee/en/eli/503022023002/consolide> accessed on 8 July 2024.

80 Ibid, s 115(2).

81 Ibid, s 118(1).

82 Ibid, s 120(2).

83 Public Procurement Act, s 110(2).

the right to submit an offer (this confirmation would be inherently specific, given that both the tenderer and the author are aware of the terms and conditions of the public contract[*84]). However, the author remains the ultimate decision-maker in respect of the suitability of the regulation handling treatment of their moral rights. If the terms are not acceptable to the author, the tenderer cannot proceed with submitting a tender. Should the tenderer do so anyway, the terms and conditions of the public contract cannot cover the author, since the author is not directly a party to the contract. The tenderer's role in this setting is that of the author's representative in management of the regulation of moral rights.

In the context of contracting authorities' activities, adopting this approach in practice necessitates ensuring that the tenderer possesses the capability of regulating the author's moral rights on the author's behalf. Under the previous version of the Public Procurement Act,[*85] there existed a provision requiring the contracting authority to seek the tenderer or applicant's confirmation of the existence of the intellectual-property rights relevant for the execution of a public contract.[*86] However, the Public Procurement Act in its current form, by lacking an equivalent provision, lays the burden of responsibility directly on contracting authorities: they must address this issue explicitly within the public contract. Failure to do so renders the terms and rules stated in the public contract ineffective with respect to the author's moral rights. Consequently, it becomes imperative to incorporate the tenderer's explicit confirmation – acknowledging said entity's authority to regulate the exercise of the author's moral rights – into the public contract. Additionally, the contracting authority should include protective provisions in the contract to safeguard against situations wherein the tenderer does not hold the necessary rights. The relevant terms might feature provisions for an obligation for the tenderer to compensate the contracting authority for any resulting damages.

An alternative route for the contracting authority's verification that the tenderer possesses a right to regulate the author's moral rights within the public contract's sphere would involve seeking direct confirmation from the author. In this scenario, the contracting authority requests tenderers to provide an author's confirmation alongside the offer. Implementing this method would increase the administrative burden for the contracting authority, however – the authority would need to review these confirmations meticulously, to verify their alignment with regulatory requirements, and need to make sure that all authors concerned have provided confirmation to the tenderer – and simultaneously impose additional responsibilities on tenderers. Alternatively, the same level of confirmation from the contracting authority's angle can be achieved by incorporating it directly into the public contract, as discussed above.

An additional consideration when the regulation of an author's moral rights in the public-contract domain is that of the limited opportunity for negotiations between the contracting authority and the author. Typically, public contracts get drafted by the contracting authority without prior consultation with tenderers in the course of the procurement process. This practice stems from the requirement that contracting authorities follow either the 'open' or the 'restricted' procedure, unless otherwise instructed by the law.[*87] In the context of architectural work, most public procurements follow the former,[*88] which precludes direct negotiations with tenderers.[*89] This method entails the contracting authority drafting procurement documents – including the terms and conditions for the public contract[*90] – and making them available to tenderers.[*91] Neither tenderers nor authors (whether architects or any others) can directly alter these documents' terms and conditions. While there exists a mechanism for suggesting modifications to certain aspects of the public contract,[*92] one highly significant challenge plaguing the process is that the procurement process necessarily entails the identity of the tenderer behind the ultimately successful bid being unknown as the process progresses toward its conclusion. The associated lack of specificity impairs the ability of individual

84 This one-time confirmation applies to an open procedure while, for example, the terms and conditions in a negotiated procedure might change without prior publication, under the Public Procurement Act, s 72(6).

85 Public Procurement Act 2013: RT I, 23.12.2013, 74. English translation available <https://www.riigiteataja.ee/en/eli/530012014002/consolide> accessed on 8 July 2024.

86 Found in s 31(8^1).

87 The current version of the Public Procurement Act, s 48(1).

88 The Estonian Ministry of Finance has provided statistics specific to public procurement in connection with state aid and assets. These are available via <https://www.fin.ee/riigihanked-riigiabi-osalused/riigihanked> accessed on 8 July 2024.

89 Public Procurement Act, s 52(4).

90 Public Procurement Act, s 4 cl 17.

91 Public Procurement Act, s 77(1).

92 The terms of the Public Procurement Act, in s 81(1), specify that the contracting authority may modify the contract notice or other procurement documents before the closing date for tenders' submission in an open procedure.

authors to regulate terms and conditions, not least those connected with the exercise of their moral rights, within the public contract. In this context, addressing each moral right separately in the contract becomes problematic on account of the authors' limited influence.

While options exist, the regulation of author-specific moral rights within public contracts lacks a universal approach. In the open procedure, the contracting authority has the flexibility to adjust the procurement documents until the tender-submission deadline.[*93] Once that deadline passes, no further modifications can be made to those documents or the public contract. Regrettably, this restricts the room for tailoring the treatment of an author's moral rights in accordance with her preferences.[*94] Such limitations are at odds with the fundamental principle that authors should have the autonomy to decide how their moral rights are regulated. Therefore, it is crucial to consider whether the mechanism of standard terms and conditions precludes effectively managing moral rights or, instead, permits striking a fair balance between author rights and the needs of contracting authorities.

Under the Estonian Law of Obligation Act[*95], a contract term that is pre-drafted for use in standard contracts or has not been negotiated case-specifically by the parties for any other reason is considered a standard term.[*96] Since contracting authorities apply an open procedure for most public procurement related to architectural work,[*97] the contracts in most cases are concluded under standard terms[*98]. Because these contracts' conditions are not subject to negotiation between the parties but are instead prepared by the contracting authority, said contracts' interpretation must follow the regulations governing the interpretation of standard terms.

The interpretation of standard terms should adhere to objectivity,[*99] with the implication that the terms must be understood in the way a reasonable entrepreneur participating in public procurement would perceive them under the given circumstances. In situations of uncertainty, standard terms are construed in the manner less favourable for the party imposing the condition[*100] (i.e., the contracting authority). A standard term is considered void if, when the contract's nature, content, and entry process are taken into account, it unfairly harms the other party. Unfair harm might arise from a significant imbalance in the parties' rights and obligations, with prejudice against the weaker party. There is a presumption of unfair harm when a standard term deviates from fundamental legal principles or restricts the other party's rights and obligations to such an extent that the likelihood of achieving the contract's purpose gets called into question.[*101]

When the exercise of an author's moral rights is governed by standard terms and conditions, those terms may be found void if they prove unfair from the author's perspective. Since moral rights are tied to the architectural work's creator, bound up with the author's personal identity, the authors are the ones who must determine when and how those rights are to be exercised, yet standard terms and conditions are not subject to negotiation. These terms prepared unilaterally by one party might well place the author at a disadvantage. For instance, the content of the standard terms might require the author to waive certain moral rights. Such terms are likely void, as they unfairly harm the author. The author lacking an opportunity to negotiate these terms – terms with which the author may not agree – is only one factor. Secondly, the significant imbalance in rights and obligations allows the contracting authority to modify the architectural work without concern for the author's right to integrity. This contradicts the very essence of moral rights: because they are inherently tied to an author's personhood, only the author should possess the power to decide how to exercise them. Achieving a fair balance between the contracting authority's needs and an author's rights necessitates genuine negotiation of the contract's terms, terms on the exercise of moral rights among them.

93 Public Procurement Act, s 81(1).

94 Neither can authors contest the procurement documents, because they are not tenderers. See the Public Procurement Act's s 185(1) and s 185(2) sub-s 1.

95 Law of Obligations Act, s 116.

96 Law of Obligations Act, s 35(1).

97 Ministry of Finance (n 88).

98 MA Simovart and M Parind, *Riigihangete seadus. Kommenteeritud väljaanne* [The Public Procurement Act: A Commentary] (Juura 2019) 101: point 25, about s 8(2).

99 Per the first sentence of s 39(1) of the Law of Obligations Act.

100 Law of Obligations Act, s 39(1).

101 Law of Obligations Act, s 42(1).

4. Contractual restrictions to the author's exercise of moral rights

4.1. Contractual restrictions pertaining to reasonable and necessary changes

The right of integrity is derived from the Berne Convention. The *Guide to the Berne Convention* explanation is that the formula for the right of integrity, sometimes called the right of respect, is very elastic and leaves a good deal of latitude to the courts.[*102] This indicates that courts may interpret the right of integrity such that some limitations follow; in fact, it is almost entirely up to the courts to interpret the right of integrity. The guide's explanation states also that the author's 'right of respect' allows the author to demand, for example, the preservation of her work and the main features of her literary characters from changes that are bound to alter the nature of the work or the author's most basic message.[*103]

Contracting authorities' practice often incorporates provisions into a public contract that grant the authority a right to make reasonable and necessary modifications to construction projects[*104].[*105] Simultaneously, the provisions in question stipulate that authors cannot prohibit such changes. This contract-rooted limitation serves as a mechanism to balance the interests of contracting authorities and authors' rights in some fashion. By allowing only those adjustments that are necessary, so as to safeguard the author's creative vision, authorities that take this approach seek harmony between the two parties' needs within the context of public contracts.

It is impossible for public contracts to capture the meaning of such notions as 'reasonable' and 'necessary' explicitly. While a contract could offer definitions for these words, specifying a meaning that functions in every possible scenario is both complicated and unnecessary. Public contracts are subject to the provisions outlined in the Law of Obligations Act and in legal acts relevant to the specific type of contract unless otherwise specified by the Public Procurement Act.[*106] The Supreme Court of Estonia has recognised that the unique nature of public-procurement procedures leads to these contracts typically being based on standard conditions in conditions wherein the parties have not negotiated specific terms.[*107] The standard conditions' objective interpretation supports ensuring that reasonably informed and diligent tenderers can understand them consistently.[*108] While regulating the exercise of the author's moral rights through standard terms and conditions might produce terms that are deemed void since they could, in theory, be unfair from the author's perspective, the requirement that they be interpreted objectively – that is, not from the contracting authority's perspective alone or solely from the author's either – could represent a path to a safeguard. Regulating the exercise of the author's moral rights through standard terms is permissible only when a fair balance is struck between the contracting authority's needs and the rights of the author. Stating the limitations by means of the public contract such that the contracting authority maintains the right to make reasonable and necessary changes might be a way to create the required balance between those sets of interests.

Outlining the principle of reasonableness, the Estonian Law of Obligations Act, Section 7, furnishes some of the meaning for these notions. Reasonableness is judged by what persons acting in good faith would ordinarily consider reasonable in the same situation.[*109] Various factors come into play when one is assessing reasonableness here, among them the nature of the obligation, the transaction's purpose, industry practices, and other relevant circumstances.[*110] Reasonableness is judged objectively. Indeed, the law requires this. To that end, the evaluation hinges on modelling a neutral person's behaviour: the

102 Ricketson and Ginsburg (n 3) para 42, on art 6*bis*4.

103 Ibid, on art 6*bis*5.

104 The list of works 'for which copyright arises' is laid out in the Copyright Act, s 4(3) sub-s 14; see n 21.

105 See, for example, the details of public procurement 256304 <https://riigihanked.riik.ee/rhr-web/#/procurement/5107120/general-info> and 261161 <https://riigihanked.riik.ee/rhr-web/#/procurement/5589540/general-info>. Both links accessed on 8 July 2024.

106 Public Procurement Act, s 8(2).

107 Decision 2-15-15662 (n 18) para 21.

108 Law of Obligations Act, s 39(1).

109 Law of Obligations Act, s 7(1).

110 Law of Obligations Act, s 7(2).

content considered reasonable in the objective circumstances identified is concretised, and a model for rational and considered behaviour is formed. A reasonable person looks after her economic interests, but reasonableness implies ethical behaviour in addition.[*111] This is where the final element in the list of factors in assessment of reasonableness asserts itself. Hence, the Estonian Supreme Court has found that it may be necessary to consider other circumstances in addition to the nature of the debt relationship, the purpose of the transaction, and the customs and practices of the relevant fields/professions.[*112]

Additionally, the Estonian Act on the General Part of the Civil Code[*113], specifically Section 63 (1), delineates which costs related to property are considered necessary. Costs incurred in connection with a property object are necessary where they serve to preserve that object or protect it from either complete or partial destruction. For instance, the Estonian Supreme Court has ruled that expenses related to replacing a fully depreciated heating system[*114] and renovating water and sewerage systems qualify as necessary costs.[*115] Ultimately, ascertaining whether a change to a construction project is necessary and reasonable depends on the findings from case-by-case assessment.

To safeguard the interests of contracting authorities or the public interest, it is crucial for the authority to retain the ability to make modifications to construction projects as needed.[*116] The public contracting authorities serve as the owners of buildings constructed through the corresponding projects. In Estonia, the property-owners' rights are safeguarded by both the Constitution of the Republic of Estonia[*117] and the Law of Property Act[*118], where ownership is defined as full legal control by a person over a thing. An owner has the right to possess, to use, and to dispose of the thing and to demand the prevention of violation of those rights and the elimination of the consequences of violation arising from all other persons.[*119] Consider a scenario wherein a building requires restoration work to protect against its partial or complete destruction. Examples of work of this nature are replacing a compromised heating system that should protect the structures in winter and renovating the water-supply and drainage systems to meet current requirements. These types of improvements are deemed necessary. This perspective, consistent with the principles outlined in the Act on the General Part of the Civil Code, is supported by the Estonian Supreme Court's case law. Contracting authorities should not have to fear that such modifications might infringe on the author's moral rights. When it comes to necessary changes in settings such as schools or hospitals, the goal is to prevent the building from collapsing and otherwise ensure that it fulfils its intended purpose, through actions such as protecting its users from harm caused by everything from asbestos fibres to excessive radioactivity. Letting contracting authorities make the corresponding essential adjustments enables them to exercise their rights as property-owners and honour their responsibilities to maintain and enhance the properties as needed. The approach evident here strikes a balance between intellectual-property rights and the practical requirements of maintaining and improving public infrastructure.

In the context of the contracting authority's prerogative to effect changes to a building, it is imperative to reconsider the term 'necessary'. While the Act on the General Part of the Civil Code provides a definition, this definition may prove overly restrictive. The scope of necessity extends beyond mere preservation; it encompasses a broader spectrum of circumstances. Consider the scenario of an educational institution, such as a school, facing population growth specific to its geographical region. Extending an existing school might be a more pragmatic solution than constructing an entirely new one. Making such extensions, whether to schools or hospitals, should qualify as necessary work within the context of construction projects. The need for modifications of this sort arises not only from preservation concerns but also from practical exigencies. Furthermore, both necessity and a contracting authority's motivation to alter a building can arise from diverse factors. For instance, the imperative to enhance energy-efficiency might prompt replacing the

111 P Varul and others, *Võlaõigusseadus. Kommenteeritud väljaanne I* [The Law of Obligations Act: Commentary I] (Juura 2016) point 4.1, regarding s 7.

112 Civil Chamber of the Supreme Court decision 3-2-1-135-15 [2015] para 17.

113 Act on the General Part of the Civil Code, s 33.

114 Civil Chamber of the Supreme Court decision 3-2-1-116-11 [2012] para 33; Civil Chamber of the Supreme Court decision 3-2-1-105-16 [2016] para 14. Both in the Estonian language.

115 Decision 3-2-1-105-16 (ibid) para 14.

116 All modifications to public contracts also have to be in line with s 123 of the Public Procurement Act.

117 Namely, under its art 2.

118 Law of Property Act 1993, RT I, 17.3.2023, 57. English translation available <https://www.riigiteataja.ee/en/eli/524032023005/consolide> accessed on 8 July 2024.

119 Law of Property Act, s 68(1).

existing roof, whether it be a traditional tile roof or a sheet-metal roof, with one equipped with solar panels. In this scenario, the need to modify the building transcends preservation aims and aligns with broader goals. As a steward of the building, the contracting authority should possess the agency to prosecute these changes, recognising that necessity encompasses multifaceted dimensions, far beyond mere preservation.

Reading the foregoing discussion could raise concerns from authors' perspective, however. By exerting their power to commission necessary alterations to a building, contracting authorities could significantly alter its appearance. Such alterations might, in turn, lead to erosion of the author's honour and reputation – i.e., violate the right of protection of the author's honour and reputation. For instance, consider the above-mentioned scenario of replacing the original roof with a roof adorned with solar panels. This change could fundamentally transform the building's character, thus negatively influencing the author's reputation and honour. The author might perceive this alteration as damaging because she would never have associated a solar-panel roof with a building featuring a yellow façade and Art Nouveau windows. Clearly, it is not merely the necessity of modifications to the structure that matters; the changes must be reasonable also from the perspective of safeguarding the author's moral rights.

For instance, in a prominent Estonian Supreme Court case, architects Leonhard Lapin and Toomas Rein alleged an infringement of their right of integrity by the municipality of Kihnu.[*120] The district court concurred with the county court's determination that the project took a course that deviated from the authors' original design during construction without their consent. Specifically, the district court concluded that the alterations – made to the vestibule, the cloakroom, the canopy of the main entrance, the façade and its eaves heights, the glass pyramid above the lobby, and the building's ventilation – violated the moral rights of the project's authors. The architects contended that these changes significantly and irreparably compromised the conceptual and architectural integrity of the original design, while the argument on the other side asserted that these alterations were necessitated by technical constraints, with the initial project having not provided unambiguous solutions for every construction-related issue. In such a context, imposing limitations via the public contract so as to allow for truly necessary adjustments would avoid violation of the author's moral rights.[*121]

Let us examine the solar-panel example further. In the context of building modifications, contracting authorities hold the power to replace traditional roofing materials with solar panels; however, doing so should be deemed permissible only if it qualifies as making a reasonable change. The principle of reasonableness, as outlined in the Law of Obligations Act, plays a pivotal role in judging the acceptability of alterations of this kind. For assessing whether these changes to a building are reasonable, factors such as the above-mentioned nature and purpose (of the modification) and prevailing practices (in the field of restoration work) come into play. The Copyright Act explicitly safeguards the author's moral rights, with the right of integrity and the right of protection of the author's honour and reputation counting among these, so any modifications to a building must adhere to reasonableness standards if they are to avoid infringing upon those rights. Were contracting authorities to order necessary changes that fundamentally alter a building in a manner detrimental to the author's reputation or honour, their actions would constitute a violation of said moral rights. Consequently, the reasonableness criterion can serve as a shield for an author's moral rights. It ensures that contracting authorities cannot legally impose changes that fall short of reasonableness. In other words, to go forward, the 'necessary' alterations to a building must both be required and be justifiable from the perspective of preserving the author's artistic intent and reputation. For instance, adding solar panels to enhance energy-efficiency might be deemed reasonable on condition that it dovetails with the overall purpose and appearance of the building. Since reasonableness is an objective requirement,[*122] its conceptual framing affords considering both the author's rights and the practical needs of the contracting authority. The purpose of the building, its aesthetic character, and other relevant facets to the setting should be carefully weighed to determine whether the modifications proposed in a given case meet the reasonableness standard.

Moreover, setting the contract's limits such that they permit only 'reasonable and necessary' changes would create a similarity to limitations employed in other EU member states. The German Federal Supreme Court stated in several 2019 decisions that, in general, the owner's rights take precedence over the author's

120 Decision 3-2-1-39-03 (n 43).

121 Ibid, paras 10, 26.

122 Decision 3-2-1-135-15 (n 112) para 17.

rights when the construction or remodelling of a building is at issue – but only in cases wherein the property-owner's non-aesthetic interests necessitate the construction or remodelling of the building.[*123] Likewise, in a 2006 decision, the District Court of Berlin found that changing the plans for the ceiling of a building's lower floor for aesthetic reasons without sufficient economic justification is not allowed.[*124] In contrast, if the building is not safe anymore, the façade of the building may be changed without the author giving permission. Among the other permissible criteria are economic, environmental, and various other interests, so long as the sources of justification are non-aesthetic ones. These factors might intersect when, for example, the building-owner cannot rent out the building anymore. In Germany, one can seek guidance in the national Copyright Act, which states that the author has the right to prohibit distortion or any other derogatory treatment of the work that could prejudice said author's legitimate intellectual or personal interests in the work.[*125] Italian copyright law grapples with such issues by foreseeing an exemption for architectural work. Namely, the Italian Copyright Act states that in cases of architectural work, the author may not oppose modifications deemed necessary during construction. Furthermore, the author may not oppose other modifications that may be necessary in any such completed work.[*126]

As for how the aesthetics issue could be tackled in Estonia, if limits were imposed at contract level so as to permit 'reasonable and necessary' changes only, public-procurement contracts would most probably restrict the contracting authority from making non-aesthetic alterations to a building. This conclusion is based on the need for two key conditions to apply: firstly, there must be a genuine need for the contracting authority to initiate modifications, and, secondly, those changes must meet the criterion of reasonableness. Changing a building's appearance merely to enhance its perceived elegance or align with personal tastes or aesthetic standards of the day would be unlikely to qualify as a reasonable change from the author's perspective. There would have to be other, demonstrably practical considerations behind the need envisioned for some aesthetic change. In this context, reasonableness necessitates attention to the delicate balance between the interests of the contracting authority and the author. Again, since reasonableness is an objective requirement, it empowers practitioners to consider the practical needs alongside the value of preserving the author's artistic intent and reputation – this tool supplies a lens suited to considering economic interests, ethical behaviour, etc. simultaneously[*127].

An alternative approach to achieving a balance between the needs of contracting authorities and an author's rights involves legal reform akin to that informing the Italian model. Under a system following that model, authors do not retain the right to oppose modifications specifically in the context of architectural work that are deemed necessary and reasonable. Consequently, setting limits to this effect in contracts become unnecessary. However, it is essential to recognise that the restriction imposed in this scenario pertains specifically to the author's right of integrity, as discussed earlier in the paper.

In summary, surveying the state of affairs led to the following recommendation expressly for the purpose of striking a fair balance between the interests of the contracting authority and the rights of an author subject to a public contract: public contracts should explicitly grant contracting authorities the right to make architectural modifications that are both reasonable and necessary without contestation from the author. The changes found necessary might be connected with preservation efforts, energy-efficiency enhancements, adaptations to population changes, or other factors; however, appropriate equilibrium between the author's rights and the contracting authority's interests necessitates these modifications also meeting the criterion of reasonableness, lest the alterations potentially harm the author's reputation and honour. Crucially, this limitation must be articulated explicitly in the public contracts, since it does not follow naturally from the legal provisions now in force. Implementing such a mechanism with careful attention to the 'both reasonable and necessary' condition could serve as a practical means of balancing some of the important competing interests evident in the context of public contracts.

123 German Federal Supreme Court decision I ZR 98/17 *HHole (for Mannheim)* BGH, 21.2.2019; decision I ZR 15/18 *Minigolfanlage* BGH, 21.2.2019; decision I ZR 99/17 *Pharadise* BGH, 21.2.2019.

124 District Court (Landgericht) Berlin decision 16 O 240/05, 28.11.2006.

125 See s 14 of the German Copyright Act.

126 See the Italian Copyright Law's art 20 co. 2.

127 Again, please see Varul and others (n 111) point 4.1, regarding s 7.

4.2. Contractual restrictions connected with the public interest

The terms 'public' and 'public interest' represent legal concepts that lack precise definitions. Their interpretation varies greatly with the context. Accordingly, legal scholars and case law have explored these terms extensively, and only a few facets to them can be carved out for attention here.

The target of public interest is a certain public (general, societal) good.[*128] According to interest theory, public law tends to matters related to the state while private law concerns itself with individual-level gains. From an interest-theory perspective, a legal issue falls within the realm of public law when the interests of the state deserve priority. However, it is crucial to note that there exist public-law norms that protect private interests and, even more significantly, some norms of private law are established with consideration for public interests.[*129] Additionally, the topic can be approached with either a normative or an analytical tack. From a normative angle, the relationship between individuals' rights and public interests becomes a question of the state's and society's fundamental structure, so discussion of private and public interests remains relevant as long as it is encapsulated with the concept of justice. With an analytical lens, in contrast, the focus is on precisely defining the relationship in question, which necessitates precise delineation of individual-level rights and societal interests. While the latter is far from simple, the inherent ambiguity of these terms renders a normative approach impossible.[*130] One can argue that, as a rule, the target of public interest – the public good – is indivisible between members of a society. The public interest does not necessarily even reflect the interest of most individuals in the society, because no society is the sum of its private interests.[*131]

Some needs that fall under 'public good' as defined by the Court of Justice of the European Union (CJEU) are the general need to preserve public order; the imperative of protecting the environment; protection of public health, inclusive specifically of the provision of medicinal products of reliable and good quality; pursuit of the objective of security and solid public policy when a genuine serious threat places a fundamental interest of society at risk; the promotion of research and development and of high standards of education;[*132] and earthquake-resistance of buildings.[*133] Golding and Henty have mentioned the Olympic Games as another possible example.[*134] On the other hand, the CJEU has consistently excluded considerations of an administrative, economic, or financial nature from among the overriding elements in the public interest.[*135]

Estonian case law too reflects the fact that 'public interest' is an undefined legal concept. The Supreme Court has found that, in light of the vital nature of freedom of the press, the press has extensive leeway for decision-making with regard to the range of topics whose investigation and reporting falls within the public's interest.[*136] Furthermore, case law reveals multiple instances wherein the court has meticulously balanced competing interests amid definitional ambiguity. For instance, in a case involving the potential closure of a school, the court weighed the larger public interest against the interest of the applicants (the parents of the school's students) in maintaining the school's operations.[*137] Some other examples that have shed light on the definition of 'public good' have involved peace internal to and beyond the country's borders, a thriving economy, the integrity of the environment, and a high level of culture.[*138] This underscores the nuanced interplay between public and private interests.

In light of the foregoing discussion, an additional limitation that could be incorporated into public contracts with regard to the exercise of an author's moral rights is one grounded in the public interest. In essence, the provision envisioned would empower contracting authorities to effect changes to a construction

128 K Ikkonen, 'Avalik huvi kui määratlemata õigusmõiste [Public Interest As an Undefined Legal Concept]' [2005] (3) Juridica 187, 187.

129 R Narits, *Õiguse entsüklopeedia* [Encyclopaedia of Law] (Juura, Õigusteabe AS 2002) 44–45.

130 Ikkonen (n 128) 193.

131 Ibid 199.

132 MA Simovart, 'Old Remedies for New Violations? The Deficit of Remedies for Enforcing Public Contract Modification Rules' [2015] (1) Upphandlingsrättslig Tidskrift (UrT) 33-47, 36; also see the case law cited.

133 Case C-159/11 *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* EU:C:2012:817, para 37.

134 Simovart (n 132) 36 and the legal literature cited.

135 Simovart (n 132) 37 and the case law cited.

136 Administrative Chamber of the Supreme Court decision 3-17-62 [2021] para 15.2; Administrative Chamber of the Supreme Court decision 3-3-1-85-15 [2016] para 23. Both in Estonian.

137 Tartu District Court order 3-22-984 [2022] para 12.

138 Ikkonen (n 128) 187 and the case law cited.

project on grounds of public-interest considerations. In the Estonian legal context, the issue of restricting an author's moral rights on the basis of public interest is notable for not having been broached yet – or having been addressed in case law in any way. Nevertheless, it merits thoughtful examination. Might such a stipulation in public contracts help ensure an equitable equilibrium between the author's prerogatives and the interests of the contracting authority?

The Spanish Supreme Court grappled with the interplay between the moral right of integrity and the public interest[*139] in a case involving two architects, Calatrava and Isozaki. The City of Bilbao commissioned Isozaki to add a walkway to Calatrava's bridge in the aim of enabling pedestrians to use and leave the bridge without needing to ascend or descend long flights of stairs to access several of the commercial buildings on one of the banks of the river. In its design, the pedestrian passage differed significantly from the original bridge. Calatrava sued, seeking the walkway's demolition and the restoration of the railing originally part of the structure. Initially, the court accorded greater weight to the public interest, concluding that the author's interests/reputation had not been damaged because the interest of the public at large to use the more practical passage should prevail. On appeal, the court recognised that Calatrava's moral rights had indeed been violated, however. The court considered the public purpose for which the bridge had been created, emphasised the bridge's original purpose, and ruled in favour of Calatrava.[*140]

There could be a possibility of identifying scenarios wherein public-interest-driven alterations to a building may outweigh private interests (i.e., the author's moral rights). However, the crucial goal again is to strike a fair balance between the author's rights and the contracting authority's needs, given that public contracts are concluded on standard terms and conditions[*141]. After all, contracting authorities' use of taxpayer funds to procure supplies and services inherently brings in the public interest, yet pursuit of the associated public interest should not disproportionately infringe upon the author's moral rights.

In the realm of architecture modifications, practical factors often render alterations necessary. The above-mentioned case of the bridge provides an example of weighing the needs involved. In the context of buildings, a contracting authority may commission an extension to a school in response to local population growth. Just as additional space for students might be needed, solid patient-care capacity might require expanding an existing hospital. Again, constructing entirely new schools or hospitals is likely to be impractical from a financial standpoint if nothing else. Creating extensions becomes essential, aligning with the broader public interest. In such cases, constructing extensions to existing buildings is in the public interest. Conversely, administrative, economic, and financial considerations have consistently been regarded as outside the domain of overriding reasons associated with public interests, as noted above with reference to the CJEU.[*142] A stalemate does not necessarily follow, however: Estonia's Public Procurement Act and the European public-procurement directives provide a potential solution to address scenarios such as these. Specifically, contracting authorities have the right to employ a negotiated procedure without prior publication. This procedure allows the public contract to be awarded exclusively to a particular economic operator on account of factors related to the protection of exclusive rights – intellectual-property rights included.[*143] Contracting authorities, then, may engage the author of the original work to design an extension to it. Still, each case demands careful assessment of the appropriateness of this procedure for its unique circumstances.[*144]

Allowing building modifications solely because they are financially advantageous for the contracting authorities potentially constrains authors' freedom. For instance, if the contracting authority seeks to alter the choice of building materials purely to reduce costs, this might be justified in the context of public funds; however, contracting authorities might well prioritise cost savings over an author's right to integrity in such cases. While alterations rooted in financial considerations could be justified with regard to public funds, it is

139 MG León, 'Moral Right of Integrity and the Public Interest' (2019) 14 Journal of Intellectual Property Law & Practice 294, 295. – DOI: https://doi.org/10.1093/jiplp/jpz011; Spanish Supreme Court decision 1869/2009, 18 January 2013.

140 León (ibid) 295–96; Provincial Court of Bizkaia decision of 10 March 2009; RC Vallès, 'El caso Calatrava o Zuri Zuri, ¿una victoria pírrica en apelación?' [2009] (32) Revista de Propiedad Intelectual 99.

141 Simovart and Parind (n 98) 101: point 25, on s 8(2).

142 Simovart (n 132) 37 and the case law cited.

143 See the Public Procurement Act's s 49(1) cl 2. This is in accordance with Directive 2014/24/EU's art 32(2).

144 Because of the limited space available for this article, the applicability of applying a negotiated procedure without prior publication is not analysed, since such examination cannot shed light on appealing to the public-interest argument as a way of limiting the author's exercise of moral rights.

essential for contracting authorities to assess their financial resources thoroughly before initiating a public-procurement procedure in the first place.

That said, modifications might be justified by public interests when, irrespective of such diligence, the necessity arises from architectural deficiencies, such as fire-safety standards no longer being met or inadequate earthquake-resistance. In such instances, the need to safeguard public health overrides the author's interests. Where a building is teetering on the brink of collapse and rife with fire-safety violations, safety should receive priority over the author's right of integrity even if materials at variance with those in the original plan get used. This is an extreme example by design: modifications on public-interest grounds should be permitted only in specific cases and be well-justified. Therefore, considering the public interest could form the core of an additional restriction that public contracts could incorporate with regard to the exercise of an author's moral rights. A provision of this type would empower contracting authorities to execute changes to a construction project on the basis of prevailing public interest.

An alternative approach to using public-interest-underpinned contract terms for seeking balance between the needs of contracting authorities and an author's rights is to undertake legal reform to the equivalent effect. The outcome, specific to the context of architectural work, would be that authors do not retain the right to oppose those modifications deemed necessary in light of public interest. Handling the limitations through legal reform would make contract-level limitations unnecessary; nevertheless, one must remember here too that the restriction at issue pertains specifically to the author's right of integrity.

In summary, public interests, of various sorts, merit careful consideration when one is evaluating the necessity of building-modification work. In some scenarios, public interests may outweigh private interests when these two distinct concerns come into collision with each other. It is important to recognise that considering the public interest can impinge on the author's exercise of her moral rights, the right of integrity specifically, and that the case law permits this in only a rather limited range of scenarios. The law neither mandates nor precludes a public-interest-oriented limitation. Incorporating one into public contracts could function to harmonise the interests of the parties – contracting authorities and authors.

5. Conclusions

The intention behinds this paper was to draw attention to legal aspects of the author's moral rights in public contracts, specifically the right of integrity within the context of architectural work. The primary objective of the study reported upon was to ascertain whether, and how well, the exercise of the author's right of integrity can be limited in public contracts through standard terms and conditions. To this end, the evaluation of the legal permissibility of transactions involving moral rights aided in identifying the most suitable model for agreements that govern these rights in public contracts.

Drawing on prior Estonian legal research led to the conclusion that the optimal method for regulating an author's moral rights within the Estonian legal framework is through a structured approach of consent and waiver. This approach allows explicit tailoring of each moral right's consideration in accordance with its inherent nature, thereby ensuring precise and individualised regulation. The landscape of issues accentuates the need for rules in this area to be detailed and targeted rather than constitute a sweeping granting of consent that could infringe on the author's moral rights.

That said, addressing individual moral rights within a public contract poses challenges in that public contracts are concluded between a contracting authority and a tenderer, without the author as a direct party to them, and because negotiations between a contracting authority and an author are quite often infeasible. It was largely because of these two major challenges that the option for authors of works of architecture to consent to the terms and conditions of the public contract and give the tenderer the right to agree with those terms and conditions regulating the author's moral rights emerged as one of the more viable options. Legally, there is no impediment to the tenderer regulating this aspect of the transaction on behalf of the author if the author has provided the tenderer with specific confirmation that the latter may do so under specific circumstances. For the contracting authority's work, ensuring that the tenderer can effectively regulate the exercise of the author's moral rights on behalf of the author becomes essential, so contracting authorities must explicitly address this within the public contract. Failure to do so would render the terms of the public contract ineffective in the realm of regulating the author's moral rights. This situation produced the conclusion that public contracts should explicitly encompass and mandate contract-winners' explicit

confirmation of their ability to manage the authors' moral rights on those authors' behalf. In addition, the contracting authority should incorporate protective provisions to safeguard its interests in case the tenderer turns out to lack the authority necessary for managing these rights. The relevant provisions could specify remedies such as compensation for any damages.

One of the properties of standard terms that demand the greatest awareness in this context is that these terms and conditions are unilaterally prepared by one party and not subject to negotiation with the other party. Consequently, they may disproportionately favour the contracting authority and potentially disadvantage the author. Hence, if standard terms are to regulate the exercise of an author's moral rights effectively, specifically the right of integrity, a delicate balance must be struck, one that considers both the contracting authority's needs and the author's rights. The author's thorough assessment of the scope of moral rights was rooted in this concern. From this exploration of potential limitations on their exercise, it appears prudent to incorporate a specific provision in public contracts, for solid alignment with the legal literature and case law.

Meticulous examination of the practical restrictions commonly employed by contracting authorities in the context of contractual limitations on the exercise of an author's moral rights in settings of public contracts identified a pattern wherein contracting authorities' contracts often include language that obliges the author to permit reasonable and necessary modifications to her work. It is noteworthy that this limitation lacks a legal foundation and does not receive an explicit endorsement in case law. Thoughtful analysis conducted against this backdrop sought a route to the overarching objective of reaching and maintaining an appropriate equilibrium between the legitimate interests of contracting authorities and the moral rights of authors. The aim was to ascertain whether such a limitation could be judiciously applied in public contracts. While this appears possible, carefully evaluating the implications and potential consequences painted a fuller picture. The aim here was to contribute to a nuanced understanding of the interplay between contractual provisions and the protection of moral rights in the domain of architectural work.

Within the context of public contracts, the exercise of an author's moral rights encounters a potential limitation arising from the property-owner's interests (here, the contracting authority's specifically). These interests may prompt contractual stipulations that preclude the author from contesting reasonable and necessary modifications to architectural work. Especially in the space of public and individual-level interests' knotty interrelations, the concept of 'reasonable and necessary changes' assumes critical significance for reaching an equitable balance between the author's rights and the contracting authority's needs. The changes must be necessary, and, on the other hand, requiring them to be reasonable ensures that they do not compromise the author's honour or reputation. Importantly, although not directly rooted in legal statutes, a limitation to this effect warrants explicit inclusion in public contracts. It provides an avenue toward that delicate balance for safeguarding both the author's moral rights and the needs of contracting authorities.

Practice in the realm of architectural-work contracts pointed to a need for meticulous examination of an additional limitation to the exercise of moral rights: one anchored in the public interest. The ensuing analysis revealed that public contracts could incorporate terms preventing authors from contesting architectural modifications deemed necessary in light of public interest. Appeals to legitimate public interest can legally curtail the author's exercise of her moral rights, specifically the right of integrity, but only in the narrow range of scenarios identified by case law. Without adequate justification, alterations could potentially undermine the author's reputation, violate her right of integrity, and disrupt the delicate balance inherent in moral rights' protection. Given the absence of direct legal precedent, it is imperative that a clear public-interest-based limitation be explicitly stipulated in public contracts, to ensure clarity and fairness in navigating the intricate web between creative expression and public welfare.

In the context of public contracts, which are often governed by standard terms and conditions, the various limitations discussed here as possible for inclusion in the contracts can serve striking a balance between the interests of contracting authorities and the rights of authors. These limitations alleviate concerns for contracting authorities, ensuring that authors do not hinder the authority's exercise of its economic rights. Simultaneously, authors can find reassurance that their moral rights (that of integrity especially) remain safeguarded and unharmed.

An alternative approach to achieving a balance between the needs of contracting authorities and an author's rights involves legal reform. Specifically, in the context of architectural work, authors would not retain a right to oppose modifications deemed necessary and reasonable or those in the public interest. After such reform, there would be no need for setting limits in each contract with specific regard to the author's right of integrity, though other rights are certain to continue requiring regulation.

Abbreviations

UN	United Nations
UPR	Universal Periodic Review
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNGPs	United Nations Guiding Principles on Business and Human Rights
OEIGWG	open-ended intergovernmental working group
NGOs	non-governmental organisations
CESCR	Committee of Economic, Social and Cultural Rights
GDPR	General Data Protection Regulation
CJEU	Court of Justice of the European Union
EC	Estonian Constitution
CFR	Charter of Fundamental Rights
IDA	Identity Documents Act
GPCCA	General Part of the Civil Code Act
ETSI	European Telecommunications Standards Institute
EUTS	Electronic Identification and Trust Services for Electronic Transactions Act
ROCA	Return of the Coppersmith Attack
IP	intellectual property
NATO	North Atlantic Treaty Organization
IPRs	intellectual property rights
OECD	Organisation for Economic Co-operation and Development
WTO	World Trade Organization
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
PLT	Patent Law Treaty
EPC	European Patent Convention
EPO	European Patent Office
TFEU	Treaty on the Functioning of the European Union
MAR	Market Abuse Regulation
CSMAD	Directive on Criminal Sanctions for Market Abuse
ECJ	European Court of Justice
AMLD	Anti-Money Laundering Directive
KarS	Estonian Penal Code
OWiG	German code of administrative offences
KrMS	Code of Criminal Procedure
VTMS	Code of Misdemeanour Procedure
FI	Estonian Financial Supervision and Resolution Authority
FSAA	Estonian Financial Supervision Act
EBA	European Banking Authority
CIA	Credit Institutions Act
APA	Administrative Procedure Act
ECB	European Central Bank
SIs	significant institutions
LSIs	less significant institutions
ESL	European Superleague Company
FIFA	International Association Football Federation
UEFA	Union of European Football Associations
ISU	International Skating Union
SWA	Social Welfare Act
ACA	Administrative Cooperation Act
PPA	Public Procurement Act

38.EESTI
ÕIGUSTEADLASTE
PÄEVAD

RULE OF LAW AND SECURITY

Thursday, 26 September

9:00–10:00 Morning coffee at Vanemuine Concert Hall (Vanemuine 6)

Opening

10:00 **Katarina Talumäe**, President of Estonian Lawyers Union
Hanno Pevkur, Minister of Defence

PLENARY MEETINGS

10:20–11:35 **20 years in NATO**
Vanemuine Concert Hall (Vanemuine 6)

Moderator: *dr. iur*. **Mart Susi**, Professor of Human Rights Law, Tallinn University

Participants in the discussion: PhD **Ülle Madise**, Chancellor of Justice; **Kalev Stoicescu**, Chairman of the National Defence Committee of the Riigikogu; **Rainer Saks**, Security Expert; **Merili Arjakas**, Editor in Chief of Diplomaatia and Junior Research Fellow in the International Centre for Defence and Security

The opening plenary meeting focuses on the quadrilateral relationships between NATO, Estonia, international law, and the rule of law. Is the world order based on international law starting to become an illusion as aggression and war crimes go unpunished and the world politics is increasingly guided by the principle of "might makes right"? Is Estonia willing to follow the principles of the democratic rule of law that we formulated at the time of regaining independence, no matter how exceptional the situation and how endangered the continuation of statehood? What weight do the basic principles of international law and the rule of law have at the backstage of NATO? In addition to these topics, the speakers will discuss the most relevant security issues and the current situation of NATO in the context of international law and human rights.

11:35–12:00 Awarding the "Õiguse eest seisja" prizes – **Liisa-Ly Pakosta**, Minister of Justice and Digital Affairs

12:00–12:30 Coffee break

12:30–14:00 **20 years as part of the judicial system of the European Union: experiences and perspectives so far**

Vanemuine Concert Hall (Vanemuine 6)

Moderator: *dr. iur*. **Priit Pikamäe**, Advocate General, European Court of Justice

Participants in the discussion: **Küllike Jürimäe**, Judge, European Court of Justice, President of the Third Chamber; *mag. iur.* **Lauri Madise**, Judge, General Court of the European Union; PhD **Iko Nõmm**, Judge, General Court of the European Union; **Kristel Siitam-Nyiri**, European Prosecutor

First, the participants will take a look back to how the Estonian judicial system entered into a dialogue with the Court of Justice of the European Union 20 years ago, and to the main challenges faced by the first Estonian judges who started to work there. Afterwards, there will be an exchange of views on how the Estonian courts operate from the perspective of the Court of Justice of the European Union, and take a look at the reform of the work of the Court of Justice of the European Union that will soon enter into force.

14:00–15:15 Lunch

After the end of the plenary meeting at 14:00, the participants will move to sections, i.e., to one of five locations: Vanemuine Concert Hall, assembly hall of the University of Tartu, Tartu University library conference centre, V Spa conference centre, Hotel Lydia event centre.

Thursday, 26 September

15:15–16:45 **Financial security of consumers during a recession**

Tartu University library conference centre (Struve 1)

Moderator: *dr. iur.* **Karin Sein**, Professor of Civil Law, University of Tartu

Dain M. Muru, Lawyer at the Business Department of Consumer Protection and Technical Regulatory Authority
Financial services – luck or misery? Viewpoint of the Consumer Protection and Technical Regulatory Authority

Siim Tammer, Member of the Board, Financial Supervision Authority
The principle of responsible lending: capital requirements and fines as an accelerator of responsibility

Jüri Puust, Head of the Judicial Procedure Department, Swedbank
A creditor's view of consumer credit regulation

PhD **Piia Kalamees**, Associate Professor of Civil Law, University of Tartu
Is the loan agreement signed using an eID acquired fraudulently valid?

There is more and more talk about the economic recession that is about to take over Estonia, and we hear news about redundancies almost every week. This also damages the ability to repay consumer loans, including residential mortgages, the number of debtors will increase and this, in turn, will aggravate social issues. The section deals with this topic, including compliance with the principle of responsible lending from the point of view of both national supervision (Consumer Protection and Technical Supervision Board and the Financial Supervisory Authority) and the credit sector. Is the current legislation sufficient to ensure the financial security of consumers in difficult times and what are the most important bottlenecks?

In the context of increasingly frequent cybercrime and identity theft, attention should also be turned to the validity of loan agreements in situations where someone else has used the person's eID to take out a consumer loan. It is analysed whether and how can a consumer rely on the nullity of their loan

agreement on the grounds that the transaction made using their eID was not carried out by them or their authorised representative, but their identity was fraudulently hijacked.

16:45–17:15 Coffee break

17:15–18:45 **How safe is it to give away personal rights?**

Tartu University library conference centre (Struve 1)

Moderator: *dr. iur.* **Triin Uusen-Nacke**, Judge, Tartu Circuit Court

MA **Susann Liin**, Adviser, Civil Law Chamber of the Supreme Court, Visiting Lecturer of Private Law, University of Tartu
Self-authorised, well authorised? person's freedom to authorise vs. the State's duty to intervene

Arno Ruusalepp, Head of Department of Cardiac Surgery, Chief medical officer, Lecturer
How to reach an agreement with a doctor/surgeon?!

Paavo Uibopuu, notary
Qui facit per alium, facit per se. Representative's will = will of the represented?

The section discusses whether and how we can ensure our well-being and safety in case there are short or long-term changes in our ability to understand the situation. Blind love or sudden health issues. What is the right of representation in all matters and should the State interfere with private autonomy? The topic of the discussion is power of attorney as an alternative to guardianship, whether there is a reason to exercise control over the use of right of representation, and how to do it. The focus is on patient's declaration of will. How to be a smart patient? How and on what matters should I make an agreement with the doctor?

15:15–16:45 **Dangers of artificial intelligence and how to mitigate them**

Vanemuine Concert Hall (Vanemuine 6)

Moderator: **Henrik Trasberg**, Legal advisor on new technologies and digitalisation, Legislative Policy Department, Ministry of Justice

Participants in the discussion: PhD **Helen Eenmaa**, Associate Professor of Governance and Legal Policy, Johan Skytte Institute of Political Studies; **Rauno Kinkar**, Attorney-at-Law and Partner, Advokaadibüroo WIDEN, Head of IT, IP and data protection; PhD **Meelis Kull**, Associate Professor in machine learning, Institute of Computer Science, University of Tartu, Head of the Estonian Centre of Excellence in Artificial Intelligence

The increasingly extensive use of artificial intelligence by both the State and businesses creates added value in almost every industry and in important areas such as health care, education, transport, governance, security, and environmental protection. At the same time, significant dangers arise with the introduction of artificial intelligence: there are numerous examples where partial or complete automation of decisions and processes of institutions with artificial intelligence has led to discrimination, extensive invasion of people's privacy, or other consequences that violate fundamental rights. The abuse of technology has already led to a wave of frauds based on deep fakes, the spread of more extensive disinformation and various manipulative practices, as well as new cyber security threats. The participants will discuss the important challenges associated with artificial intelligence from the point of view of the State and the people. It also looks at whether or how we are trying to address these potential threats through the AI Regulation and a broader legal framework, international cooperation and Estonia's domestic strategies, and what legal, political, etc. developments are necessary to ensure that the use of artificial intelligence remains reliable and responsible.

16:45–17:15 Coffee break

17:15–18:45 **Estonia as a potential centre of financial activity: security risk or a safeguard?**

Vanemuine Concert Hall (Vanemuine 6)

Moderator: LLM **Monika Koolmeister**, Attorney-at-Law and Partner, Advokaadibüroo COBALT

Participants in the discussion: **Kilvar Kessler**, Chairman of the Board, Financial Supervision Authority; **Evelyn Liivamägi**, Deputy Secretary General for Financial and Tax Policy, Estonian Ministry of Finance; **Indrek Neivelt**, entrepreneur; **Tõnu Pekk**, Member of the Board of Tuleva Fondid AS; **Karolin Soo**, Judge, Tallinn Administrative Court; **Miiko Vainer**, Estonian Banking Association, Head of Anti Money Laundering Committee, SEB Pank

The section focuses on the legal guarantees of the successful functioning of the financial sector – why is Estonia not an attractive financial centre? What are the advantages of Estonia and what issues have arisen in practice? What could be done to make Estonia more attractive?

15:15–16:45 **Surveillance and information acquisition in criminal proceedings**

V Spa conference centre (Riia 2)

Moderator: PhD **Tambet Grauberg**, Judge, Pärnu County Court, Visiting Lecturer of Criminal Law, University of Tartu

Participants in the discussion: PhD **Eerik Kergandberg**, former Member of the of the Criminal Chamber of the Supreme Court; **Oliver Nääs**, Attorney-at-Law and Partner, Advokaadibüroo WIDEN; **Taavi Pern**, Chief State Prosecutor; PhD **Arnold Sinisalu**, former Director General of the Estonian Internal Security Service

Due to security threats, there is a greater need to proactively collect secret information to prevent and detect crimes. When criminal procedure and threat prevention intertwine, a balance needs to be found between public interests and individual rights. Whether and under what conditions is the exercise of fundamental rights and judicial control over the monitoring of people guaranteed? The right of defence, the principle of equality, and the inter partes nature of court proceedings set restrictions on the use of secretly collected information in court proceedings. Based on the interests of security or criminal procedure, can it be justified to infringe the basic procedural rights of the accused, and what countervailing measures should be taken in this regard?

16:45–17:15 Coffee break

17:15–18:45 **An individual in a panopticon of cameras. Cameras at the disposal of authorities**

V Spa conference centre (Riia 2)

Moderator: **Risto Hübner**, Attorney-at-Law and Partner, Advokaadibüroo Nordx Legal

Andra Laurand, Visiting Lecturer of Administrative Law, University of Tartu
Cameras in the service of public authorities – legal framework

Andrus Padar, Expert at the Remote Monitoring Research and Development Centre of the Estonian Academy of Security Sciences
Surveillance cameras – myths and reality

Liisa Ojangu, Data Protection Expert, Estonian Centre for International Development, former Head of Department of Supervision, Estonian Data Protection Inspectorate
Cameras – View of the Data Protection Inspectorate

From street cameras with low-quality footage that showed a blurry image of a suspected criminal on TV, we have now moved to a world where cities are covered in cameras. The Internal Security Development Plan calls for creation of private camera network and the help of artificial intelligence to ensure public order. Police officers have uniform cameras that record both high-quality sound

and images, and drones watch (and record?) our behaviour from the sky. What is the capability of such cameras and what level of efficiency do they create for law enforcement agencies? What is the legal framework and are our fundamental rights protected both from the perspective of regulations and from the point of view of the supervisory authority?

15:15–16:45 **Security and human rights**

Hotel Lydia event centre (Ülikooli 14)

Moderator: *dr. iur*. **Mart Susi**, Professor of Human Rights Law, Tallinn University

Kalev Stoicescu, Chairman of the National Defence Committee of the Riigikogu
International relations have the face of human rights

LLM **Hent Kalmo**, Legal Adviser to the President
Total protection and fundamental rights

PhD **Tiina Pajuste**, Professor of International Law and Security, Tallinn University
Balancing security and international obligations

PhD **Merilin Kiviorg**, Associate Professor of International Law, University of Tartu
Religion and threat to security

Although in theory, respect for human rights is an absolute requirement in any situation, including military conflicts or the threat thereof, the actual risk situations challenge the feasibility of this principle. Attacks that existentially threaten the security of a country and its nation may raise the question of why and how it is necessary to protect human rights, if this may, for example, harm the safety of the population and the perspective of surviving. Does the international obligation to protect human rights still outweigh effective measures to repel or prevent attacks or act against them? At the same time, we know from the lessons of the last century that it is geopolitical upheavals that have led to reformulation of the principles of human rights or even the development of new principles. The participants will discuss these topics both in the context of practical feasibility and in a theoretical framework.

16:45–17:15 Coffee break

17:15–18:45 **International criminal law as a security guarantee**

Hotel Lydia event centre (Ülikooli 14)

Moderator: MA **Liina Lumiste**, Visiting Lecturer, University of Tartu; Doctoral student, University of Tartu

Participants in the discussion: *dr. iur.* **René Värk**, Associate Professor of International Law, University of Tartu; *mag. iur.* **Andres Parmas**, Prosecutor General; Major **Leenu Org**, Lecturer, Estonian Military Academy

One of the goals of international criminal law is deterrence – making sure that the initiators of a war of aggression, war criminals and perpetrators of crimes against humanity are brought to justice, and that acts that paralyse the entire humanity will not go unpunished. Russia's attack on Ukraine and the war that ignores the rules of warfare have raised the importance of international criminal law to a new level for Estonia as well. In this section, we will discuss whether and how could the deterrence offered by international law work for the protection of Estonia. How to handle the challenges, such as the different willingness of countries to cooperate, and the differences in legal framework? How does international criminal law influence the practice of armed forces and vice versa? From drones to cyber attacks, what will the new methods of warfare bring? It is also equally important to look inward: what is the role of the State itself in the enforcement of international criminal law, and what does it bring to the development of Estonian criminal law? At this crossroads of international and criminal law, we are looking for an answer to these and several other questions that have become urgent in the current security situation.

15:15–16:45 **Is the Estonian Parliament in a crisis?**

University of Tartu Assembly Hall (Ülikooli 18)

Moderator: *mag. iur.* **Aaro Mõttus**, Visiting Lecturer of Constitutional Law, University of Tartu, Doctoral student, University of Tartu, Member of the Advisory Committee of National Research Awards

PhD **Allan Sikk**, Associate Professor, University of London
How to restrain the Parliament?

Participants in the discussion: PhD **Allan Sikk**, Associate Professor, University of London; PhD **Margit Vutt**, Justice of the Supreme Court, Member of the Constitutional Review Chamber; MA **Armani Pogosjan**, Legal Adviser, Estonian Ministry of Education and Research

For a long time, the parliamentary law in Estonia has mainly been a topic of interest only within the Riigikogu. However, after the 2023 Riigikogu elections, the unprecedentedly heated political struggle brought the issues of interpretation and application of the constitutional norms and internal regulations regarding the activities of the Riigikogu into the focus of the public debate. And not just that: during the last year, the Supreme Court as the court of constitutional supervision, has made almost as many decisions in relation to the Parliament as in its entire history before that. Since the constitution gives the Riigikogu a central role in Estonia's constitutional state organisation, it is completely appropriate to ask: do our constitutional and common law norms provide the Parliament and its members with sufficient guarantees to meet the standards of their constitutional status? Are the possibilities of the majority and the minority to influence the decisions of the Parliament balanced?

16:45–17:15 Coffee break

17:15–18:45 **Rule of law at the time of crises**

University of Tartu Assembly Hall (Ülikooli 18)

Moderator: **Heddi Lutterus**, Deputy Secretary General, Legislative Policy Department, Ministry of Justice

Participants in the discussion: **Liisa-Ly Pakosta**, Minister of Justice and Digital Affairs; **Taimar Peterkop**, Secretary of State; **Mait Palts**, Director General of the Estonian Chamber of Commerce and Industry; PhD **Külli Taro**, Head of Knowledge Transfer at Ragnar Nurkse Department of Innovation and Governance, Tallinn University of Technology

In light of the endless crises of the recent years, our current situation has also been characterized as a "permacrisis". It marks an extended period of instability and uncertainty resulting from a series of catastrophic events.

Since 2020, we have overcome the corona crisis, the border crisis of Belarus and the European Union, and the energy crisis. The war in Ukraine continues, placing our security situation in a different light. The state budget is tight, inflation has been fast and the economy is in decline. The obstruction in the Riigikogu has been referred to as a crisis of democracy. Climate changes are a warning of an impending climate crisis.

All this has put pressure on the principles of the rule of law, where quick solutions have been and continue to be needed to solve the crises quickly. At the same time, it has been accompanied by a growing restlessness of entrepreneurs, interest groups, media and citizens that the state does not involve or listen to them, and involvement and dialogue have become no more than a facade. There are more and more complaints about the legislative process and the quality of legislation. The new keywords are speed, flexibility, agility, resilience. Yet, the decisions must be made based on information. The rule of law, fundamental rights, the principle of legality, etc. seem to be increasingly sacrificed to practical needs and sound anachronistic.

The participants will discuss how to meet the needs arising from the so-called permacrisis, while maintaining our rule of law. We will discuss whether we have already begun to crumble the foundations of our rule of law in order to solve these crises, or what are the dangerous trends that can be observed in the light of the crises of recent years. Or maybe it is vice versa? We will discuss whether new times require new solutions, and as lawyers and legal scholars it is our duty to make our forward-looking contribution to this process. The main question is how to find a balance, because undermining the principles of the rule of law is ultimately also a threat to the security of our country.

Friday, 27 September

09:30–11:00 **Protection of children's rights, family mediation as a magic wand?**
Vanemuine Concert Hall (Vanemuine 6)

Moderator: **Risto Sepp**, Bailiff of Tallinn

Participants in the discussion: PhD **Kristi Paron**, Senior Adviser at the Chancellor of Justice, Children's and Youths' Rights Department; **Merle Liivak**, Head of Department of Social Welfare and Health Care of Tartu, long-term practitioner in children's communication agreements; **Hannela Teaste**, State-funded Family Mediator; **Tambet Laasik**, Attorney-at-Law, Advokaadibüroo Kõrgesaar & Laasik, initiator of family mediation and revictimisation discussions

The aim is to discuss with experts the changes in the field of children's rights that came into force a year and a half ago – the state family mediation. Hopefully colleagues will support the discussion and introduce the family mediation service. With the help of the experts, the section reflects the need for state family mediation, its weak points (if any), benefits (retrospectively), as well as its future developments.

11:00–11:30 Coffee break

11:30–13:00 **Data disclosure and security**
Vanemuine Concert Hall (Vanemuine 6)

Moderator: **Kristi Värk**, Head of Data Protection Law Division of the Ministry of Justice

Participants in the discussion: *mag. iur.* **Nele Siitam**, Justice of the Supreme Court; **Leho Laur**, Head of National Criminal Police; **Sten Tikerpe**, Advokaadibüroo NOVE IT and Head of the field of cyber security, Lawyer; **Silver Lusti**, Head of Legal Department, Estonian Information System Authority

Data protection, as well as its availability, is nowadays closely connected to safety and security. At the same time, in the recent years, the European Union and Estonia have rapidly moved towards a more data-based society, one part of which is the provision of public information to the public sector for re-use, i.e. open data. Such disclosure of data allows businesses to make more informed decisions and create better services. Open data also enables natural persons to better understand how their data is processed in the performance of public tasks. This is thereby making the public sector more transparent. However, it should not be forgotten that the open data is published without restrictions, i.e. it is data that is available to everyone. At that, the open data can be reused differently than initially, both for commercial and non-commercial purposes. Could this excessive disclosure of data affect the security of society?

09:30–11:00 **The impact of the length of criminal proceedings on security**

Tartu University library conference centre (Struve 1)

Moderator: PhD **Laura Aiaots**, State Prosecutor, Lecturer in Criminal Law, Faculty of Law, University of Tartu

Participants in the discussion: LLM **Norman Aas**, Attorney-at-Law and Partner, Advokaadibüroo Sorainen, Lecturer at Tallinn University; MA **Harrys Puusepp**, Head of Office of the Estonian Internal Security Service; **Kaido Tuulemäe**, Senior Prosecutor, District Prosecutor's Office for Economic Crime and Corruption; **Martin Tuulik**, Judge, Harju County Court

The duration of criminal proceedings has an impact on security. On the one hand, there is a wish to speed up criminal proceedings, but on the other hand, procedural rules and judicial practice impose increasingly strict requirements on the collection of evidence. Based on the aforementioned, it is as if there are two opposing goals, and fulfilling both of these at the same time poses a challenge. Therefore, it is important to analyse which requirements for the collection of evidence are justified and to what extent it is possible to reduce the duration of criminal proceedings without harming both the quality of the proceedings and the fundamental rights, including how much we can influence it domestically and what this means regarding the European Union law.

11:00–11:30 Coffee break

11:30–13:00 **Availability of legal services**

Tartu University library conference centre (Struve 1)

Moderator: *dr. iur.* **Urmas Volens**, Justice of the Supreme Court

Participants in the discussion: **Ivo Viires**, Head of Legal Department of Ergo Insurance; **Mari-Liis Mikli**, Deputy Secretary General, Judicial Administration Policy Department, Ministry of Justice; **Imbi Jürgen**, Head of Estonian Bar Association; **Meelis Pirn,** Member of the Board of Estonian Lawyers Union

The average net monthly salary in Estonia as of December 2023 was approx. 1,600 euros. This enables to finance approximately 10 hours of reasonably high quality legal aid. But besides that, a person needs to pay for other living expenses (the average mortgage balance as of the end of 2023 was 56,000 euros, the average car lease balance was about 12,000 euros). As of the beginning of 2021, the median deposit amount – of which half of people have more and half have less – was approximately 1,300 euros. Such a person with an average salary probably does not qualify for state legal aid either, due to not being poor enough. So how should a person like this finance solving their legal problems? If there is no actual ability for this, we must ask whether and how the fundamental right to a court and other fundamental rights provided for in § 15 of the Constitution are guaranteed in this situation. The participants will discuss the potential solutions.

09:30–11:00 **Dilemma of the Constitution: to evolve or to freeze**

V Spa conference centre (Riia 2)

Moderator: PhD **Jüri Raidla**, Member of the Advisory Committee of National Research Awards, former Minister of Justice, Head of Expert Committee of the Constitutional Assembly

Participants in the discussion: PhD **Ülle Madise**, Chancellor of Justice; **Rein Lang**, former Minister of Justice, Expert of the Constitutional Assembly; **Heiki Loot**, Justice of the Supreme Court, Head of the Advisory Committee of National Research Awards; **Kristel Urke**, Head of International Law, Ministry of Defence

The Constitution is a law of a high order which is characterised by a higher level of generalisation and a meaning that is immensely more significant than that of the other laws. Therefore, the scope for interpreting the Constitution is wider, but still not unlimited. If the legal-political reality

and the interpretation of the Constitution start to differ too much, and if the interpretation of the Constitution is manipulated with the aim of proving its questionable conformity to the changed political and social reality, it leads to a legal and political devaluation of the Constitution.
The Constitution shall not be changed lightly. At the same time, the Constitution must not be confined, the opportunity for development must not be taken away from it not to damage the ability of the State and the society to develop. The Constitution must not be a political toy, nor a stack of dogmatic norms set in stone. In order to create a successful future for Estonia, the Constitution must be changed as little as possible, but as much as necessary.

11:00–11:30 Coffee break

11:30–13:00 **Losing and preserving the rule of law in a state of emergency. Historical experiences**

V Spa conference centre (Riia 2)

Moderator: *dr. iur.* **Marju Luts-Sootak**, Professor of Legal History, University of Tartu

Dr. iur. **Marju Luts-Sootak**, Professor of Legal History, University of Tartu; *dr. iur*. **Hesi Siimets-Gross**, Associate Professor of Legal History and Roman Law, University of Tartu

The legal basis of the special situation that enabled the reduction of the rule of law in the early days of the Republic of Estonia

Mag. iur. **Hannes Vallikivi**, Attorney-at-Law and Partner, Advokaadibüroo WALLESS, Doctoral Student, University of Tartu

Deportation as an internal security measure in the first period of independence of the Republic of Estonia

Mag. iur. **Toomas Anepaio**, Data Protection Specialist-Archivist, Supreme Court

Meeting of the foreign Estonian legal scholars – preservers of Estonian legal thought

The first Constitution of the Republic of Estonia from 1920 was considered democratic to the point of radicalism at the time and sometimes also extremely individualistic, because it contained a relatively extensive catalogue of fundamental rights. Less attention has been paid to the fact that this Constitution enabled to turn off a large part of this catalogue of fundamental rights if the situation required. However, in order for what is expressed in the Constitution to function, we also need the so-called common law. The presentation of Marju Luts-Sootak and Hesi Siimets-Gross will discuss what this level of common law really consisted of in the first period of independence of the Republic of Estonia and where it came from. Hannes Vallikivi will take the example of a specific institute and explain what the implementation of the restrictions prescribed in a special situation meant in practice at the time. Toomas Anepaio's presentation, however, observes a rather special situation in which the Estonian State could not function, but the Estonian lawyers still preserved the Estonian legal thought.

09:30–11:00 **Land acquisition for national defense**

University of Tartu Assembly Hall (Ülikooli 18)

Moderator: *mag. iur.* **Triinu Rennu**, Junior Research Fellow and Doctoral student, University of Tartu

Mag. iur. **Triinu Rennu**, Junior Research Fellow and Doctoral student, University of Tartu
Land acquisition and expropriation in 1918–1940

Dr. iur. **Priidu Pärna**, Tallinn Notary
Expropriation of Immovable Property Act 1995 – legislation from the to do list

The section concludes with a discussion on **the extent to which the land needs of the national defence objects have influenced the regulation of real estate acquisition in the public interest.**

Participants in the discussion: LLM **Ave Henberg**, Legal Advisor, Road and Railway Department, Ministry of Climate; **Kaupo Kaasik**, Coordinator of infrastructure project cooperation at the National Defense Investment Centre; **Merje Krinal**, Head of Department of Land Consolidation, Land Board, Project Manager of Rail Baltic

Triinu Rennu provides a historical insight into the special laws on the expropriation of land for military-defence purposes and the legal changes made due to the 1939 Bases Agreement. From Priidu Pärna's presentation, we will learn what gave impetus to the law on expropriation of immovable property in 1995, and what was used as a basis when preparing the draft.
In the discussion round, the practitioners will talk about the extent to which the change in the security situation has had an impact on the regulation of the law on the acquisition of immovable property in the public interest. The participants will discuss the difficulties in finding a balance between private and public interests, how the time frame of the need for land affects negotiations with landowners and how an agreement to acquire land is reached.

11:00–11:30 Coffee break

11:30–13:00 **Security and fraud prevention in the world of virtual currencies**
University of Tartu Assembly Hall (Ülikooli 18)

Moderator: **Viljar Kähari**, Member of the Management Board of the Estonian Digital Assets Union, Attorney-at-Law, KÄHARI Advokaadibüroo

Participants in the discussion: **Ago Ambur**, Head of the National Criminal Police Cybercrime Bureau; **Hermes Brambat**, Member of the Management Board of the Estonian Digital Assets Union, Chief Executive Officer at Vaspex Legal; **Vladislav Linko**, Attorney-at-Law, Advokaadibüroo Hedman Partners & CO

The growing popularity of virtual currencies brings new challenges in the field of security and fraud. The section focuses on risks and dangers related to cryptocurrencies, discusses legal and technical solutions, and gives practical advice on how to protect your digital assets.

The experts share their knowledge and experiences to help understand the nature of cryptocurrency scams, money laundering and cybercrime and provide recommendations on how to avoid them.

Whether the goal is to protect your investments or simply raise awareness, the section's discussion will provide valuable information for anyone interested in the world of virtual currencies.

09:30–11:00 **The limits of security and flexibility in today's employment relationships**
Hotel Lydia event centre (Ülikooli 14)

Moderator: **Liina Naaber-Kivisoo**, Judge, Viru County Court

PhD **Seili Suder**, Head of the Employment Relations and Working Environment Department, Ministry of Economic Affairs and Communications
Will artificial intelligence take away the security of employment relationships?

Mag. iur. **Thea Treier**, Counsellor for Labour Affairs, Permanent Representation of Estonia to the EU
Intervention of real intelligence in decision-making – the end of platform work?

Dr. iur. **Merle Erikson**, Professor of Labour Law, University of Tartu
What kind of distress does the compensation paid to the employee in case of illegal termination of the employment contract compensate?

LLD **Annika Rosin**, Associate Professor of Labour and Social Law, University of Turku
Do Estonian laws allow strikes? What could we learn from Finland?

In the regulation of labour relations nowadays, ensuring increasing flexibility for the parties to the employment contract has become one of the central aspects. This is amplified by the ever-accelerating technological development and the changing interests of employees and employers. In all this, the safety of employees and the protection of fundamental rights, which is the starting point of labour law regulation, tends to be left aside. The participants will discuss how to ensure employee privacy and termination protection and the right to strike in the light of the latest developments in labour relations.

11:00–11:30 Coffee break

11:30–13:00 **Accidents at work and occupational diseases – a security risk to the legal system and the economy?**
Hotel Lydia event centre (Ülikooli 14)

Moderator: *dr. iur*. **Gaabriel Tavits**, Professor of Social Law, University of Tartu

Mag. iur. **Merle Malvet**, Senior Adviser, Social Rights Department, Office of the Chancellor of Justice
Compensation in case of work accidents and occupational disease

Kaire Saarep, Director General of Labour Inspectorate
Accidents at work and occupational diseases through the eyes of the Labor Inspectorate

Mihkel Nukka, Lawyer, UniLaw Õigusbüroo
Claims for work-related injuries in court proceedings. Issues and possible solutions

Peep Peterson, former Head of Estonian Trade Union Confederation, former Minister of Health and Labour
Golgotha road in reaching tripartite agreements for mitigating risks related to occupational health and safety

Work accidents and occupational diseases are an important part of working life. So far, it is not unequivocally clear how to behave in a situation where a work accident or occupational disease has occurred. Are occupational diseases and accidents at work a risk? If it is a risk, is it only the employer's risk, or is it also a risk to the state and must be taken into account at all times? The discussion seeks to answer the question whose risk and concern are work accidents and occupational diseases in today's Estonian society.

13:00–14:15 Lunch at locations

FINAL SESSION

Vanemuine Concert Hall (Vanemuine 6)

14:15–15:40 **Our legal culture**

Moderators: *Dr. iur.* **Marju Luts-Sootak**, Professor of Legal History, University of Tartu;
PhD **Marko Kairjak**, Vice Chairman of the Estonian Legal Science Society, Attorney-at-Law and Partner, Ellex Raidla Advokaadibüroo

Participants in the discussion: PhD **Marju Lauristin**, Professor Emeritus, University of Tartu; **Katrin Prükk**, Editor of Juridica; MA **Heili Sepp**, Justice of the Supreme Court; *dr. iur.* **Paloma-Krõõt Tupay**, Associate Professor of Constitutional Law, University of Tartu

Our Lisbon, our Istanbul, our cuisine, our capital of culture, our country, our legal system, our institution... Everything expresses association, attribution and archetypes: we deem something inherently ours even when we cannot really describe it. Thus, we can talk about our legal system

without being able to explain exactly what it regulates: what is law, what is the system and why is it the exact result of understandings and connections that have formed in our heads over time. When there are several lawyers together, the "we" form a kind of binding substance that could be called legal culture – something that holds it all together but cannot be found in the Riigi Teataja. Or maybe it can, to some extent? Or at least should be? And should lawyers even talk about culture if we have been taught to proceed from the law?

15:40–15:50 Henn Jõks foundation scholarships
The winners will be announced by **Allar Jõks**, Attorney-at-Law and Partner, Advokaadibüroo Sorainen, and **Karolyn Krillo**, Adviser and Law Clerk, Tallinn Circuit Court

15:50–16:00 Handing over the support of the participants of the Estonian Lawyers' Days to help Ukraine
Closing words
Dr. iur. **Priidu Pärna**, Tallinn Notary