conference proceedings

EUROPEAN AND INTERNATIONAL COURTS AS FOCAL POINTS OF JUDICIAL DIALOGUE AND CROSS-BORDER INSPIRATION

Igor Sloboda (eds.)

FACULTY OF LAW
Comenius University
Bratislava

conference proceedings

EUROPEAN AND INTERNATIONAL COURTS AS FOCAL POINTS OF JUDICIAL DIALOGUE AND CROSS-BORDER INSPIRATION

collection of papers from the international scientific conference

of PhD Students and young researchers

„Milestones of Law in Central Europe 2025"

which was held on 10-12 April 2025, Častá-Papiernička, Slovakia

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PRÁVNICKÁ FAKULTA
Univerzita Komenského
v Bratislave

2025

Sloboda, Igor (eds.): European and International Courts as Focal Points of Judicial Dialogue and Cross-Border Inspiration. Bratislava: Faculty of Law, Comenius University in Bratislava, 2025. 90 p. ISBN 978-80-7160-776-2

© Autor

Editor: Igor Sloboda, Institute of European Law, Faculty of Law, Comenius University in Bratislava

Cover: Jozef Andraško

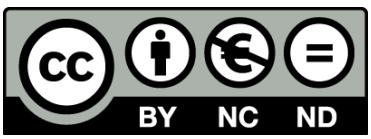
All contributions underwent double-blind peer review.

1st edition

Faculty of Law, Comenius University in Bratislava

2025

ISBN (e-version) **978-80-7160-776-2**



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HOW THE EFTA COURT'S „DURABLE MEDIUM" TEST TRAVELLED TO THE CJEU: A CASE STUDY OF E-4/09 INCONSULT AND C-375/15 BAWAG[1] [2]

Igor Sloboda[3]

Abstract: This article presents a focused case study exploring how the EFTA Court's interpretation of the concept of a "durable medium" in Case E-4/09 Inconsult Ansalt v. Finanzmarktaufsicht was adopted by the jurisprudence of the Court of Justice of the European Union (CJEU) in Case C-375/15 BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v. Verein für Konsumenteninformation. The article traces the path of influence through Advocate General Bobek's Opinion, which relied on the reasoning developed by the EFTA Court. Although the CJEU is not formally bound by EFTA case law, the "BAWAG judgment" demonstrates how persuasive reasoning from the EFTA pillar can be integrated into the EU legal order when it offers a functional and coherent interpretative framework. The analysis demonstrates a particular instance of "persuasive influence" within the broader context of judicial dialogue between the two European courts. While it is not possible to generalise the findings beyond this particular example, they offer a valuable insight into the mechanisms through which mutual awareness and informal borrowing contribute to the gradual convergence of EU and EEA jurisprudence.

Key words: EFTA Court, Court of Justice of the European Union, European Economic Area, Case law, Judicial dialogue

[1] This paper is an output of the project GUKE 2024: UK/3268/2024: „European Economic Area – advantages and disadvantages of incomplete integration"

[2] The article was presented at the conference Milestones of Law in Central Europe 2025 under the title „Impact of the EFTA Court's Case Law on the Development of the EU Legal Order"

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Introduction

As outlined in the previous paper[4], the role of the Advocates General of the Court of Justice of the EU (hereinafter referred to as "AGs") in the dialogue between the Court of Justice of the EU (hereinafter referred to as the "CJEU") and the EFTA Court is getting more attention and subsequently it emerged in due course that the Gas work and reference the EFTA Court decisions in their opinion, using the terminology and justification of EFTA to support their reasoning in implementation of the EU law. Although the GAs' proposals are not binding on the CJEU, nor are the EFTA Court's decisions binding on the CJEU in terms of the application of the homogeneity principle. We can confirm, that in several cases where GAs have worked with EFTA Court decisions in their opinions, the CJEU has follow their argumentation refering to the previous EFTA Court decision and has subsequently reflected it in its judgment. Thus, our conclusions show that the GA's opinions serve as an imaginary "gateway" for the application of the EFTA Court's jurisprudence by the CJEU, thus actively contributing to creating a space for dialogue between the highest judicial institutions of the two pillars of the EEA.

However, the CJEU does not often reflect previous decisions of the EFTA Court and usually resorts to it in cases where it has not yet had the opportunity to deal with the interpretation of certain concepts in its decision-making, whereas the EFTA Court has already had the opportunity to do so.

The aim of the present article is to conduct a detailed case study of the CJEU's judgment in C-375/15 BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation, with a particular focus on the mechanism through which the CJEU adopted the reasoning of the EFTA Court in Case E-4/09, Inconsult Ansalt v. Finanzmarktaufsicht, concerning the establishment of the criteria for a "durable medium". This case was selected for our research for the following reasons. First, it involves clear technical criteria that can be systematically traced. Second, it demonstrates the documented gradual transfer of reasoning from the

[4] SLOBODA, Igor: Dialogue between the EFTA Court and the Court of Justice of the European Union through the Advocates general opinions. In: Sára Kiššová, Igor Sloboda, Veronika Ťažká (eds.): Unwritten law of the European Union. Bratislava: Faculty of Law, Comenius University in Bratislava, 2024. p. 53 – 54

EFTA Court, through the AG opinion, to the CJEU. Third, it is a case of particular relevance for the study of the functioning of the dialogue between the highest judicial authorities of the two EEA pillars.
The focus of this paper will be a content analysis of the AG's opinions with interlinked EFTA Court's decision and the decisions of the CJEU, aiming to assess the impact of the EFTA Court's decision-making on the shift in the interpretation of the provisions of the EU legal order through the decision in E-4/09 Inconsult Anstalt v. Finanzmarktaufsicht.
The paper uses scientific methods of analysis, comparison and synthesis. It is structured as follows. In the first chapter, we will define the relationship between the CJEU and the EFTA Court. In the following chapter, we will define the principle of homogeneity for the purposes of the EEA Agreement. In the third and final chapter, we will introduce the dispute concerning the definition of the term 'durable medium', which we will look at through the lenses of the EFTA Court, the AG opinion and the CJEU. We will conclude the article by summarising our findings.

1. The EFTA Court and CJEU: Institutional and Doctrinal Context

The status, powers and proceedings before the EFTA Court are not, as in the case of the CJEU, regulated directly by the Treaty on the European Union ("TEU") and the Treaty on the Functioning of the EU ("TFEU")[5] in the Agreement on the European Economic Area ("EEA Agreement"). According to the original draft of the EEA Agreement, an independent EEA Court of Justice was to be established in accordance with Article 95(1), which would have been functionally integrated with the then EC Court of Justice ('ECJ').[6] The latter, in its opinion, rejected this option as incompatible with the EEC Treaty.[7] Its reasoning can be systematically divided into three main strands. First, the ECJ pointed out that the EEA Agreement envisaged from the outset a uniform interpretation and application of the law within the EEA, but pursued different objectives and had a different context compared to the objectives and context of the law of the then Community.[8] At the second level, the reasoning of the ECJ concerned the interpretation of the term 'Contracting Party', which included both the Community and its Member States or the

[5] Articles 13, 19 TEU and article 251 et seq. TFEU
[6] Opinion of the Court of Justice 1/91 part III. Analysis of the agreement
[7] Opinion of the Court of Justice 1/91
[8] Par. 29 Opinion of the Court of Justice 1/91

Community or the Member States. In future disputes decided by the ECJ, it would thus have to give an interpretation of that concept which would inevitably lead to decisions concerning the Community powers provided for in the Treaties.[9] On the third level, the Court argued that it would undermine the uniform interpretation of the law in the EEA. This was based on the fact that the original version of the EEA Agreement obliged the EEA Court of Justice to interpret the provisions of the Agreement as well as the part of the secondary law taken over in accordance with the case-law of the ECJ prior to the date of signature of the Agreement, but that the EEA Court of Justice was no longer subject to the same obligation in the case of decisions of the ECJ adopted after the date of signature of the Agreement.[10]

In terms of the functional integration of the EEA Court of Justice and the ECJ and the shared staffing, the Court referred, last but not least, to the issue of the impartiality and impartiality of the judges. Depending on whether they are hearing a case in the EC Court of Justice or the EEA Court of Justice, they would have to take into account the different nature and objectives of the Agreement and the Treaties, which would also require them to interpret the same provisions in a different way[11] – „*In those circumstances, it will be very difficult, if not impossible, for those judges, when sitting in the Court of Justice, to tackle questions with completely open minds where they have taken part in determining those questions as members of the EEA Court*."[12]

The solution to the above problems took the form of a provision in Article 108(2) of the EEA Agreement, binding those Member States of the European Free Trade Association that are Contracting Parties to the EEA Agreement (hereafter referred to as the "EEA/EFTA States") to establish an independent judicial body, the EFTA Court, by means of a special agreement concluded between the EEA/EFTA Member States - the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.[13]

[9] Par. 32 – 36 Opinion of the Court of Justice 1/91

[10] Par. 37 – 46 Opinion of the Court of Justice 1/91

[11] Par. 47 – 51 Opinion of the Court of Justice 1/91

[12] Par. 52 Opinion of the Court of Justice 1/91

[13] Article 108 (2) EEA Agreement, Recital 2 and Article 27 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice

2. The Principle of Homogeneity and Judicial Dialogue in the EEA System

Through the EEA Agreement, a two-pillar structure is being created, within which we have regulated the relationship between the two pillars, as well as the ways in which the institutions of the two pillars can engage in active dialogue with each other.[14] In accordance with the provisions of the EEA Agreement, the EFTA Court is competent to deliver advisory opinions to the courts of the EFTA/EEA Member States, whereas the CJEU is competent to deliver preliminary rulings to the national courts of the EU Member States.[15] The latter between the EFTA Court and the CJEU is primarily based on the principle of homogeneity, which presupposes the identical application of the same rules in EU and EEA conditions.[16] In this respect, however, the principle of homogeneity must be distinguished on two levels.

The first concerns primarily the normative level, which, apart from the recitals contained in the preamble[17] to the EEA Agreement, is reflected in Article 6 of the EEA Agreement, within the provisions defining the objectives and principles of the Agreement: *„Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement."*[18] This principle is further regulated within the EEA Agreement in a separate Chapter III, the first section of which is devoted to homogeneity. In accordance with Articles 105 and 106 of the EEA Agreement, the EEA Joint Committee is under an obligation to

[14] KOKOTT, Juliane and DITTERT Daniel: European Courts in Dialogue In: Eds. The EFTA Court: The EEA and the EFTA Court Decentred Integration. Oxford, Hart Publishing, 2014. p. 44 - 51

[15] VARGA, Zsófia: EU and EEA Law Litigation Before National Courts A Practical Guide – 1. ed. – Oxford, United Kingdom: Hart Publishing 2024 p. 366

[16] SPEITLER, Philipp: Judicial Homogeneity as a Fundamental Principe of the EEA In: BAUDENBACHER, Carl (eds.): The Fundamental Principles of EEA Law EEA-ities – 1. ed. – Cham, Switzerland: Springer International Publishing 2017. p. 23 - 34

[17] Recital 15 Preamble of the EEA Agreement

[18] Article 6 EEA Agreement

monitor the development of the case law of both courts. Where, upon examination of the decisions submitted to it, the Committee finds that divergences in interpretation or application have arisen, it shall take action to preserve homogeneity.[19] Should the efforts to maintain homogeneity fail and a uniform interpretation of the Agreement not be achieved within two months from the identification of such divergences in the jurisprudence of the two courts, the matter may subsequently be referred to the dispute settlement procedure pursuant to Article 111 of the EEA Agreement.[20] On the substantive level, analogous provisions concerning homogeneity can also be found in the Agreement on the Establishment of a Surveillance Authority and a Court of Justice , the conclusion of which the EFTA/EEA Member States were obliged to undertake pursuant to Article 108(2) of the EEA Agreement.[21] At this point, Article 3(2) of the Agreement on the Establishment of a Surveillance Authority and a Court of Justice of the EFTA States (SCA) may be cited: "*In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement*."[22]

In the second instance, the focus shifts from the normative level to the practical level of judicial dialogue between the two courts. At this level, homogeneity is no longer pursued through binding interpretation arising from the EEA Agreement or from the Agreement on the Establishment of a Surveillance Authority and a Court of Justice. Rather, it is achieved through mutual judicial engagement, where the judicial authority of one

[19] VARGA, Zsófia: EU and EEA Law Litigation Before National Courts A Practical Guide – 1. ed. – Oxford, United Kingdom: Hart Publishing 2024 p. 366 - 367

[20] Article 111 EEA Agreement

[21] Article 108(2) EEA Agreement

[22] Article 3(2) Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice

pillar seeks to persuade the judicial authority of the other. It must, of course, be acknowledged that the CJEU is not bound by the case law of the EFTA Court. However, the courts of both pillars have recognized the need to ensure that the provisions of the EEA Agreement and the related provisions of the primary law Treaties are interpreted uniformly.[23] Nevertheless, this does not preclude the possibility that the CJEU may adopt or rely upon the reasoning of the EFTA Court, particularly where such reasoning is sufficiently persuasive or significantly contributes to the development or clarification of EU/EEA law.[24] This can be illustrated, for example, by the active dialogue between the EFTA Court and the AG of the CJEU, who in their Opinions refer to previous judgments of the EFTA Court.[25] This dynamic will be further illustrated in the following case study.

3. Interpretation of the term "durable medium"

In Case C-375/15 BAWAG PSK Bank für Arbeit un Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation, the CJEU had to deal with the interpretation of the concept of 'durable medium' for the purposes of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, in the context of a reference for a preliminary ruling. Under that directive, the payment service provider is obliged to provide the payment service user with amendments to framework contracts either on paper or on another durable medium.[26] The dispute arose in what is, by now, a commonplace scenario: a bank sought to notify amendments to a framework contract through its e-banking environment, while a consumer association questioned whether this method satisfies the directive's requirement that such amendments be provided "on paper or on another durable medium".

The case thus sits at the intersection of consumer-protective information duties under EU secondary law and the technological shift from "paper-

[23] E-1/03 par. 27, C-522/04 par. 44

[24] For example: Case T-115/94 par. 108 with reference to E-1/94 and E-2/94

[25] MENGOZZI, Paolo: The Advocates General and the EFTA Court In: Eds. The EFTA Court: The EEA and the EFTA Court Decentred Integration. Oxford, Hart Publishing, 2014. p. 55 - 61

[26] Opinion of the AG in the Case C-375/15 par. 1

based communication" to digital communication via online platforms. The legal issue was therefore not confined to whether the bank's system was convenient and reliable, but whether it secured for consumers the core protective functions that the notion of a "durable medium" is intended to guarantee: personal addressability of the information, the possibility to store it and access it for future reference, and its unchanged reproducibility—without the payment service provider being able to unilaterally alter what has already been communicated to the consumer.

3.1. Facts of the case and the legal issue

BAWAG, a bank operating in Austria, offered its customers, among other things, the possibility of concluding a contract relating to online electronic banking. The bank's general terms and conditions relating to the Internet e-banking contract included a condition under which the bank's customers who concluded the contract would receive information and notifications of changes to the terms and conditions of the contract by means of the e-banking system, the so-called e-banking.[27] These messages are to remain published without change within e-banking, where they remain published for a reasonable period of time in order to inform consumers of the new contractual terms and conditions.[28] However, in the opinion of the consumer association Verein für Konsumenteninformation, the terms and conditions formulated in this way do not comply with the obligation to provide information on a 'durable medium' as laid down in Directive 2007/64/EC.[29]

Following a series of judicial decisions, the Austrian Supreme Court decided to refer the following questions to the CJEU for a preliminary ruling: *„1., Is Article 41(1) in conjunction with Article 36(1) of Directive 2007/64 to be interpreted as meaning that information (in electronic format) transmitted by the bank to the electronic mailbox of the customer as part of the [online banking website e-banking], so that the customer can retrieve this information by clicking on it after logging into the online banking website e-banking, has been provided on a durable medium? 2., If the answer to Question 1 is in the negative, Is Article 41(1) in conjunction with Article 36(1) of Directive [2007/64] to be interpreted as meaning that in such a case: a) the information from the bank is indeed provided on a durable*

[27] Ibidem par. 2 and Case C-375/15 par. 25 – 27

[28] Case C-375/15 par. 28

[29] Opinion of the AG in the Case C-375/15 par. 2 and Case C-375/15 par. 29 - 30

medium, but not notified to the customer, merely made accessible to him, or b) all that happens is that the information is made accessible without the use of a durable medium?"[30]

The Supreme Court thus asked whether information delivered to the customer's e-banking constitutes provision on a durable medium and, if not, whether the information was nevertheless provided on a durable medium but was not duly notified to the customer, or whether it was merely made accessible without the use of a durable medium. This formulation already reveals the core tension: messages conveyed through e-banking platform-based channels may be "addressed" to a specific consumer and may be operationally convenient, yet they can remain under the provider's control—raising doubts as to whether the consumer genuinely has the ability to retain an immutable record for future reference.

3.2. Opinion of the Advocate General Bobek

As AG stated at the outset of his opinion, the Court should have determined, first, whether the information so sent can be considered to have been provided on a durable medium and, second, the balance between the minimum requirements for the provision of information to clients and the technological developments manifested by the abandonment of written communication and its replacement by online communication.[31]

AG explicitly structured the analysis in two steps, first, whether the e-banking mailbox (or the documents transmitted through it) can qualify as a durable medium under definition in Directive; and second, whether amendments placed there are "provided" or merely "made available". The AG stressed that Directive treats these as distinct issues: a channel can satisfy durability requirements yet still fail the "provided" standard if the user / consumer must take extra steps to become aware of the information[32]

With regard to the notion of a "durable medium", the Advocate General examined it from two complementary perspectives. First, he addressed whether a durable medium can, in principle, operate in an online

[30] Case C-375/15 par. 33

[31] Opinion of the AG in the Case C-375/15 par. 3

[32] Ibidem par. 32 – 46 and par. 67 - 71

environment. Second, he considered whether the internal mailbox within an e-banking platform may itself be regarded as a durable medium.
According to the Directive, as a "durable medium" may be considered any instrument which: „*enables the payment service user to store information addressed personally to him in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored*,".[33]
With regard to the notion of a "durable medium", the AG proceeds from the definition in the Directive: the medium must enable the storage of information addressed personally to the user, its accessibility for future reference for a period adequate to the purposes of the information, and the unchanged reproduction of that information. He further emphasises that EU secondary law employs comparable definitions in other contexts (notably in consumer-protection legislation)[34]. In this respect, therefore, there are several ways to define the term. One of them is the possibility of using other directives which contain this concept by analogy. In the context of his opinion, the AG has worked with Directives 2002/65 and 2011/83. In the first case, the directive specified that a website could not be considered a durable medium unless it met certain criteria, while in the second case, the directive also considered e-mail to be a durable medium. Directive 2007/64 is, in this respect, comparatively more receptive to digital solutions: its recitals expressly refer to internet sites as a possible example of a "durable medium", provided that they satisfy those functional criteria.[35]
In this respect, AG also supported his reasoning by reference to the EFTA Court's earlier judgment in Case E-4/09, which confirmed that an website may qualify as a durable medium provided that the relevant functional criteria are satisfied. On that basis, the AG likewise concluded that internet-based communication systems cannot be excluded per se from being regarded as durable media.[36]

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[33] Article 4(25) directive 2007/64/EC
[34] For example: Directive 2011/83/EU of European Parliament and of the Counci of 25 Octoer 2011 on consumer rights, Directive 2002/65/EC of the European Parliament and of the Council of 23 September concerning the distance marketing of consumer financial services
[35] Opinion of the AG in the Case C-375/15 par. 32 – 34 and par. 43 – 44
[36] Ibidem par. 45 – 46

As noted above, the AG's analysis also refined the question whether the internal mailbox within an e-banking platform may itself be regarded as a durable medium. In this respect, he drew an important distinction between understanding that e-banking mailbox as a storage space remaining under the provider's control, and a portal or gateway through which durable electronic documents are transmitted and subsequently stored by the user. Conceptually, the first model gives rise to doubts as to compliance with the requirement of unchanged reproducibility, precisely because technically speaking, the e-banking mailbox remains within the provider's sphere of control. Under the portal / gateway model, by contrast, compliance depends primarily on whether the system and the document format realistically enable downloading or printing and thus place the information under the user / consumer control. The AG expressly adopted the insight from C-4/09 Inconsult that the design of such systems should lead the customer "almost certainly" to store or otherwise secure the information (on another durable medium).[37]

3.3. Applicability of the previous case-law of the CJEU

In the CJEU's case-law to that date, the starting point for interpreting the concept of a "durable medium" was the judgment C-49/11 Content Services. In the context of a preliminary ruling, the Court examined whether providing information to a consumer solely by means of a hyperlink to a website satisfies the requirement under Directive 97/7/EC—as laid down in Article 5(1)—that certain information be provided to the consumer on a durable medium.[38] The criteria under which a website may satisfy the characteristics of a durable medium were developed by the EFTA Court in Inconsult Anstalt v Finanzmarktaufsicht E-4/09, an approach that the CJEU subsequently drew upon in the present judgment.[39] Applying those criteria in Content Services, however, the Court held that information made available to the consumer only via a hyperlink does not meet that requirement, since it is neither supplied by the undertaking nor received by the consumer in the relevant sense and therefore cannot be regarded as information provided on a durable medium within the meaning of Article 5(1) of the Directive.[40]

[37] Ibidem par. 52 – 62 and E-4/09 par. 64 – 65
[38] Case C-49/11 par. 17 – 25
[39] Ibidem par. 45
[40] Ibidem par. 51

The AG drew on that line of reasoning in his Opinion, while explaining why Content Services is of only limited relevance to the case at hand.[41] First, he noted that the Court in Content Services did not have occasion to address a situation in which a website (or an online banking platform) not only gives the consumer access to information, but also enables the consumer to store and reproduce it. Second, the legal context differs: Directive 97/7/EC pursues objectives and employs a regulatory structure distinct from those of Directive 2007/64/EC. Finally, the factual circumstances of disclosure are not comparable: information made available merely through a hyperlink differs, in terms of the mode of delivery and the degree of consumer control over retention, from information send through an online banking environment.

3.4. Argumentation Based on the EFTA Court's Judgment in Case E-4/09 Inconsult Anstalt

The most visible source of the functional test is the EFTA Court's reasoning in Case E-4/09, where the EFTA Court assessed whether a website could qualify as a durable medium under an EEA-relevant Directive 2002/92. The EFTA Court approached the question through system characteristics rather than formal categories: a website can qualify if it enables storage, access for an appropriate time, and unchanged reproduction.[42]

In its reasoning, the Court distinguishes between "ordinary websites", which cannot be regarded as meeting the criteria of a durable medium, and "sophisticated websites". Within the latter category, it further differentiates between websites that enable users to access information stored on another instrument and thus operate merely as a portal for its provision, and websites that may themselves constitute a durable medium. In this connection, the Court treats a secure personal storage area as comparable to the user's own hard drive—provided that any possibility of unilateral change by the intermediary is excluded.[43]

Two features of Inconsult became particularly influential for the later reasoning. First, it framed the problem as control over the information. Second, it linked durability to design features that "*lead the customer*

[41] Opinion of the AG in the Case C-375/15 par. 50 and 80

[42] Case E-4/09 par. 39, par. 46 and par. 67

[43] Case E-4/09 par. 63 - 67

almost certainly" to store/secure the information—a functional insight that later reappears in AG Bobek's approach to e-banking "mailboxes".[44]

3.5. Assessment of the Case by the CJEU

The CJEU explicitly confirmed that Article 41(1) of the Directive entails two cumulative requirements: the use of a durable medium containing the information, and that the information must be "provided" to the user.[45]

On the "durable medium" requirement, the Court adopted the functional criteria and echoing both Content Services and Inconsult Anstalt cases held that a website may qualify if it allows personal storage, future reference for an adequate period, and unchanged reproduction. Importantly, it added an explicit control-oriented safeguard: any possibility that the provider or a third party managing the site could unilaterally change the content must be excluded -> a point that tracks the EFTA Court's insistence on excluding unilateral alteration and confirms the "control" rationale underlying durability.[46]

However, the CJEU left to the national court the assessment of whether, in the circumstances of the case, the conditions it had identified for a medium to qualify as a 'durable medium' were met.[47]

On the second requirement "provided", the CJEU anchored its interpretation in Recital 27 of the Directive and agreed with AG Bobek's core insight that "provided" implies the provider must ensure effective communication without requiring the user to take active steps such as logging in to discover whether something has changed. The Court accepted that online banking transmission can amount to "providing" within Article 41(1), but only where accompanied by active behaviour aimed at drawing the user's attention to the existence and availability of the information. In this respect, we can also observe a convergence with the approach previously articulated by the EFTA Court.[48]

From a comparative perspective, the influence of the EFTA Court's judgment in Case E-4/09 is reflected primarily in the first part of the analysis carried out by both the AG and the Court, which in both instances

[44] Case E-4/09 par. 65 and Opinion of the AG in the Case C-375/15 par. 58.- 60
[45] Ibidem par. 39
[46] Ibidem par. 40 - 44
[47] Ibidem par. 46
[48] Ibidem par. 47 – 51

focused on the concept of a durable medium in an online / digital environment. The approaches diverge in the second part of the analysis, which then turns to the distinction between "providing" and "making available" information. Both courts converge on a technology-neutral functional test centred on storability, temporal accessibility, unchanged reproduction, and exclusion of unilateral change. The CJEU's willingness to cite and mirror that reasoning can be read as a "homogeneity-friendly" move, yet it remains firmly embedded in EU law because Directive itself in Recital 24 explicitly contemplates internet sites as durable media (if certain criteria's are met) and thus invites a functional approach.

Conclusion

The relevance of the EFTA Court's reasoning for EU law is not automatic: the EFTA Court operates in the EEA's two-pillar structure and delivers advisory opinions to national courts under the Surveillance and Court Agreement. At the same time, the EEA is designed to achieve a homogeneous internal market across the EEA, and interpretive dialogue between the courts serves that objective.

On the basis of the analysis carried out of the decisions of the CJEU in cases C-375/15 and C-49/11, in which the CJEU's previous judgment of the EFTA Court in case E-4/09 has been reflected, we consider that, despite the principle of homogeneity, which is primarily based on the assumption that, due to the greater number of cases, it is the CJEU that will be the court, which will be the first to have the opportunity to rule on certain ambiguous concepts of EU law, in the present case, that concept is in a way 'overturned' in favour of the EFTA Court, which, in the course of its case-law, had the opportunity to be the first to deal with the not entirely unambiguous meaning of the term 'durable medium', thus helping the development of EU law, since one of the ambiguous terms has been clarified in the practical application of the directive in question. However, the present case cannot be universally generalised to the overall relationship between the EFTA Court and the CJEU, since such adoption of reasoning from the EFTA Court by the CJEU is not frequent, and therefore it cannot be asserted that the CJEU's primacy is, in this respect, in any way undermined. At the same time, this case confirms the existence of the so-called "persuasive influence", whereby the reasoning of the EFTA Court's judgment was first endorsed by the AG, who subsequently presented these criteria for the concept of a "durable

medium" in his Opinion, which the CJEU then accepted and adopted in its final ruling. The case under review, however, sheds further light on the functioning of the dialogue mechanism between these two judicial authorities.

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CONDITIONAL BASIC INCOME FOR DEMOCRATIC RESILIENCE

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Abstract: The EU's policy has recently recognised the importance of strengthening European values as cemented in TEU Article 2 amid democratic backsliding. Complementing the EU's efforts, this paper puts forward a policy recommendation, for decision-makers, from local to supranational levels, to increase democratic resilience through enhancing the quality and quantity of civic participation. The research conceptualises an institution that enables and incentivises quality civic participation in public affairs. The institution creates a Conditional Basic Income (CBI) scheme, a system of monetary reimbursement conditional upon citizen's engagement in activities such as voting, public debates, citizens' assemblies and adult education. The institution's theoretical foundations lie in a synthesis between republicanism and liberalism, recalling the crucial role of civic virtues and duties in upholding democracy, while recognising people's limited capabilities for political engagement and autonomy to choose their own ends. The research involves a corresponding feasibility assessment including a review of risks and vulnerabilities, but for the sake of space, this is not part of the present essay.

Key words: Democratic Resilience, Rule of law, Constitutional Freedom, republicanism, autonomy

Introduction

While hopes concerning the further spread of liberal democracy as the leading model of governance were extremely high after the fall of the Soviet Union, in 2023 we witness the 18th consecutive year of shrinking democratic freedoms globally.[50] It is estimated that less than 8% of global

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[50] FREEDOM HOUSE: Freedom in the World Report 2024: Mounting Damage, Flawed Elections and Armed Conflict. Washington, D.C.: Freedom House, 2024. [online] Available at: https://freedomhouse.org/report/freedom-world/2024/mounting-damage-flawed-elections-and-armed-conflict [Accessed 2024.03.22].

population lives in a full democracy, while almost 40% lives under authoritarian rule.[51] Meanwhile, a huge part of the global population, 37.2% lives in a flawed democracy and an additional 15.2% in a hybrid regime.[52] These trends suggest not only a severe struggle for democratisation, but also a tendency of global democratic backsliding amid emerging threats. Crucially, symptoms of democratic backsliding are present not only in immature democracies, such as the post-soviet states of Europe, but also in societies which were previously thought to be exemplars of Liberal Democratic Constitutionalism (LDC) such as the United States of America (USA) or the Federal Republic of Germany. Most importantly, the USA has been recently relegated to the flawed democracy category.[53] Constitutional democratic values are being contested within the EU too, as populist and illiberal leaders are gaining momentum in several member states. The challenge of a "new democratic deficit" is on the horizon for the EU, as the democratic nature of some member states is being contested.[54] Therefore, to complement the EU's efforts in strengtening its Article 2 values, the present essay proposes an institution aiming to reinforce the integrity of well-functioning democratic systems, to mitigate the backsliding in flawed democracies, and to enhance the resilience of civil society in hybrid regimes.

The primary intervention logic of the proposition is to increase the number of virtuously participating citizens in public affairs, thus tackling the democratic vulnerability associated with the manipulability of citizens. The choice to focus particularly on this element of an otherwise very complex socio-political phenomena is underpinned by a number of factors which I'm unable to fully elaborate here. Yet, as Jürgen Habermas put it: "the institutions of constitutional freedom are worth as much as a

[51] ECONOMIST INTELLIGENCE UNIT: Democracy Index 2023 Age of Conflict. London: Economist Intelligence Unit, 2024. [online] Available at: https://www.eiu.com/n/campaigns/democracy-index-2023/ [Accessed 2025.04.03].

[52] Ibid.

[53] Ibid.

[54] Kim Lane Scheppele has put forward the "New democratic deficit" thesis recently in a number of public lectures - SCHEPPELE, Kim Lane: The EU's New Democratic Deficit. Princeton, New Jersey: University Center for Human Values, Princeton University, 2021, public lecture, Available at: https://uchv.princeton.edu/events/kim-scheppele-princeton-univeristy-eus-new-democratic-deficit [Accessed 2025.07.03].

population makes of them."[55] Despite the most meticulous initial setup, the institutions of constitutional democracies might only provide the expected public goods, if a sufficient ratio of capable citizens virtuously participates in them. Therefore, to achieve a sufficient number of virtuous citizens, the proposal aims to increase the capabilities of citizens for meaningful engagement in public affairs. However, this proposal is in tension with certain liberal principles such as the neutrality of the state concerning different conceptions of the good. Therefore, a significant chunk of the essay aims to create a synthesis between liberal neutrality and republicanism (which places considerably more emphasis on citizens duty to participate virtuously), to establish an adequate theoretical foundation for the proposal. In this regard, this also implies that the essay argues for a slight theoretical reform of LDC itself. The proposed reform would introduce a Conditional Basic Income (CBI) scheme to enable and motivate citizens for virtuous participation and to recognise their efforts.

Theoretical adjustment to enhance democratic resilience

It is intrinsic to the nature of democracy that it depends on the *demos* regarding its outcomes. Already in ancient Athens Plato has identified the corresponding vulnerability: if a sufficient number of citizens are misled concerning the true interest of the community by demagoguery and deception, or otherwise corrupted, the democratic system will be unable to produce outcomes that serve the true interest of the people.[56] Plato actually considered this risk excessive compared to the virtues of democracy. The problem, Plato argued, is that many citizens are not financially independent, many lack political education and thus, they are prone to fall victim to bribery or demagoguery.[57] Plato feared that ultimately people would relinquish power to an authoritarian, through a process that nowadays we might refer to as democratic backsliding.

[55] HABERMAS, Jürgen: Citizenship and National Identity: Some Reflections on the Future of Europe. In: Praxis International, Vol. 12, no. 1 (1992), pp. 1-19.
[56] CLARK, William Roberts – GOLDER, Matt – GOLDER, Sona Nadenichek: Principles of Comparative Politics. Thousand Oaks, California: CQ Press, 2013. Chapter 5. ISBN 978-1-60426-554-1.
[57] Ibid Clark et al. and LANGE, Stella: Plato and Democracy. In: The Classical Journal, Vol. 34, no. 8 (1939), pp. 480-486.

Hence, he reaches his famous anti-democratic conclusion in the Republic which is to be led by a closed group of wise men.
In the 21.st century, perhaps it became even more challenging for citizens to be well-informed and to participate virtuously in public affairs. First, with new communication technologies, today we live in a constant information overload. Furthermore, online service providers are actively trying to exploit our psychological vulnerabilities often employing AI tools to maximise the attention „paid" to their sites and to maximise their income, a system called surveillance capitalism or attention economy.[58] Thus, the complexity of the information landscape has immensely increased, while our mental capacities remained as before. Secondly, despite many citizens recognize the utmost importance of practicing virtuous civic participation, they have more pressing private priorities that effectively prevent them from engaging in virtuous public discourse or other forms of political participation. Afterall, if making ends meet financially is a challenge for your family, you are highly unlikely to spend your time researching the background of policy debates, instead of taking on a secondary employment. Thus, many citizens are not in a position, either financially or due to lacking educational attainment, to virtuously participate in political affairs and protect civic liberties.
Continuing with the analysis of social groups facing the dilemma of acting for private or public interests, another group can be identified. These are citizens who might recognize the importance of engaging in public affairs in the name of the common good, yet, they decide to free-ride the system and trust that fellow citizens will make a sufficient sacrifice to maintain the public good, the benefits of which they also wish to reap in their private life. This formulation exposes a classic collective action dilemma known from game theory. In the collective action problem the overall expected utility of a group would be maximised if members would cooperate. In the present case, cooperation means value laden public engagement. However, the problem arises due to the fact that

[58] ZUBOFF, Shoshana: The Age of Surveillance Capitalism. New York: PublicAffairs (Hachette Book Group), 2019. 704 pp. ISBN 978-1-61039-569-4. And CELIS BUENO, Claudio: The Attention Economy: Labour, Time and Power in Cognitive Capitalism. New York: Rowman & Littlefield International, 2016. 248 pp. ISBN 978-1-78348-823-0.

individually each person has an incentive to free-ride on the efforts of others. Which in the current context would mean a citizen who consciously avoids virtuous engagement in political affairs, while counting on the benefits of the public goods that are secured by such engagement. Such a citizen effectively avoids the burden and the sacrifice associated with engagement while enjoying the public good. Of course, if an excessive number of citizens attempts to free ride, the rest will not be able to maintain the public good or only with a considerably larger individual sacrifice. But, the larger the required sacrifice, the less citizens are capable and willing to make it. Leading to the erosion of the public good to the damage of the whole citizenry.

Another group of citizens might simply fail to recognize the value associated with maintaining civic control over the executive power, or alternatively, they do not believe that their engagement would have any effect on the balance of power between the elites and the ordinary citizens. Thus, they opt out from engagement in public affairs. Afterall, in effectively all democratic systems there's a significant share of the population who decides not to vote in general elections, which has arguably a lower entry threshold compared to frequent virtuous and informed engagement in public discourse as such. According to a recent study of 30 democracies, "people with occupations that only require a lower level of education are disproportionately less likely to vote. This effect of socially unequal voting is particularly pronounced among young voters."[59] This behaviour might already be a symptom of a dysfunctional democratic system, where this group of citizens lost trust in the self-correcting mechanisms of the governance system due to prior exploitation of their well-intended efforts towards the public good.

Lastly, the fourth group that I would identify here corresponds to citizens who are active in public affairs, however, their convictions concerning the adequate direction of state policies and its organising principles are contrary to securing equal freedoms for all citizens. While there always are citizens who contend the adequacy of constitutional democracy and argue for an anti-pluralistic system of governance. However, with the

[59] ELSÄSSER, Lea – HENSE, Sebastian – SCHÄFER, Armin: Who does (not) vote? Unequal democracies: Voter turnout trends in 30 European and North American democracies. Vienna: Friedrich-Ebert-Stiftung, 2024. 36 pp. [online] Available at: https://library.fes.de/pdf-files/bueros/wien/21421.pdf [Accessed 2024.03.22].

recent increasing polarisation of democratic societies fuelled among others by economic inequalities, migration tendencies, historical grievances and external authoritarian information warfare operations among others, the number of politically active citizens supporting anti-pluralistic and illiberal movements reached significant numbers. The challenge posed by this fourth category of citizens is extremely hard to overcome as these citizens are actively supporting agendas that are contrary to the constitutional principles in LDC regimes. I do not intend to define here which movements or parties qualify for this anti-pluralistic category, for it is a very sensitive and highly context dependent exercise, yet a claim concerning the existence of such communities would perhaps not be contended. Therefore, these citizens can neither be expected to contribute to maintaining the foundational values of LDC. Next to these four categories of citizens, luckily there is a fifth group. This category consists of citizens who recognize the importance of practicing virtuous civic engagement in political affairs to secure a constant control over the executers of public power. Who furthermore have the capacities to act in line with her recognition. And finally, who are also willing to make considerable sacrifices at the expense of their short-term private gains to uphold the invaluable public goods stemming from *liberté*, *egalité e fraternité*. Now, with this categorization in mind, wouldn't it be legitimate or even desirable for a state duly committed to the values of equal constitutional freedoms to enable, nudge and motivate citizens to make a contribution towards securing the required threshold of active and virtuous citizens?

Nowadays, most liberal regimes operate on a crucial state organising principle: the neutrality of the state concerning different philosophical and religious conceptions of the good. Thus, while liberal neutrality recognizes civic virtues, active political participation, and the common good as essential for LDC, it does little to actively promote them. Instead, the philosophy leaves it to the autonomous judgement of the citizen to pursue these virtues or not. Proponents of this school consider that citizens would recognize on their own that practicing virtuous participation in political affairs is essential for safeguarding the society they wish to live in. While I'm sympathetic to the attitude that citizens would employ these virtuous engagement methods autonomously, or following some limited civic education is secondary schools, we ought to recognize that the above description of the dilemma concerning virtuous public engagement severely undermines the validity of this approach. On

the other hand, republicanism is a theoretical tradition with roots reaching back to ancient Athens and Rome, which places considerably more emphasis on the civic duty of virtuous participation in public affairs for the common good.

There is no space here to duly revisit the liberal – republican debate and to issue a verdict. I merely wanted to raise pragmatic challenges concerning reaching the sufficient number of virtuously participating citizens and thus, to legitimise an approach which accepts the conscious protection of the values of freedom and equality. However, this also implies that perhaps the most fundamental liberal principle, state neutrality, shall be abandoned. I understand people's reluctance to accept this implication. However, it is crucial to recognise that I argue for abandoning neutrality for the sake of improving the resilience of liberal democratic constitutionalism, not for some exogenous goal to liberalism. Afterall, even John Rawls recognised that "liberty can be restricted only for the sake of liberty."[60] All in all, I argue that in the present context the neutrality principle shall be abandoned and the state shall be able to explicitly promote the values of freedom and equality.

The institution proposed by the current argument has its theoretical foundations in a synthesis between republicanism and liberalism, recalling the crucial role of civic virtues and duties in upholding democracy, while recognising people's limited capabilities for political engagement and autonomy to choose their own ends[61].

[60] RAWLS, John: A Theory of Justice. Revised ed. Cambridge, Massachusetts: Harvard University Press, 1999. 560 pp. ISBN 978-0-674-00077-3.

[61] KENDE, Péter: A liberális szemlélet republikánus kiigazítása. In: Kortárs Republikanizmus. Eds.: TÓTH, János Szilárd – LOSONCZ, Márk. Budapest: L'Harmattan, 2021, pp. 245-263. ISBN 978-963-414-722-1. And KIS, János: Közjó és honpolgári Erény. In: Kortárs Republikanizmus. Eds.: TÓTH, János Szilárd – LOSONCZ, Márk. Budapest: L'Harmattan, 2021, pp. 13-33. ISBN 978-963-414-722-1. and DAGGER, Richard: Civic Virtues: Rights, Citizenship, and Republican Liberalism. New York: Oxford University Press, 1997. 296 pp. ISBN 978-0-19-510634-3.

Building democratic resilience through Conditional Basic Income:

As discussed, Plato recognised the inherent vulnerability of democracy. Interestingly, we can also look back to ancient examples of democracy for potential solutions. For example, we should recall the reform of Pericles in the ancient Athenian democracy. Pericles introduced a daily allowance or monetary compensation for people who were assigned public duties as part of the functioning of democracy. Specifically, first payment was provided to citizens participating as jurors in the *dikesteria* or people's court and later the institution of pay was extended to cover additional functions. This reform, reduced the economic barriers to political engagement, empowering a wider segment of citizens and diminishing the dominance of wealthy elites in public affairs. As for current examples, one might recall the US jury system where jurors receive a daily allowance for fulfilling their duty which employs the same logic found in Ancient Athens. Moreover, the institution of compulsory voting is a further example, which usually fines citizens who have the right to vote but refuse to do so. Some formulation of such a system is operational in Belgium, Australia, Brazil and Argentina among others. For an overview see the compilation of IDEA.[62]

While these examples show us that the logic of incentivising democratic participation is not without historical or contemporary precedents, the system that I will outline differs from the already existing institutions in two crucial aspects. First, it does not only focus on specific institution such as jury duty or voting, rather its scope is substantively wider and includes several forms of civic engagement. Secondly, unlike the cited examples, the current proposal includes education into its scope, which is crucial, for it enhances the efficacy of the investment and contributes to a sustainable impact. Enabling and motivating participation is one thing, but it is essential that citizens participate in common affairs with the necessary skills and knowledge. Furthermore, this ensures that citizens actively remain resilient to novel challenges as they arise.

I argue that LDC should recognize, enable and incentivise citizens' efforts of well-informed participation in public affairs by providing a monthly allowance. LDC functions adequately when its citizens are engaged with public affairs. For meaningful participation, citizens should be up to date

[62] IDEA: Compulsory Voting. Stockholm: International IDEA, [no date]. [online] Available at: https://www.idea.int/data-tools/data/voter-turnout-database/compulsory-voting [Accessed 2023.11.19].

with relevant information and be able to filter out disinformation. They should organise interest groups and associations, join unions and parties, share knowledge and views with one another in an intelligible and respectful manner, engage in argumentation and debate, provide criticism and feedback to the leadership. Moreover, they should initiate reforms, protest, educate themselves and otherwise participate in public affairs with the intention of furthering the good of society as a whole. Nonetheless, these activities are time consuming, emotionally frustrating, intellectually challenging, tiring and require a level of financial sacrifice, an opportunity cost. Therefore, many citizens do not have the chance to meaningfully perform them, some are disillusioned thinking that their actions don't have a meaningful effect, and a significant group employs the free-rider logic and aims to reap the common benefits while avoiding the costs of maintaining the system that benefits them. In order to enable and incentivise citizens for meaningful engagement in the institutions of LDC, states should create a Conditional Basic Income scheme. Under this novel institution, a person would receive a monthly allowance, a *patriotic dividend*, which would be conditional upon the person's attendance in certain educational, discursive and directly democratic communal events. While in the present essay I only aim to initiate the discourse around the concept of a CBI, I will provide a limited overview concerning how I conceptualise the pragmatic feasibility of the institution.

First, the amount of the CBI would of course vary from country to country and time to time, but to provide an indication, I would argue that around one third of the minimum wage would be a sufficient amount to incentivise participation, yet it would escape the common criticism of basic incomes that they might disincentivise work in general. Moreover, it should be an essential feature that refusing the allowance should be an option, more so, above a certain income level, the default should be opting out of receiving the allowance. In order to enhance the cohesion of local communities and in line with the principle of subsidiarity, by default, these events should be organised at a level not higher than the municipal one. Yet, there will be inevitable exceptions and coordination on a regional, national and supranational level should be pursued. The organisation of the events should occur in cooperation with legally registered local associations and civil society organisations, but be coordinated by a responsible committee at the municipality. Integral to this committee should be the locally registered civic associations and

other relevant stakeholders. Not all events would be organised on a monthly basis, but lectures, seminars, workshops and public debates should occur monthly. The locations of events should be unpartisan buildings such as public libraries, townhalls, sport halls and if possible in the cultural and legal context of a country, possibly public schools and universities. Events should be hosted by the head of the relevant municipal committee, but should be led and facilitated by experts, members of local associations, scholars and practitioners who are committed to the integrity of their professions rather than the will of any political party or force in particular.

Furthermore, the type of activities that should fall under the scope of the CBI could be classified under three categories: A) Educational activities B) Discursive activities and C) Directly democratic ones. Whereas overlaps would certainly occur between the categories, these labels might help us to grasp the functions that the events should fulfil in order to achieve the desired goals. Educational activities should follow the logic of university lectures and seminars, complemented by workshops. Crucially, the digital age does not only pose challenges for LDC, but creates opportunities too. As such, gamified digital educational materials would greatly improve marginal costs and levels of penetration. Essential topics should include: media literacy, debating culture, state affairs, ethics, financial awareness etc. Discursive activities should be built upon educational ones and should put into practice the knowledge gained through the first category. These would be moderated debates between citizens, moderated debates between public intellectuals and decision-makers, issue focused citizens' assemblies etc. The third category, directly democratic events would not only include voting on elections and referenda, but could also include an element of community budget allocation, election supervision and more. Crucially, these events should also integrate digital solutions to voting procedures.

Conclusion

To conclude the present essay, I shall restate the main arguments and offer some criticism and limitations to the essay. First, it is a substantive challenge for citizens to participate virtuously in public affairs. From the arguments of Plato, to the current practices of surveillance capitalism, people could use some extra help in maintaining the public good of checks and balances, accountable public offices, impartial courts and

responsible politicians. Thus, following the logic of Pericles, a monetary reimbursement scheme, a Conditional Basic Income, should enable and support citizens in virtuous participation. However, this comes at a price: state neutrality shall be abandoned, but only for the sake of liberty and equality. Now, the aim of the essay is to initiate a public debate surrounding the proposal which has several internal limitations and risks. I outline a few of these to conclude the piece.

First, some might be concerned by the substantive financial and political requirements that setting up the CBI scheme would entail. As for political constraints, I shall admit that such an institution will probably not materialize in a country that is already too far down the hill of democratic backsliding. The proposal does require substantive political support from current leaderships, therefore, it will be unable to provide a democratic boost in backsliding countries where the elit has a firm grip on power. Next, assuming there is sufficient political will in a country behind the proposal, the massive financial requirements could still halt the process. I have three comments in that regard. First, a detailed feasibility study with a cost/benefit analysis should be performed to have sufficient information regarding concrete decisions. Secondly, given that established constitutional democracies are among the wealthiest countries in the world, I think it's not far-fetched to claim that they would be able to mobilise the capital, especially assuming there is public support behind the proposal. Thirdly, the tax system is effectively a system of incentives, which sometimes need fine-tuning and adjustment, perhaps the integrity of our system of governance merits one. Moreover, there is the possibility of reallocating already existing welfare benefits. These are certainly some of the available possibilities, but any decision must be based on a much more detailed holistic analysis than the last paragraphs of this essay allow for.

Finally, there remains a pressing political vulnerability concerning the proposal. One must establish a CBI scheme assuming that anti-democratic and/or illiberal actors will attempt to hijack the platform for their selfish political goals that are contrary to the original aims of the institution. To mitigate this risk, I advocate for the decentralised operation of the institution (organisational control at municipal committees complemented by civil society stakeholders), and there must be additional internal safeguards assuring a professional execution, internal democracy and additional checks and balances. Elaborating this aspect is essential in further research.

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THE QUANDARY OF THE MEMBER STATE'S PRIVATE LAW CONSEQUENCES OF AN EU INFRINGEMENT PROCEDURE IN THE FIELD OF STATE AID LAW

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Abstract: A state aid measure may usually affect the grantor, the beneficiary and the third persons potentially damaged by an incompatible state aid. However, there is a fourth concerned party sometimes that is not less affected by a potential declaration of incompatibility, the lender of the beneficiary. An infringement procedure is one way to force the Member State to terminate incompatible state aid. However, as the addressee of such a procedure is the Member State, the lender remains toolless when it comes to the risk of the procedure. The paper covers a case in which the national private law and the national courts -rightfully- failed the lender to enable it to terminate its contract concluded with the beneficiary. The paper aims at presenting the perplexity of national and EU law in the field of the private law consequences of an infringement procedure and the potential solutions.

Key words: infringement, state aid, national court, private law

The infringement procedure and the facts of the case

Under Article 258 of the Treaty on the Functioning of the European Union (TFEU) "if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union". Usually, the Commission deals with alleged incompatible state aid measures under Article 108(2) TFEU. However, this is not always the case, for instance, in

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this case, when there are more Treaty -or even secondary law- provisions suspectedly being infringed at the same time, therefore, an infringement procedure is opened by the Commission with the Commission's approach reaching out to the Member States before it would condemn a certain aid measure.[2] If a case does not solely concern state aid issues under Article 107 TFEU, but is also interconnected and scrutinized with, like in the current case, Articles 56, 49, 106(2) TFEU and the Concession Directive[3], then the breach cannot be challenged under the standard state aid procedure as the issue is branching and covers different provisions[4]. In infringement procedures, the competence to adjudicate falls upon the Court of Justice (Court), while in the standard state aid procedure, the annulment falls within the competences of the General Court.[5]

The infringement procedure consists of 2 distinct phases: first, it starts with its informal phase (pre-litigation procedure), then it may turn into a formal phase, potentially topped by the procedure taking place before the Court (litigation procedure). The Commission, if it considers it necessary at all, initiates the informal phase through EU Pilot dialogue (structured dialogue)[6], which, in my opinion, is the most amicable way of settling legal disputes on an international level and also effective as it prevents issues to escalate to the formal phase in around 75%[7]. "The Commission clearly values the elite cooperation dimension of the infringement procedure, which enables disputes over enforcement to be resolved at the pre-contentious stage without recourse to the Court."[8] This very informal step precedes the formal, albeit still not judicial part of the procedure, comprising the letter of formal notice and the reasoned opinion. If the EU Pilot dialogue does not succeed, the Commission dispatches a letter of formal notice requesting further information from the Member State, which is obliged to send a detailed reply. In case the

[2] Quigley p. 601-602

[3] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts

[4] Kreppenne Point 27.106

[5] Competences of the Court of Justice of the European Union https://www.europarl.europa.eu/ factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union (accessed 16th April 2025)

[6] Communication from the Commission — EU law: Better results through better application (2017/C 18/02)

[7] Single Market and Competitiveness Scoreboard https://single-market-scoreboard.ec.europa.eu/enforcement-tools/eu-pilot_en (accessed: 16th April 2025)

[8] Craig p. 467-468

Commission concludes that the Member State is breaching the Treaties by failing to fulfil its obligations under EU law, it may adopt a reasoned opinion, which is a formal demand to comply with EU law. In this document the Commission specifies all its reasons and grounds on which and because of what it considers the Member State to be infringing EU law. It is essential to state all its reasons and legal bases in the reasoned opinion, for later, in the unfortunate scenario of a Member State not aligning with EU law upon notice, the Commission cannot deviate from what it has already stated in its reasoned opinion if the procedure should turn into a litigation before the Court, otherwise its action shall be deemed inadmissible.[9] Failure to repair the breach, the Commission may bring action against the Member State before the Court by referring the case to it, and in the first round the Court either declares the infringement of EU law or it states, there has been no infringement of it. This is the exact momentum in time from what the Member State has got no other choice but to submit to this declaration and to bow to the judgment, thereby terminating the infringement. It is not possible to levy and to impose penalty upon the Member State at this stage, as it is up to the state how to mend the breach as soon as possible, within a reasonable time period that shall commence immediately upon the pronunciation of the judgment.[10] In case of a failure of such acting, the Commission may bring the case before the Court again to ask the Court to impose a penalty upon the Member State to enforce the willingness of the state.

The role of national courts as second-layer guardians of the Treaties

National courts play an enormous role in enforcing EU law. Even though, in this case the Court does not have the jurisdiction to rule on the compatibility of a state aid measure, it has got a full-scale arsenal to give guidance to the national court on how and by what metrics to do so.[11] National courts are also obliged to observe EU law, which obligation directly stems from the direct effect and direct applicability -with restrictions, especially with limitations in the field of state aid law- of the Treaties, regulations and directives, just like it stems from the principle of the supremacy of EU law and the indirect effect which places burden upon the national courts to interpret domestic legal sources in

[9] Case C-350/02, 24 June 2004, paras 16,20,29, ECLI:EU:C:2004:389
[10] Case C-131/84, 6 November 1985, para 7, ECLI:EU:C:1985:447
[11] Quigley p. 619

accordance and in harmony with EU law[12]. National courts also play an enormous role in the private enforcement of the EU's competition law, although, in the field of state aid it is not yet harmonised. In the field of state aid law, the handling of such issues vary Member State to Member State, nonetheless, Member States do grant their own ways to restore such damages.[13]

An infallible and airtight regime?

As contoured above, EU law, supplemented by national laws, as a European state aid regime, grants remedies for almost all kinds of competition law infringements, in the field of state aid, as well.[14] The decision of the Commission binds the Member States, thereby its courts, authorities and citizens, as well. Such decisions set a clear task: the Member State and its entities have to do everything in their power to recover the illegal state aid within the specified or a reasonable time period, usually with interest rate[15]. This also generates an obligation on the side of the recipient (beneficiary) to pay back its advantage. On the other hand, the national courts have to observe EU law and have to notice, *ex officio*, if a measure contains illegal (in the case of national courts, mostly unlawful state aid, due to the breach of the standstill obligation as laid out by Article 108(3) TFEU), state aid, or if a legal source runs counter EU law[16] (and may also avail itself of a reference for preliminary ruling by the Court). National authorities are also obliged to monitor state aid measures. Thereby, the circle seems to be hermetically sealed: EU institutions, national institutions and recipients have to obey EU law and the decisions of the courts and authorities adjudicating based on and safeguarding EU law and the Treaties.

Even beyond that, from the newest Micula case[17], it became clear that the compliance with the Treaties surpasses any other aspiration and objective: a Member State has to withdraw all its existing state aid measures granted prior to its accession to the EU that are not in line with Article 107 of the TFEU, and the beneficiaries who have been

[12] Von Colson case, Case 14/83, 10th of April 1984, para 26, ECLI:EU:C:1984:153
[13] Wollenschläger p. 6-7
[14] Goyder pp. 416-428
[15] Tóth p. 919
[16] Case T-578/17, 20 June 2019, para 8, 72, ECLI:EU:T:2019:437
[17] T-624/15 RENV, T-694/15 RENV and T-704/15 RENV, 2nd of October 2024, ECLI:EU:T:2024:659

dispossessed by these withdrawals do not have the right to seek compensation for their losses because the coherence of the internal market is of superior objective.

Are there any loopholes?

The above-detailed regime, thereby, seems to have created a system without any lacuna. However, some certain aspects and relations are not so much covered by it. Operating railways is still considered as a state monopoly in most of the Member States[18], even though, the liberalisation of this field has been accelerated by EU legislations.[19] When the state -the concession owner- wishes to authorise a company to exercise the right to operate a business belonging to state monopoly, it usually concludes a concession agreement with the operator -the concessionaire-, thereby enabling it to build, operate based on or to make use of that concession. These concession agreements may be concluded by any entity imputable to the state. However, concession is only one -albeit indispensable- part of the actual project, as this enables a private operator to construct facilities, infrastructure, terrain features and basically anything tangible or intangible that would otherwise be a task and prerogative of the state, may that be a railway construction and operation as in my current illustration. The other not less significant part of the project of the concession is to make it work, that usually necessitates the acquisition of financing, since being authorised to build a railway is a prerequisite, however, without the necessary amount of financing it is usually not feasible to attain this very objective. In order to obtain financing, the concessionaire issues bonds, lists its shares on the stock exchange, or most often it seeks loan from banks, typically from investment banks.

A concession, however, does not stand alone. As it is granted by the state, through itself or entities imputable to it, it is subject to state aid analysis. Granting concession to an undertaking may constitute state aid as it may constitute an advantage to an undertaking from the state or an entity imputable to it, selectively, thereby qualifying as state aid under Article 107(1) TFEU.[20] If the suspicion arises that the concession may contain state aid, the Commission may declare it in a decision after the necessary

[18] https://competition-policy.ec.europa.eu/sectors/transport/rail-transport_en

[19] Eliasson p. 594-618

[20] Quigley p. 27

consultations are being made under Article 108 TFEU or it may start an infringement procedure -if the detailed circumstances are given- to clear the situation under Article 258 TFEU.
The status of the lender in our case remains unsettled. The lender that provides loan for the subject of the concession to come to life is not the grantor of the state aid, nor the beneficiary, nor the damaged competitor affected by the illegal state aid. The first, second and third parties' status are settled, however the line does not continue to the fourth party, the lender, that does not seem affected by the -allegedly- illegal state aid.
As an illustration of the situation I am sketching the following facts: The concession agreement has been concluded for 50 years, including the construction of 2 railway tracks and the right of operating train and railroad services during these 50 years, the profit of which shall solely belong to the concessionaire, without any consideration to be paid by the concessionaire to the budget. After this the concessionaire approaches the lender to provide loan for the project. The lender has concluded a loan agreement with the concessionaire for a term of 20 years and consequently the lender has disbursed the loan to the concessionaire. The loan agreement only consists of standard terms that are usually covered also by the civil codes.
However, 6 months later the Commission approached the Member State via EU Pilot structured dialogue, expressing its concern about the concession constituting state aid as it presupposes, the lack of consideration on the side of the concessionaire along with other parameters of the concession and the non-transparent way of granting the concession rise sufficient suspicion to buttress its stance on the concession and the concession owner not being in line with the behaviour of a market economy operator (MEO), therefore runs counter the market economy operator principle (MEOP)[21].

The *actio radius* of the infringement procedure

Generally an infringement procedure takes years. In a case like the one presented by me, 3 years could elapse between the opening of the infringement procedure and the referral to the Court. The specialty of EU law is that –in principle- the Member State is bound by the decisions of the Commission (although may challenge them by initiating an

[21] Land Burgenland v Commission case T-268/08, 28th February 2012, para 48, ECLI:EU:T:2012:90

annulment procedure) and the judgment of the Court. However, the Court has got no power to coerce the Member State into executing its judgment. The only tool it has got is that it may motivate and pressurize the Member State by levying penalties upon it in the hope that the Member State would bend and eventually break under the burden of the financial pressure or under the public opinion. Still, as of the end of 2023, there were 16 active cases where Member States were still infringing EU law (active infringement cases).[22]
Therefore, there is a chance that the breach would be terminated by the Member State right upon receiving the request from the Commission in the EU Pilot dialogue, however, it is also possible that the concession would remain untouched during the entire 20-year term of the loan. Nonetheless, it is apodictic that in the case of either scenario, it is a risk for the lender.

The nature of loan agreements in the Hungarian private law and potential legal grounds

As stipulated by the Civil Code of Hungary, the lender may refuse to issue the loan if, after the conclusion of the contract, a substantial change has arisen in the circumstances of the debtor or in the value or enforceability of the security, due to which the performance of the contract can no longer be expected, and the debtor does not provide adequate security despite being requested to do so.[23] This option, however, cannot be applied to our case in question as the disbursement of the loan amount has already been taken place, the money has already been transferred to the concessionaire.
After the issuance of the loan there are four distinct, potential options for the lender to invoke: by the first scenario, it may unilaterally terminate the contract but only if there is a general breach on the side of the concessionaire, the debtor.[24] However, the opening of an infringement procedure against the Member State could hardly be interpreted as a breach of contract on the side of the debtor, hence, the second criterion, the cessation of interest in the performance[25] is not to be analysed,

[22] Special report 28/2024: Enforcing EU law – The Commission has improved its management of infringement cases, but closing them still takes too long, European Court of Auditors, p. 39.
[23] Section 6:384
[24] Section 6:140(1)
[25] Leszkoven p. 128

therefore, this provision, in my opinion, shall not be applied in this case, either. Regardless of the stage of the infringement procedure, even after the second judgment of the Court, the incompatible character of the aid cannot be construed as a breach attributed to the beneficiary in the beneficiary's private law relations.

As a second scenario, the lender may resort to the special provisions relating to the unilateral termination of a loan agreement. According to them, the lender may unilaterally terminate the contract in seven cases, three of which could (and in the certain case was) argued, namely if a) substantially adverse changes have arisen in the circumstances of the debtor; b) it is impossible to use the loan for the purpose specified in the contract, or the debtor does not use the loan for that purpose; c) the debtor has deceived the lender, thereby affecting the conclusion or the content of the contract. Regarding point a) it could be argued that the change has arisen in the circumstances of the debtor as this expression refers to a risk-sharing: does a circumstance fall within the circumstances of the lender or the debtor. It is not arguable, that from the two possibilities, it rather falls within the circumstances of the debtor and not the lender. The Civil Code does not prescribe liability as a prerequisite for a change to fall within the circumstances of the debtor, therefore it is not to be analysed whether the debtor is liable for such adverse change. However, the national courts require this change to be connected to the financial situation of the debtor, and the mere fact of a judgment declaring the project to be containing incompatible state aid is not to be comprehended as such.[26] Point b) could also be reasonably invoked as it is clear that a legal transaction (concession) that has been found incompatible state aid and which the project, the purpose of the loan is based on, shall not be executed, however, the inactivity of the Member State (active infringement) impedes the national court to conclude that it is impossible to use the loan for the specified purpose as the Member State has not terminated the concession, therefore, from the point of view of the lender, the purpose is not frustrated, consequently the national court rebuffed this argument, as well. Regarding point c) it could distantly be argued that the debtor deceived the lender about the state aid character of the project. However, the state aid categorisation does not depend on the debtor, therefore, it is not in the position of deceiving the lender about this, thus, the national court rejected this argument.

[26] Tőkey p. 1998

The third potential option of the lender is invoking the impossibility of performance. According to the Civil Code, if performance has become impossible, the contract shall terminate.[27] The impossibility may be legal, physical, economic or of interest.[28] Out of these, the first and the fourth ones could be argued. Regarding the legal impossibility of the performance, it can be relied on when the legal background so changes that it prohibits or practically prohibits the execution of performance, for instance when a new legal act prohibits an activity that has otherwise been legal prior to that. However, a judgment addressed to the Member State and not abided by and not executed cannot be considered as a prohibiting legal act as the ban shall have the immediate effect of making the performance impossible, therefore, the "legal *vis maior*" could only be argued if the Member State actually executed the judgment (or acted according to the letter or opinion of the Commission) and it would have terminated the concession. The national court took this stance, as well. The impossibility of performance due to the cessation of interest cannot be invoked, either, as it could be relied on when, after the conclusion of the contract, a change of such gravity and magnitude occurs in the party's individual or market-economic circumstances that significantly exceeds the usual level of business risk and which could not have been foreseen even with due care[29], and the facts of the case fall short of the requirements detailed above as first, this risk could have always been foreseen and also falls under the realm of the usual business risk.
The fourth argument is that firstly, the concession agreement was an illegal contract. According to the Civil Code of Hungary "any contract which is incompatible with the law or that was concluded by circumventing the law shall be null and void."[30] A person who has a legal interest therein or who is so authorized by law, may rely on the nullity of the contract and may bring action in connection with the nullity of the contract according to the Civil Code.[31] Therefore, the lender has got the right to invoke the nullity of the concession agreement, even though, it is a third party outside of the obligation. And if the national courts declare (or simply observe) the concession agreement null and void, thereby

[27] Section 6:179(1) and Section 6:180(1)
[28] Tőkey p. 1643
[29] Tőkey p. 1644
[30] Section 6:95
[31] Section 6:88(3)

invalid, the concession has to be winded up, and then, eventually, the lender has the right to unilaterally terminate the contract based on what has been detailed above, that it is impossible to use the loan for the purpose specified in the contract. In this case, this fourth option is basically a prerequisite of the abovementioned second scenario. However, in the case it has been established that even though, state aid may be incompatible and illegal in the EU law sense, however, just because the Court finds that the Member State is infringing EU law, it only has got one consequence, which is that the Member State has to terminate the state aid (the concession), but it does not make the state aid (the concession agreement) invalid, unlike, for instance an agreement restricting competition under 101(2) TFEU, Based on these, it is impossible to invoke the invalidity of the concession agreement by the lender because invalidity of the underlying contract is not a consequence of a state aid decision/judgment and the lender cannot invoke that the concession agreement runs counter 107(1) TFEU because -according to the national court- the (in)compatibility check is not up to the national courts and even if the authorised and relevant institution (the Court or the Commission) declares so, it does not entail automatic invalidity under the national private law, therefore the concession agreement cannot be an illegal contract.

Conclusion

Deducing from all these, the lender has got no *ex post* remedy to exit the deal, the parties have to keep performing until (when or if, at all) the Member State opts for complying with the judgment of the Court for any reasons, but mostly for getting released from the financial sanctions imposed on it. The only opportunity for a lender is to prepare for such circumstances *ex ante*, therefore it has to fit out its contracts that cover such rare cases, as well. Based on these bitter experiences, some financial institutions have changed the samples of their agreements accordingly by explicitly stating that the issuance of the letter of formal notice of the Commission qualifies as a substantially/materially adverse change (as detailed in the second scenario), thereby there is no legal disputes whether it qualifies as such and based on that the lender may unilaterally terminate the loan agreement instantly (or with a 15-day notice period). There are diverging opinions on where to draw the line after which the termination could be effectuated. The interests of the lender would suggest that it could terminate the contract right at the start of the EU

Pilot structured dialogue. However, firstly, that is a confidential phase, therefore, the lender should not know about it, and secondly, the national courts may declare such a clause -being part of the general terms- invalid as granting a too wide and arbitrary discretion for the lender on when to terminate the contract[32], especially at such an early and uncertain stage with an unpredictable outcome. It is also arguable if this right is exercised right upon the dispatch of the letter of formal notice, as this stage may also end up in the Commission dropping the case or the Member State mending the infringement in other ways than terminating the measure. In my view, the most balanced momentum in time would be the publication of the first judgment of the Court from when the lender could exercise its right to terminate the loan agreement because from this time it is declared by the Court that there has been an infringement and from this moment the Member State has got no opportunity to escape from this declaration and to steer clear of compliance as uncertainty ceases to exist at this point, on the other hand, I see no reason to wait until the second judgment as that does not add any surplus to the fact of infringement and the need for immediate reparation. That is certain, however, that the sooner it occurs, the likelier the invalidity of such clause is as mentioned above because of its unfair, thereby invalid character.
In my opinion, it would be advisable to conduct a debate on whether the automatic nullity of incompatible state aid-related legal transactions could facilitate a more effective compliance with EU law, just like in the case of Article 101(2) TFEU, or at least upon the first judgment of the Court, after its thorough and final assessment and declaration.

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[32] Section 6:102(1)

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QUESTIONS AND ANSWERS IN THE CONTEXT OF JURISDICTION IN HUNGARIAN AND EUROPEAN UNION (INTERNATIONAL) CIVIL PROCEDURE LAW

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Abstract: The aim of this study is to analyze jurisdiction as one of the most dominant concepts in international civil procedure law. In this context, the author describes the basic conceptual elements of jurisdiction, highlighting its relationship with jurisdiction and competence.

In many cases, jurisdiction arises as an absolute impediment to litigation ('excluded jurisdiction'). This article analyzes the cases of excluded jurisdiction based on both EU legal sources and Hungarian legislation. At the same time, the author addresses not only the question of excluded jurisdiction but also that of exclusive jurisdiction.

Furthermore, jurisdiction may also be a relative obstacle to litigation, and in connection with this, the legal institution of intervening in a lawsuit must be reviewed.

The analysis follows two basic methodologies: in addition to judicial practice, it processes the conclusions of the legal literature, continuously reflecting on the ministerial justification of the Act on Hungarian Private International Law.

The author concludes that the Hungarian procedural law system relies heavily on and is in accordance with the norms of EU law (with the exception of the norms of the Brussels IIb Regulation concerning intervention and Article 106 (2) of the Hungarian Private International Law Act). This necessarily also means that, in addition to Hungarian case law, the legislation of the CJEU must also be taken into account.

Keywords: jurisdiction, domestic law, absolute procedural impediment, excluded jurisdiction, exclusive jurisdiction

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Introduction – the concept of jurisdiction

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

The aim of this study is to identify possible jurisdictional issues that arise and to find answers to them, focusing specifically on Hungarian civil procedure. In doing so, this article will rely primarily on the analysis of the provisions of the Hungarian Act on Private International Law (hereinafter: NMJTV)[2] and the Hungarian Code on Civil Procedure (hereinafter: CPC)[3] and, to the extent necessary, the main EU jurisdictional regulations (Brussels Ia.,[4] Brussels IIb.,[5] EU Succession Regulation,[6] and Maintenance Regulation[7]).

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

[2] 2017. évi XXVIII. törvény a nemzetközi magánjogról (Act XXVIII of 2017 on Private International Law).

[3] 2016. évi CXXX. törvény a polgári perrendtartásról (Act CXXX of 2016 on the Code of Civil Procedure).

[4] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351/1.

[5] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) ST/8214/2019/INIT OJ L 178/1.

[6] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ L 201/1.

[7] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations OJ L 7/1.

('competence'),[8] as well as competence in the international sense ('jurisdiction')[9] are known as definitions.
István Szászy considered competence to be a question of jurisdiction, i.e., in his opinion, the court must have jurisdiction over the procedure in relation to several aspects.

1. Under international law, the courts of the state should have jurisdiction to exercise judicial power, being one of the branches of state power – i.e., the courts of the state should have the power to apply the law and judge in the specific case (*Gerichtsbarkeit, facultas iurisdictionis*). In other words, judicial competence means the state's ability to apply international law, the counterpart of which in private international law is the state's ability to legislate under international law; its legislative right.
2. It is also necessary that the courts of the state have jurisdiction under international and domestic state law vis-à-vis foreign courts to decide the dispute in a specific case, i.e., judicial jurisdiction under international law and domestic state law means judicial jurisdiction under international law and domestic state law in the

[8] KENGYEL Miklós: Keresetindítás [Filing for Action]. In: NÉMETH János – KISS Daisy (eds): A polgári perrendtartás magyarázata [Commentary on the Code of Civil Procedure]. Complex kiadó, Budapest, 2006. 778.; ZSITVA Ágnes: Perindítás [Bringing action]. In: WOPERA Zsuzsa (ed): Kommentár a polgári perrendtartáshoz [Commentary on the Code of Civil Procedure]. Wolters Kluwer, Budapest, 2019. 440.; ÉBNER Vilmos: Perindítás [Bringing action]. In: VARGA István (ed): A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja [Commentary on the Code of Civil Procedure and related legislation]. HVG-ORAC, Budapest, 2018. 707. para 1829; NÉVAI László – SZILBEREKY Jenő: Polgári eljárásjog [Civil procedural law]. Tankönyvkiadó, Budapest, 1974. 169.; GOMBOS Katalin: A Brüsszel Ia rendelet és a készülő nemzetközi magánjogi törvény egymáshoz való viszonya [Relationship between the Brussels Ia and the forthcoming private international law]. In: BERKE Barna – NEMESSÁNYI Zoltán (eds): Az új nemzetközi magánjogi törvény alapjai – Kodifikációs előtanulmányok [Fundamentals of the new private international law law - Codification preliminary studies]. HVG-ORAC, Budapest 2016. 181.

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narrower sense (*iurisdictio internationalis, staatliche, abstrakte Zuständigkeit*), to which legislative jurisdiction corresponds in private international law.

3. It is also a prerequisite that the case must be subject to civil proceedings, i.e., that the civil courts of that state must have jurisdiction to decide the dispute.
4. The fourth criterion to be examined is the classic question of jurisdiction in civil procedure (*sachliche Zuständigkeit*), i.e., which level of the judicial system is competent to act in the dispute.
5. Finally, territorial jurisdiction (*örtliche Zuständigkeit*), which is referred to in Hungarian civil procedure law as jurisdiction, should be included here.[10]

Miklós Világhy regards jurisdiction as the right of the state, flowing from its sovereignty, to act by state means (either administratively or judicially) in assessing legal relations containing foreign elements. Világhy also points out – in explaining the uncertainties regarding the conceptual definition – that the conceptual basis of jurisdiction is the distinction known in the domestic legal system of each state between competence on the one hand and jurisdiction on the other. It is important that while competence classically allocates cases within a single state, experience shows that the distribution of cases occurs not only within individual states but also between individual states, so some rules are required to distribute individual cases internationally among the various bodies of states. Világhy calls this international division of cases jurisdiction. In his view, this latter division of cases expresses 'the same kind of territorial distribution of cases as jurisdiction implies under domestic law'.[11]

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

To sum all this up, it can be stated that jurisdiction means the international division of cases and the subordination of the forum of one

[10] In detail: SZÁSZY 315-316.

[11] VILÁGHY 71.

or another state to the decision-making power. Thus, 'jurisdiction feeds on the sovereignty of the state; [it] means the right of the state, flowing from sovereignty, to act in court with the help of state resources in disputes involving a foreign element'.[12] It is important to note that jurisdiction in this study refers only to judicial jurisdiction in the form of the decision-making power of the courts of a given state in a given case[13]; i.e. we do not examine the issue of jurisdiction from an administrative or legislative point of view.[14]

Date of determination of jurisdiction

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

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

The CPC does not expressly provide for this issue, and nor does the NMJTV offer any further guidance in this regard. However, it may be a starting point if the date of the filing of the application is the relevant date

[12] MÁDL Ferenc– VÉKÁS Lajos: Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga [Private international law and international economic relations law]. ELTE Eötvös Kiadó, Budapest 2012. 457-458. para 598.

[13] In detail: JUHÁSZ 389-390.

[14] To the definition of jurisdiction see also: Andreas HELDRICH: Internationales Zuständigkeit und anwendbares Recht – Beiträge zum ausländischen und internationalen Privatrecht. J.C.B. Mohr (Paul Siebeck) Tübingen, 1969; Bernd von HOFFMANN: Internationales Privatrecht. Verlag C.H.Beck, München 2001; Haimo SCHACK, Internationales Zivilverfahrensrecht. Verlag C.H.Beck, München 2010

[15] SZÁSZY 408.

for both competence and jurisdiction, then also when determining jurisdiction, and if the originally missing jurisdiction is deemed to exist due to a change in circumstances during the litigation, the jurisdiction of the Hungarian court may be established.

In essence, this principle is the basis of the legal institution of entering the proceedings since jurisdiction is absent when the application is lodged, and only a positive statement by the defendant (submission of a written defence) creates jurisdiction. Otherwise, the proceedings must be terminated ex officio (Section 240 (1) (b) CPC). However, if, during the litigation, the circumstances necessary to establish jurisdiction change and the jurisdiction existing until then ceases to exist, this does not constitute an obstacle to litigation in the absence of an express rule of litigation; it does not result in the termination of the proceedings. In other words, the answer to the question posed by István Szászy is, in my view, that Hungarian law recognises the principle of perpetuatio iurisdictionis.

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

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

[16] ARATÓ István: Joghatóság a külföldi állam magánjogi ügyletei felett [Jurisdiction over the private law transactions of a foreign State]. Taizs József Könyvnyomda, Pécs, 1942. 35.

Jurisdiction as an absolute procedural impediment – excluded jurisdiction and the exclusive jurisdiction of a court of another state

General overview

Based on the above definition of jurisdiction, it can be concluded that the lack of the latter may result in an impediment to litigation, i.e. it may arise as a condition for litigation.[17]

According to István Szászy's approach, however, the term 'litigation condition' is not precise enough because the existence of jurisdiction is not an existential prerequisite for the establishment of the entire litigation relationship (i.e., the litigation legal relationship), bearing in mind that a lawsuit may also be brought before a court without jurisdiction, and the court must decide on the question of jurisdiction. Therefore, Szászy argues that the existence of jurisdiction is a condition for the admissibility of litigation.[18]

At the same time, it is essential that the absence of jurisdiction is not the same as an obstacle to litigation because, in the system of Hungarian civil procedure, only excluded jurisdiction or the exclusive jurisdiction of a foreign court can result in the rejection of the application as an obstacle to litigation (absolute procedural impediment) (Section 176 (1) (a) of the CPC). In cases of excluded jurisdiction, the CPC refers to applicable laws, binding acts of the European Union, and international conventions. In other words, on the basis of these sources of law, the court must decide whether jurisdiction is excluded on the side of the Hungarian courts.

This is why I share Szászy's opinion that the absence of jurisdiction in itself is not an obstacle to litigation; it is not a condition for litigation, unlike excluded or exclusive jurisdiction; in all other cases, the admissibility of litigation depends on the defendant's conduct, i.e. in the

[17] The conditions of litigation are the conditions in the absence of which the application must be rejected (Section 176 (1) to (2) of the CPC). For their detailed, dogmatic analysis: MAGYARY Géza: A magyar polgári peres eljárás alaptanai (A perbeli cselekmények tana) [The Foundations of Hungarian Civil Litigation (The doctrine of the procedural acts]. Budapest, 1898.; MAGYARY Géza: Magyar polgári perjog [Hungarian civil litigation law]. Franklin Társulat Budapest, 1913.; BACSÓ Jenő: A jogvédelem előfeltételei a polgári perben [Prerequisites for legal protection in civil proceedings]. Máramarossziget, 1910.; Sándor Plósz: A keresetjogról [About right of action]. Budapest, 1927.; NÉVAI László–SZILBEREKY Jenő: Polgári eljárásjog [Civil procedure law] (Tankönyvkiadó, Budapest, 1971.; KENGYEL Miklós: Magyar polgári eljárásjog [Hungarian Civil Procedure Law]. Osiris kiadó, Budapest, 1998.

[18] SZÁSZY 399.

absence of judicial jurisdiction, the legislator gives the defendant the right to choose whether to accept (at least implicitly) the jurisdiction of the state of the given court, that is, the law presumes such acceptance represents the 'implied agreement of jurisdiction' of the defendant.[19]

When defining cases subject to excluded (averted)[20] jurisdiction, the legislature takes into account only the nature of the case to be adjudicated, which is why it can be called unconditional. It is independent of the fact that there may be a domestic court competent to hear the case. By contrast, competing (parallel) jurisdiction already implies conditional, jurisdictional jurisdiction. As a general rule, jurisdiction is excluded in matters in which the domestic state has no judicial capacity to adjudicate under international law and when it lacks any territorial or personal connection whatsoever with the territory and citizens of the domestic state or with its substantive law.[21]

Hungarian judicial practice emphasises that, a lawsuit may only be terminated if the jurisdiction of the Hungarian court is excluded from the action pursuant to a provision of law or international convention. This does not apply in cases where a jurisdiction clause fails to clearly designate the courts of a foreign state or a specific foreign court.[22]

The judicature is clear: an application can only be rejected if Hungarian jurisdiction is excluded. However, upon the defendant's objection, the court is required to examine ex officio whether grounds exist to establish its jurisdiction.[23]

It is important that excluded or exclusive jurisdiction is an absolute procedural impediment, i.e. this must be taken into account at any stage of the proceedings, so if the court notices the absence of this condition after the notification of the claim (Section 179 (1) of the CPC), the proceedings shall be terminated ex officio (Section 240 (1) (a) of the CPC); this rule also applies in redress proceedings [in appeal proceedings: Section 379 of the CPC; in review proceedings: Section 379 CPC applicable under Section 405(1) CPC].

[19] JUHÁSZ: 401.
[20] SZÁSZY 322.
[21] SZÁSZY 322-328.
[22] BH2004. 153. I.
[23] Budapest-Capital Regional Court of Appeal 9.Pkf.25.572/2020/2.

Excluded jurisdiction in domestic law

Within the scope of excluded jurisdiction, the source of domestic law is Section 89 of the NMJTV, which exhaustively lists proceedings in which the jurisdiction of the Hungarian court is excluded, which simultaneously means the recognition of the jurisdiction of the foreign court.

The areas of regulated by Section 89 of the NMJTV overlap to a large extent with the rules of exclusive jurisdiction laid down in Section 88 of the NMJTV, so the interpretative framework valid in this area also applies in relation to excluded jurisdiction.

However, the situation is complicated by the fact that while the Brussels Ia Regulation establishes exclusive rules of jurisdiction but not expressly excluded rules of jurisdiction, the exclusive rules of jurisdiction of the regulation only constitute excluded jurisdiction in relation to other EU Member States. Consequently, rules of jurisdiction excluded in relation to a third state should be laid down in domestic law.[24] When interpreting of the NMJTV, it is advisable to take into account the case law related to the Brussels Ia Regulation, as referred to later.

Where there is no explicit need for different rules, the Act reproduces the rules under EU law in order to ensure that, despite the different sources of private international law, the Hungarian judge or authority must examine their jurisdiction on the basis of the most uniform set of rules possible to facilitate their task.[25]

In the present paper, however, we will analyse certain rules of excluded jurisdiction regulated by the NMJTV only to the extent necessary, and for reasons of content and scope, we will refrain from examining them in detail.

As a matter of fact, it can be stated that the grounds of excluded jurisdiction are justified by the public interest linked to the legal relationship concerned or by the exclusive domestic aspects of the legal relationship.

In view of the fact that Section 89 of the NMJTV and Section 176(1)(a) of the CPC deny the Hungarian court the right to act, the reasons listed in the NMJTV must therefore be interpreted restrictively.[26]

[24] Bill T/14237 on Private International Law 87 ('the Proposal').

[25] Proposal 86.

[26] Proposal 86.

Pursuant to Section 89 (a) of the NMJTV, the jurisdiction of a Hungarian court is excluded in proceedings concerning a right in rem on real estate situated abroad or the lease or sale f such real estate.
The exclusion of rights in rem in relation to immovable property is also justified because the resolution of such disputes often requires checks or expert or other examinations that must be carried out on the spot, and the resolution of such disputes is often influenced by consumer habits which is best known to the courts of the Member State in which they are situated. It justifies the transfer of jurisdiction to a state that data, facts and rights relating to immovable property are recorded in the state in which it is located.[27] It is worth highlighting, based on case law, that the Hungarian court had no jurisdiction over an action aimed at replacing the legal declaration required for the registration of real estate ownership in Croatia by a court judgment. In the present action, the claim sought to be enforced is not a claim in rem; however, the jurisdiction of the Hungarian court is excluded, given that the proceedings concern the registration of rights, facts and data in a public register maintained in Hungary.[28]
It is relevant: the CJEU clarified the condition relating to ownership of immovable property in the Cez judgement, stating[29] that exclusive jurisdiction does not extend to all actions which have as their object a right in rem in immovable property, but only those actions which concern the territory of immovable property that are intended to establish the existence of its condition, property, possession or other right in rem and to secure the prerogatives of rightsholders by virtue of their title.[30]
The second phrase of Section 89(a) of the NMJTV applies to the lease and sale of real estate. An action falls under this clause only if its object is a right or obligation arising from the tenancy itself. The legal policy justification for this is that the rental of immovable property is generally governed by specific laws in the national legal canon, which are more appropriately heard by the courts of the state where they are in force. The excluded jurisdiction covers disputes between a landlord and tenant

[27] KÖBLÖS Adél: A kizárólagos joghatóság [The exclusive jurisdiction]. In: WOPERA Zsuzsa – WALLACHER Lajos (eds): Polgári eljárásjogi szabályok az Európai Unió jogában [Rules of Civil Procedure in European Union Law]. Wolters Kluwer, Budapest, 2005. 110.
[28] BH2014. 47.
[29] Case C-343/04 Land Oberösterreich v. ČEZ EU:C:2006:330
[30] OSZTOVITS András: Joghatóság [Jurisdiction]. In: CSEHI Zoltán (ed): Magyarázat a nemzetközi magánjogról [Commentary on Private International Law]. Wolters Kluwer, Budapest, 2020. 871.

concerning the existence and interpretation of a lease agreement, as well as compensation for damage caused by a tenant to rental property, but it does not apply to issues related to the payment of rent.[31] In the CJEU's view,[32] a contract which does not exclusively provide for the partial rights of use of a holiday resort but also concerns the provision of other services with a value exceeding the value of that holiday use right cannot be regarded as a contract for the rental of immovable property and is therefore not subject to the rules of exclusive jurisdiction .[33]

According to Section 89 (b) of the NMJTV, the jurisdiction of a Hungarian court is excluded in probate proceedings concerning the foreign estate of a non-Hungarian citizen. The rule can be justified by the speciality of probate proceedings, but only in the case of purely foreign inheritance relationships not settled by the regulation due to the temporal effect of the EU Succession Regulation.[34]

According to Section 89(c) of the NMJTV, the jurisdiction of a Hungarian court is excluded in proceedings for the destruction of documents or securities issued abroad. In this context, it should be borne in mind that the destruction of securities falls within the scope of the Brussels Ia Regulation if the subject matter of the proceedings falls within the material scope of the regulation, but this does not apply to the destruction of other documents.[35]

Section 89(d) of the NMJTV stipulates that the jurisdiction of a Hungarian court is excluded in proceedings relating to the grant, content and termination of foreign industrial property rights. When interpreting the rule, it should be noted that the granting of industrial property rights actually results from the exercise of state sovereignty, and these rights may be exercised in the territory of the state where they are registered.

Thus, according to the case law of the CJEU, this includes disputes concerning the existence, validity or extinction of a patent or a priority right based on a previous deposit. However, it does not include claims arising from patent infringement or disputes between an employer and an employee based on an employment contract concerning the right to

[31] KÖBLÖS: 113.
[32] Case C-73/04 – Klein, EU:C:2005:607.
[33] Case C-73/04 Brigitte and Marcus Klein v. Rhodos Management Ltd. EU:C:2005:607.
[34] Proposal 87.
[35] OSZTOVITS 877.

patent protection over an invention developed by an employee during their employment.[36]

Pursuant to Section 89 (e) of the NMJTV, the jurisdiction of the Hungarian court is excluded in proceedings relating to the establishment or dissolution of a legal person or legal entity without legal personality established abroad (hereinafter collectively referred to as 'legal person' for the purposes of the topic of discussion) in proceedings relating to the validity of the contract or articles of association on the basis of which the legal person was registered, or in proceedings for the review of decisions taken by the organs of the legal person.

The purpose of the rule is clear: to avoid conflicting and incompatible decisions and to ensure that data, facts, rights and changes thereto relating to individual legal persons are recorded and published in the home state that is best placed to adjudicate on these disputes.[37]

Pursuant to Section 89 (f) of the NMJTV, the jurisdiction of the Hungarian court is excluded in proceedings concerning the registration of rights, facts and data in a public register kept abroad. It is important that this provision applies only in relation to the registration of rights, facts and data directly in connection with the proceedings of the court or authority keeping the public register (such as an action for annulment of the order of registration order). If, on the other hand, the subject matter of the proceedings is not the registration itself but the right, fact or data on which the registration is based, that ground of jurisdiction shall not apply.[38]

Pursuant to Section 89(g) of the NMJTV, the jurisdiction of the Hungarian court is excluded in proceedings concerning foreign enforcement. The exclusion of jurisdiction in proceedings concerning foreign enforcement also follows from international law since the enforcement of judgments is a very close consequence of state sovereignty and public authority. The excluded Hungarian jurisdiction is also supported by the relationship between the forum acting and the applicable foreign substantive law.[39]

In addition to the exclusive jurisdiction rules presented so far, the relationship between immunity and the exclusive jurisdiction rule should

[36] Case C-288/82. Ferdinand M.J.J. Duijnstee v. Lodewijk Goderbauer, EU:C:1983:326.

[37] KÖBLÖS 116.

[38] Proposal 87.

[39] Detailed explanatory memorandum relating to Section 1 of Act CX of 2000 on the amendment of certain laws on jurisdiction and the recognition and enforcement of foreign judgments.

be examined. Should Section 86 (2) of the NMJTV, according to which no Hungarian court may act in proceedings against a foreign national acting as diplomatic representative in Hungary or otherwise exempt from jurisdiction, be interpreted as a rule of jurisdiction unless the foreign state or the employing international organisation has expressly waived immunity?

Although formally, this rule appears to be a jurisdictional norm, in my view, it is more correct to interpret it as an immunity issue. The problem of immunity is related to the ability to judge (facultas iurisdictionis). In Hungarian jurisprudence, István Szászy called judicial capacity an independent litigation condition distinct from jurisdiction. In his view, judicial capacity 'means the judicial power vested in the state, ... which shall not be vested in the state unless the legal relationship to be adjudicated involves a foreign sovereign state or any of its organs or institutions acting in the exercise of legal authority'.[40]

Tibor Szőcs points out that judicial capacity essentially concerns the immunity from Hungarian judicial power of foreign states, state bodies or persons enjoying diplomatic or other international legal immunity, which, however, has not been specifically regulated procedurally but has merged into the system of rules of jurisdiction.[41] That is, the question of immunity arises as a lack of jurisdiction — excluded jurisdiction — and thus results in the rejection of the application. Kinga Timar also emphasises in her study that 'the absence of state immunity is a prerequisite for the applicability of European jurisdictional regulation.'[42] That is, the assessment of immunity must necessarily precede the jurisdictional examination.[43]

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[40] SZÁSZY 328.

[41] SZŐCS Tibor: A magyar nemzetközi polgári eljárásjogi reformja – szabályozást igénylő kérdések [Reform of Hungarian civil procedure law - issues requiring regulation]. In: NÉMETH János– VARGA István (eds): Egy új polgári perrendtartás alapjai [Egy új polgári perrendtartás alapjai]. HVG-ORAC, Budapest, 2014. 678.

[42] TIMÁR Kinga: Immunitás és joghatóság az Európai Bíróság aktuális gyakorlatában [Immunity and Jurisdiction in Current Practice of the European Court of Justice] 58. (https://edit.elte.hu/xmlui/static/pdf-viewer-master/external/pdfjs-2.1.266-dist/web/viewer.html?file=https://edit.elte.hu/xmlui/bitstream/handle/10831/35148/Jogi_tan_2010_3_Timar_Kinga_p_45-60.pdf?sequence=1&isAllowed=y – accessed 10 April 2025.).

[43] NEMESSÁNYI Zoltán: A nemzetközi szervezetek immunitása és a joghatóság polgári kereskedelmi ügyekben [*Immunity of International Organisations and Jurisdiction in Civil Trade*]. In: VÉKÁS Lajos – OSZTOVITS András– NEMESSÁNYI Zoltán (eds), *Nemzetközi*

In line with this, during the codification of the NMJTV, Katalin Gombos stated that it is justified to separate issues related to public international law elements related to diplomatic law and state sovereignty from the scope of exclusive and excluded jurisdiction rules.[44]

Accordingly, we do not interpret Section 86(2) of the NMJTV as a rule of jurisdiction but as a provision relating to immunity. This is based on the fact that the NMJTV clearly distinguishes between jurisdiction in the sense of public international law and jurisdiction in the sense of private international law since these are different legal institutions built on each other.[45]

The jurisdiction agreement outlined in Section 99 of the NMJTV serves to exclude certain jurisdictional cases, determining when the Hungarian courts do not have jurisdiction.

Paragraph 99(7) of the NMJTV states that the jurisdiction stipulated by the jurisdiction agreement is exclusive unless otherwise agreed by the parties. That is, if the statement of claim is filed in a property action affected by the jurisdiction agreement, the court must reject the application on the basis of Section 176 (1) (a) CPC since the jurisdiction clause of the courts of a state or one or more specific courts simultaneously means the excluded jurisdiction of the Hungarian court.

It should be noted that, under the NMJTV, having regard also to the material scope of the Act [Section 1 of the NMJTV], the parties may not stipulate the jurisdiction of a foreign court in a purely domestic case.[46]

Nota bene, according to the latest practice of ECJ this might change with the Inkreal- judgment[47] at least under the scope of Brussels Ia.[48]

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magánjogi rendeletek az Európai Unió Bírósága gyakorlatában [Private International Law Regulations in the Practice of the Court of Justice of the European Union]. HVG-ORAC, Budapest, 2021. 107.

[44] GOMBOS 188.

[45] In detail: BORECZKI Szabolcs: Eljárásjogi rendelkezések [Procedural provisions]. In: VÉKÁS Lajos – OSZTOVITS András– NEMESSÁNYI Zoltán (eds): *A nemzetközi magánjogról szóló törvény kommentárja [Commentary of the Law on Private International Law].* HVG-ORAC, Budapest 2020. 384-388.

[46] Proposal 91.

[47] Case C-566/22 *Inkreal s.r.o. v Dúha reality s.r.o.*, EU:C:2024:123 .

[48] Article 25(1) of Brussels Ia must be interpreted as meaning that an agreement conferring jurisdiction by which the parties to a contract who are established in the same Member State agree on the jurisdiction of the courts of another Member State to settle disputes arising out of that contract is covered under that provision, even if that contract has no other connection with that other Member State.

Excluded jurisdiction in sources of EU law

Brussels Ia Regulation, Article 24 governs exclusive jurisdiction. This includes proceedings relating to the rental or lease of rights in rem or immovable property (point 1), disputes concerning the organisation and decisions of legal persons (point 2), the validity of entries in a public register (point 3), proceedings relating to the registration or validity of patents, trademarks, designs or similar rights requiring deposit or registration (point 4), proceedings relating to the enforcement of judgments (point 5).[49] I will not analyse the individual points in detail, but I will refer back to what was explained in point 3.2.

The fact that the Brussels Ia Regulation regulates only exclusive jurisdiction is a necessary consequence of EU legislation since the latter can only regulate exclusive jurisdiction, not excluded jurisdiction, so Hungarian courts can also establish the exclusion of jurisdiction by applying Article 24 of the Brussels Ia Regulation accordingly.

Similarly to Paragraph 99 of the NMJTV, the exclusion of jurisdiction by the courts of a Member State to which the agreement does not apply results from the Brussels IA agreement on jurisdiction pursuant to Article 25 of the Regulation. (I would also like to point to the Inkreal decision because of this may change the legal practice.[50])

The Brussels IIb Regulation also recognises exclusive jurisdiction so that a court of a Member State has exclusive jurisdiction if the parties, as well as any other holder of parental responsibility, have expressly declared acceptance of that jurisdiction during the proceedings and the court has

[49] A detailed analysis of the rules of exclusive jurisdiction of the Brussels Ia Regulation: Peter MANKOWSKI: Art. 24. Brüssel Ia-Vo. In: Thomas RAUSCHER (ed): Europäisches Zivilprozess-und Kollisionsrecht EuZPR / EuIPR – Kommentar (Ottoschmidt, Köln, 2021; Prof. Thomas PFEIFFER: Art. 24. Brüssel Ia-Vo. In: PRÜTTING / GEHRLEIN (ed), ZPO – Kommentar (Lucterhand, München, 2023.; SCHLOSSER/HESS: EuZPR – EU-Zivilprozessrecht. (C.H.Beck, München, 2021; KROPHOLLER/VON HEIN: Europäisches Zivilprozessrecht. Deutscher Fachverlag GmbH, Fachmedien Recht und Wirtschaft, Frankfurt am Main, 2023; MUSIELAK/VOIT: ZPO – Zivilprozessordnung. Verlag Franz Vahlen, München, 2023.

[50] cf.: It should be added that the aim of legal certainty would also be compromised if, in circumstances such as those at issue in the main proceedings, Article 25(1) of Brussels Ia were applicable only on condition that, over and above the agreement conferring jurisdiction on the courts of another Member State, there were additional elements capable of demonstrating the cross-border impact of the dispute concerned [Inkreal judgement para 32]

ensured that each party is informed of their right to object to that jurisdiction and that the exercise of jurisdiction is in the best interests of the child [Brussels IIb Regulation, Article 10(4); Article 10(1)(b)(ii)].[51]
This includes exclusive jurisdiction introduced by Article 5 of the EU Succession Regulation so that where the testator has chosen the law of a Member State pursuant to Article 22 as the law applicable to succession to them, the parties concerned may agree that the court or courts of that Member State shall have exclusive jurisdiction to decide on successions.[52]
The rule allows the forum to follow the law of its choice. Exclusive jurisdiction is based on a jurisdictional agreement concluded between the parties, which has a dual effect: it establishes the jurisdiction of the Member State of the law chosen by the testator (prorogation), and it terminates the jurisdiction of the courts that would otherwise have jurisdiction under the EU Succession Regulation (derogation). Those effects are binding on the tribunal, which would otherwise have jurisdiction.[53]
The stipulated jurisdiction, i.e. the agreement of the parties, may also give rise to exclusive jurisdiction in relation to the Maintenance Regulation (Article 4(1)). It is important that the parties' right of choice in maintenance disputes is severely restricted, as the Maintenance Regulation limits the connecting principle of jurisdiction in disputes relating to maintenance obligations. As a general rule, the jurisdictional connecting factor may be the Member State of habitual residence or nationality of one of the parties (Article 4(1)(a) and (b)). However, a dispute between spouses or former spouses concerning maintenance obligations may relate to a court having jurisdiction over the matrimonial dispute (stipulated adhesive jurisdiction), or the dispute may be subject

[51] A detailed analysis of the rules of exclusive jurisdiction of the Brussels IIb Regulation: WOPERA Zsuzsa (ed): A Brüsszel IIb rendelet kommentárja [Commentary on Brussels IIb]. ORAC, Budapest, 2023.; Thomas GARBER – Katharina LUGANI (eds): Die Brüssel IIb Verordnung. Verlag Österreich, Wien, 2022.
[52] A detailed analysis of the rule of exclusive jurisdiction of the EU Succession Regulation: DEIXLER-HÜBNER/SCHAUER (ed): EuErbVO-Kommentar 2nd Manz Verlag, Wien, 2020; SZŐCS Tibor: A nemzetközi öröklési jog szabályainak kommentárja [Commentary on the Rules of International Succession Law]. HVG-ORAC, Budapest, 2021.
[53] SZŐCS Tibor: Az Európai Öröklési rendelet [The European Succession Regulation]. In: VARGA István (ed): A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja [Commentary on the Code of Civil Procedure and related legislation]. HVG-ORAC, Budapest, 2018. 2678.

to the jurisdiction of the last Member State of habitual residence common to at least one year.[54]

Lack of jurisdiction as a relative obstacle to litigation - entry into litigation

In addition to Section 176(1)(a) CPC, the lack of jurisdiction arises as a relative impediment to litigation of a special nature. The special nature of the relative obstacle to litigation is that its actual effectiveness depends on the conduct of the defendant. In other words, the court must already realise, when examining the application, that although excluded or exclusive jurisdiction cannot be established, the Hungarian court nevertheless does not have jurisdiction to decide on the given lawsuit (case). In other words, the entry into litigation 'may be significant in cases where, although Hungarian jurisdiction is not excluded, there is not a single ground of jurisdiction in the law that would provide a Hungarian judicial forum for the given case.'[55]

Although the court notices this ex officio, its legal consequence, i.e. the termination of proceedings ex officio, can only result from the defendant's passivity (Section 240 (1) (ba) CPC) or a well-founded objection to jurisdiction (Section 240 (1) (bb) of the CPC).

The rule is also special because the application can only be notified if it is deemed suitable for initiating a lawsuit (Section 179(1) of the CPC). In other words, by notifying the claim to the defendant, the court determines that the application is appropriate for taking legal action. Nevertheless, subsequent conduct by the defendant may result in the

[54] SIMON Károly László: Az Európai Tartási rendelet [the European Maintenance Regulation]. In: VARGA István (ed): A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja [Commentary on the Code of Civil Procedure and related legislation]. HVG-ORAC, Budapest, 2018. 2753; For details on the jurisdiction rules of the Maintenance Regulation, see: Philip REUß: Kommentar zu EuUntVo. In: Reinhold GEIMER – Rolf A. SCHÜTZE (eds): Internationaler Rechtsverkehr in Zivil-und Handelssachen. C.H.Beck, München, 2014; Burkhard HESS, Europäisches Zivilprozessrecht. C.F.Müller, Heidelberg, 2010; Wolfgang HAU: Die Zuständigkeitsgründe der Europäischen Unterhaltsverordnung: In: Zeitschrift für das gesamte Familienrecht (2010/3.); Matthias ABENDROTH: Choiche of Court in Matters Relating to Maintenance Obligations. In Paul BEAUMONT/Burkhard HESS/Lara WALKER/Stefanie SPANCKEN (eds): The Recovery of Maintenance in the EU and Worldwide. Hart Publishing, Oxford, 2014.

[55] Detailed explanatory memorandum relating to Section 1 of Act CX of 2000 on the amendment of certain laws on jurisdiction and the recognition and enforcement of foreign judgments.

termination of the proceedings, thereby declaring, with retroactive effect, that it was not suitable for litigation even at the time when the application was lodged.
Section 240(1)(b) CPC contains a rule that is easy to apply at first reading, but it is actually a complex norm consisting of several elements. Namely, the proceedings may be terminated if:

- there is no excluded jurisdiction over Hungarian courts, nor does any other state have exclusive jurisdiction (because in that case, Section 176(1)(a) CPC would apply)
- Hungarian courts have no jurisdiction under conflict-of-law rules;
- however, a conflict-of-law norm does not preclude the establishment of jurisdiction by the defendant's entry into litigation (positive condition);
- the defendant does not wish to enter into a lawsuit
    - or by expressly raising a challenge to jurisdiction (Section 240(1)(bb) CPC – active provision);
    - or by remaining completely passive and not submitting a written defence (Section 240 (1) (ba) of the CPC – passive provision).[56]

An important interpretative rule for Section 240(1)(b) CPC is that for the purposes of subsection (ba), an opposition to the order for payment shall not be considered as a written defence. According to judicial practice, in proceedings following the European order for payment procedure conducted before a Hungarian notary, which has turned into a lawsuit due to an objection, the defendant may also lodge a challenge to jurisdiction in their written defence. The court may also examine the existence or absence of jurisdiction of its own motion in the cases provided for in the Brussels Ia Regulation (BH2019.3.80.).
It is essential that the defendant may lodge their objection to jurisdiction under subsection (1)(b)(bb) at the latest in their written defence at the same time as the substantive defence (Section 240(2) CPC).
The latter provision is also relevant because it clearly states that the defendant may lodge their objection to jurisdiction at the latest in their

[56] ÉBNER Vilmos: A perfelvételi szak és az érdemi tárgyalási szakban alkalmazandó közös rendelkezések [Common provisions applicable to case stage and hearings as to merits]. In: VARGA István (ed): A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja [Commentary on the Code of Civil Procedure and related legislation]. HVG-ORAC, Budapest, 2018. 1012. para 2585.

written defence, i.e. in a statement of admission, at the same time as the substantive defence. That is, the CPC lays down a rule of precedence because it declares that the defendant can only lodge a judicial objection in the written defence, i.e. not later.
Section 240 of the CPC does not expressly stipulate that the court, if the defendant has no legal representative, must be informed of the possibility of objection under subsection (1)(b)(bb); however, this provision was clearly laid down in Section 157/A(2) of the earlier Code of Civil Procedure (Act III of 1952 on the Code of Civil Procedure (rPp.)). It is questionable whether this is still the duty of the court.
It can be argued that given that there is no express provision in this regard in the CPC and, moreover, that it did not expressly maintain the previous regulation, it is not necessary to inform the party acting with legal counsel of the possibility of a challenge to jurisdiction.
At the same time, however, it is not excluded that according to Section 111 of the CPC, the court must inform the party who does not have legal representation of their procedural rights, i.e. the right to object, since the lack of jurisdiction is a fundamental procedural obstacle, i.e. the party must be aware that the Hungarian court has jurisdiction only in the case that they make a statement on the merits of the suit.
In the case of jurisdiction, this issue cannot arise because the court is always required to take procedural action regarding the lack of jurisdiction ex officio, even at the initiation stage. As a general rule, this results in a referral (Section 174 of the CPC), but, in exceptional cases, it may lead to the rejection of the application (Section 176(1)(b) of the CPC).
On the other hand, the absence of jurisdiction, unless it is excluded or exclusive, does not in itself result in the rejection of the application (cf. Section 176(1)(a) CPC). In my view, the more correct solution is to inform the defendant of the right to object under Section 111 CPC since the lack of jurisdiction deprives the state and thus all its courts with potential jurisdiction and jurisdiction to act, and therefore, it is justified from a guarantee point of view that the defendant should be properly informed.
According to Hungarian case law, only pleas of jurisdiction which are manifestly late and, therefore, likely to be abusive should be rejected on the grounds of entry into litigation. This includes objections to jurisdiction raised at second instance[57] or at first instance after several

[57] Debrecen Regional Court of Appeal 3.Gf.30.259/2014/3.

hearings and numerous substantive statements.[58] It may be pointed out from recent practice that in a lawsuit brought by the Hungarian buyer against a Belgian seller in Hungary, the court established its jurisdiction on the basis of the seller's entry into the lawsuit because it raised its objection to jurisdiction only after the defendant entered the substantive proceedings.[59] It is not considered to be an entry into court if the party objects to the order for payment but does not yet raise a challenge to jurisdiction,[60] nor if the defendant first raises a plea of pendens and only then lodges a plea of jurisdiction.[61] In particular, the case-by-case decision that the entry of proceedings must be examined individually for each defendant is irrelevant, while the party's objection to jurisdiction on behalf of the other parties is irrelevant.[62]

No access to litigation

According to Section 240 (1) (c) of the CPC, the court terminates the proceedings ex officio at any stage if the jurisdiction of a Hungarian court cannot be established on any ground of jurisdiction and the jurisdiction of the court cannot be established by the defendant's entry into the litigation.

That is, Section 240(1)(c) CPC regulates cases where no excluded or excluded jurisdiction can be established, and thus the application cannot be rejected, while the legislature does not provide the defendant with the establishment of jurisdiction by entering into litigation in view of the subject matter of the dispute. The legislature expressly excludes the possibility of bringing proceedings in certain types of cases where this is expressly justified by 'the nature of the proceedings and/or legal relationships concerned'.[63] Thus, concerning participation in litigation in insolvency proceedings (Section 100 (3) of the NMJTV), cases concerning the establishment of origin (Section 104 (2) of the NMJTV) are excluded; additionally, adoption cases (Section 105 (2) of the NMJTV), cases concerning parental authority, contact and guardianship (Section 106 (2) of the NMJTV), cases concerning guardianship and other protection measures (Section 107 (3) of the NMJTV) and cases concerning the

[58] Supreme Court Gf.VI.31.805/2001/2.
[59] Győr District court P.21.711/2015.
[60] Debrecen Regional Court of Appeal 4.Gf.30.317/2008/4.
[61] Budapest-Capital Regional Court of Appeal 14.Gf.40.317/2013/2.
[62] Budapest-Capital Regional Court of Appeal 8.Pf.22.390/2013/8.
[63] Proposal 88.

declaration of death or the establishment of death (Section 108 (2) of the NMJTV).
This rule is all the more remarkable because, although the Hungarian court does not have jurisdiction, and at the same time, excluded or exclusive jurisdiction cannot be established, the legislature nevertheless – de facto – regards the absence of jurisdiction as an absolute procedural impediment, even if it cannot be established even by entering litigation. In other words, in this case, the court must not reject the application without notifying the application but must terminate the proceedings ex officio.
In connection with Section 240(1)(c) CPC, the relationship between the Brussels IIa Regulation and the entry into litigation should be analysed separately.
Pursuant to Article 12(1)(b) of the Brussels IIa Regulation, the courts of a Member State having jurisdiction pursuant to Article 3 in an application for divorce, legal separation, or marriage annulment shall also have jurisdiction in matters of parental responsibility relating to that application where: at least one of the spouses has parental responsibility for the child; and the spouses and holders of parental responsibility have expressly or otherwise unambiguously accepted the jurisdiction of the courts at the time the court is seised, and this is in the best interests of the child.
According to the related Hungarian legal practice, there is no place in a child responsibility (custody) action for termination of proceedings due to lack of jurisdiction if, although there are no other grounds for jurisdiction, the defendant has clearly expressed through their statements in court that they accept the jurisdiction of the Hungarian court and that this is also in the best interests of the child[64] . In the related case-by-case decision, the Supreme Court stated that by implicitly but unequivocally acknowledging the jurisdiction of the Hungarian court with regard to child custody, as well as in relation to the defence and counterclaim, the defendant had implicitly but unequivocally recognised the jurisdiction of the Hungarian court. This conclusion was reached with the understanding that the question of jurisdiction could only arise once a Hungarian court had been determined to have jurisdiction to hear the case. The court's reasoning thus clearly accepted the jurisdiction of the Hungarian court, which also serves the interests of the integrated child who has lived in

[64] BH2010. 2141.

Hungary for a long time, i.e. the jurisdiction of the Hungarian court exists under Article 12(1)(b) of the Brussels IIa Regulation.
It is questionable how this relates to the legal concept of litigation, especially in view of the fact that Paragraph 91 of the NMJTV merely requires a defence to be made in order to establish jurisdiction on that basis, while Paragraph 106(2) of the NMJTV clearly excludes the application of Paragraph 91 of the NMJTV in the context of parental authority. In other words, while de facto litigation may prevail in the case of the application of the Brussels IIa and Brussels IIb regulations, if the NMJTV applies, it is not, pursuant to Section 106(2), and the proceedings must be terminated ex officio (Section 240(1)(c) of the CPC).
Next, the relationship between the Brussels IIb Regulation and the litigation procedure must also be examined. Article 10(1)(b)(ii) of the Brussels IIb Regulation – based on a grammatical interpretation – essentially maintains the rules of the Brussels IIa Regulation by making specific provision for the obligation of the court to inform the parties of the right to object to jurisdiction.
In my view, in the case of the Brussels IIb Regulation, intervention can be granted only if additional conditions are satisfied: the child has a substantial connection with that Member State (Article 10(1)(a) of the Brussels IIb Regulation) and the exercise of jurisdiction is in the best interests of the child (Article 10(1)(c) of the Brussels IIb Regulation). At the same time, however, there is also the anomaly that while Section 106(2) of the NMJTV clearly excludes entry into litigation, the defendant, under certain conditions, already has this right in cases concerning the EU. The divergent regulation is difficult to justify; therefore, the legislator's position in this regard would be justified.

Conclusion

After reviewing the Hungarian procedural issues related to jurisdiction, it may be concluded that the Hungarian procedural system relies heavily on and is in line with the norms of EU law (with the exception of the standards of the Brussels IIb Regulation on entering litigation and Section 106 (2) of the NMJTV). This necessarily means that, in addition to Hungarian case law, the CJEU's legislation must also be taken into account.
It is also relevant that the domestic (internal) sources of law address questions arising with jurisdiction – with one exception – either through

an explicit and unambiguous rule or they can be resolved dogmatically based on the rules of jurisdiction in Hungarian civil procedure. In my opinion, the exception is the second phrase of Section 176(1)(a) CPC, where clear legislative intervention would be required, which would resolve questions of legal interpretation beyond doubt.
Furthermore, it can be stated as a fact that procedural questions relating to jurisdiction are also constantly changing, and this must be addressed primarily by the legislator in each case (cf. Section 242 (2a) of the CPC; Section 473/A of the CPC). Due to the prominent role of jurisdiction, it is appropriate that disputes be clarified by clear legal provisions.

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INTERNATIONAL COOPERATION IN HUMAN RIGHTS PROTECTION DURING COVID-19: EU AND THIRD-PARTY STATES

Douaa Zaidan[1]

Abstract: The COVID-19 pandemic generated a profound crisis that extended far beyond the public health sphere, deeply impacting democratic governance, civil liberties, and socio-economic rights worldwide. Amidst national lockdowns, emergency decrees, and overwhelmed healthcare systems, international cooperation became essential not only for mitigating the spread of the virus but also for preserving the integrity of international human rights norms. This paper critically examines the role of the European Union (EU) in promoting and supporting human rights protections in third-party states during the pandemic. It focuses on the EU's strategic use of diplomacy, conditionality, financial instruments, and multilateral engagement to address rights-based challenges in its external relations, particularly with enlargement countries, the Eastern Partnership, and select countries in the Global South. Drawing on legal, political, and normative frameworks, and employing a comparative analysis of selected case studies, this study investigates the extent to which the EU was able to act as an effective normative actor under crisis conditions. The findings suggest that while the EU made significant contributions to rights-based resilience in partner states, these efforts were uneven and constrained by geopolitical interests, asymmetries in partnership dynamics, and internal coherence challenges. The paper contributes to ongoing debates in international law, human rights diplomacy, and EU external relations by offering a nuanced assessment of multilateral solidarity and its limitations in a global health emergency.

Keywords: Human Rights, health care, Covid-19,EU, Third country

Introduction

The COVID-19 pandemic was not only a global public health emergency but also a multidimensional crisis that tested the foundational norms of

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international human rights. Around the world, governments adopted sweeping emergency measures—such as lockdowns, curfews, surveillance regimes, and restrictions on movement—that, while often necessary to curb viral transmission, carried significant risks of undermining civil liberties, entrenching authoritarian governance, and deepening social inequalities. The rapid imposition of such measures raised urgent questions about proportionality, legality, and oversight, particularly in contexts with fragile democratic institutions or weak rule of law. In this environment, international cooperation became a critical tool for safeguarding human rights within crisis governance frameworks. As a self-proclaimed normative power and leading advocate of international human rights, the European Union (EU) assumed a prominent role in this global effort. While working to protect rights within its own Member States, the EU also advanced its external human rights agenda through targeted engagement with third countries. Drawing on its broad range of foreign policy instruments—including humanitarian assistance, development cooperation, political dialogue, and accession-related conditionality—the EU partnered with diverse states to promote rights-respecting pandemic responses.

In the Western Balkans, for example, the EU extended substantial support to Serbia, Albania, and North Macedonia via initiatives such as EU4Health and emergency macro-financial assistance. In Serbia, this included the provision of critical medical equipment and funding for civil society monitoring of emergency measures to limit excessive use of force during lockdown enforcement. Under the Eastern Partnership framework, the EU supported Ukraine with both COVID-19 medical aid and governance assistance, reinforcing democratic accountability and freedom of expression amidst wartime challenges intensified by the pandemic. In Tunisia, the EU mobilized €250 million to strengthen healthcare infrastructure and protect socio-economic rights, particularly for marginalized groups at risk of exclusion from public health services.

Beyond its immediate neighborhood, the EU channeled support to sub-Saharan Africa, Latin America, and Southeast Asia, often through multilateral platforms such as the Team Europe package. In Mozambique and Niger, COVID-19 health interventions were paired with gender-based violence prevention programs in response to rising domestic abuse during lockdowns. In Colombia, EU funding facilitated the integration of Venezuelan migrants into national healthcare systems, reflecting a rights-based approach to displacement during the pandemic.

This paper critically examines the EU's cooperation with third countries in protecting human rights during COVID-19. It is guided by three core research questions: To what extent were human rights safeguards embedded in the EU's external pandemic response? How effective were these interventions in shaping domestic policies and protecting vulnerable populations? And how were outcomes mediated by geopolitical interests, the capacity of recipient states, and the role of local civil society?

Methodologically, the study adopts a comparative case study approach, triangulating primary sources—including EU communications, funding instruments, and legal frameworks—with civil society reports and independent evaluations. The analysis situates these findings within the broader theoretical debates on normative power Europe, crisis governance, and international solidarity, with the aim of assessing the EU's capacity to translate its human rights rhetoric into effective external action during a moment of global disruption.

Human Rights and International Cooperation During Public Health Emergencies

The outbreak of the COVID-19 pandemic in late 2019 marked a defining moment in contemporary international relations, testing the resilience of global governance structures and the universality of human rights law[2]. Governments around the world responded swiftly with measures aimed at curbing viral transmission—ranging from movement restrictions and lockdowns to the closure of borders and mass surveillance. While these interventions were often justified by the urgency of the public health crisis, their impact on civil, political, economic, and social rights was significant and in some cases deeply problematic. Indeed, the pandemic revealed a tension that lies at the heart of emergency governance: the need to protect public health while safeguarding the rule of law and fundamental rights.

International human rights law permits the temporary limitation or derogation of certain rights during emergencies. However, these legal flexibilities are not a carte blanche for arbitrary or excessive state action. They are bounded by principles of legality, necessity, proportionality, and non-discrimination. At the same time, the pandemic highlighted the

[2] **Levy, D. L. (2020). "COVID-19 and Global Governance."** ***Journal of Management Studies*****, 58(2), 562-566.**

indispensable role of **international cooperation**[3] in ensuring not only an effective public health response but also the protection and realization of rights across borders. This dimension of extraterritorial solidarity is embedded in several human rights instruments and global health frameworks, yet its operationalization remains uneven and, at times, politicized.

This chapter examines these dual aspects of human rights protection during health emergencies: the legal parameters governing the use of emergency powers and their human rights implications, and the obligations of international cooperation, with a particular focus on the right to health. The aim is to provide a conceptual and legal foundation for evaluating the European Union's external action in human rights protection during the COVID-19 crisis, as discussed in subsequent chapters.

HUMAN RIGHTS AND INTERNATIONAL COOPERATION DURING PUBLIC HEALTH EMERGENCIES

This chapter explores the legal and normative framework governing the protection of human rights during public health emergencies, with a particular focus on the International Covenant on Civil and Political Rights[4] . the World Health Organization's International Health Regulations , and United Nations (UN) guidance issued during the COVID-19 pandemic. In doing so, it highlights the interdependence between national obligations to protect fundamental rights and the imperative of international cooperation. The chapter also examines key themes such as proportionality in derogation measures, the right to health, non-discrimination, and the legal and ethical responsibilities of states in the context of global pandemics.

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[3] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN Date of access :10/04/2025

[4] https://ks.echr.coe.int/documents/d/echr-ks/guide_art_15_eng#:~:text=Article%2015%20is%20a%20derogation,and%20freedoms%20under%20the%20Convention. Date of access 10/04/2025

ICCPR Article 4 and the Principle of Proportionality in Emergencies

Article 4 of the ICCPR establishes a legal basis for derogations from certain civil and political rights during a "public emergency which threatens the life of the nation[5]. This provision allows states to temporarily limit specific rights, provided that the measures are strictly necessary, officially declared, proportionate to the threat, and non-discriminatory. Importantly, the derogation must not contravene other obligations under international law.

The Human Rights Committee, which monitors implementation of the ICCPR, has repeatedly emphasized the exceptional nature of Article 4 derogations. In *General Comment No. 29*, the Committee stated that the burden rests on states to justify the necessity and proportionality of each derogating measure, reaffirming that derogations cannot be used as a justification for the violation of non-derogable rights such as the right to life, the prohibition of torture, and freedom of thought and religion[6].

The principle of proportionality is central to this framework. Measures adopted must be suitable for addressing the threat, necessary in their implementation, and the least restrictive means available. The European Court of Human Rights (ECtHR), in cases such as *A. and Others v. United Kingdom* (2009), reinforced that even during emergencies, courts must scrutinize the legality and proportionality of state actions. Derogation cannot serve as a carte blanche for excessive executive power or for suspending the rule of law.

International Health Regulations (IHR) and the Duty of International Cooperation

The International Health Regulations (2005), a legally binding instrument under the auspices of the World Health Organization (WHO), provide the principal international framework for coordinating responses to public health emergencies of international concern (PHEICs). The IHR

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[5] ICCPR (1966) *International Covenant on Civil and Political Rights*, adopted 16 December 1966, 999 UNTS 171.

[6] HRC (2001) *General Comment No. 29: States of Emergency (Art. 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11.

emphasize not only the importance of timely reporting and information sharing, but also the necessity of cooperation among states and WHO to prevent the international spread of disease while respecting human rights and fundamental freedoms[7].

The IHR reinforce the idea that sovereignty is not absolute in the context of pandemics. Public health threats, by their transnational nature, require a cooperative response, and states have both a legal and moral duty to act in solidarity. The preamble to the IHR states that "the implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons[8]. Yet, as evidenced during the COVID-19 pandemic, some states responded unilaterally—closing borders, restricting exports of medical goods, or withholding information—undermining the cooperative spirit of the IHR framework.

Moreover, the failure of some states to fully comply with their IHR obligations has exposed gaps in global health governance. As Gostin et al. (2020) note[9], the IHR lack robust enforcement mechanisms, and WHO itself depends on member state cooperation to function effectively. This underscores the importance of developing stronger accountability frameworks and enhancing the legal force of international cooperation during health crises.

UN Guidance on Human Rights and COVID-19

In response to the unprecedented global impact of the COVID-19 pandemic, the United Nations issued a series of statements and policy briefs emphasizing the importance of maintaining human rights standards during public health emergencies. The UN Secretary-General, in his 2020 policy brief *COVID-19 and Human Rights: We are all in this together*, urged states to ensure that pandemic-related measures were lawful, necessary, proportionate, and time-bound (UN, 2020). He warned

[7] https://iris.who.int/bitstream/handle/10665/246107/9789241580496-eng.pdf Date of access 12/04/2025

[8] **World Health Organization (WHO) (2005)** *International Health Regulations (2005)*, 3rd edn. Geneva: World Health Organization. Available at: https://www.who.int/publications/i/item/9789241580496 Date of access 12/04/2025

[9] Gostin, L.O., Meier, B.M. (2021) 'Global health justice and COVID-19: Rethinking access to vaccines', *The Milbank Quarterly*, 99(2), pp. 450–468.

that unchecked emergency powers could lead to authoritarianism, discrimination, and prolonged restrictions on civil liberties.
Similarly, the Office of the UN High Commissioner for Human Rights (OHCHR) issued guidance on balancing public health imperatives with rights obligations, highlighting the principle of "do no harm" and emphasizing the need to protect marginalized and vulnerable populations, including migrants, persons with disabilities, and people living in poverty[10] . These principles are grounded in the universality and indivisibility of human rights, which remain applicable even in emergency contexts.
While many governments responded positively to this guidance, others enacted sweeping emergency laws that lacked sufficient safeguards. As Milanovic (2020)[11] observed, a significant number of states imposed restrictions without formally notifying the UN of derogations under Article 4 ICCPR, thereby undermining international oversight and weakening transparency.

The Right to Health, Non-Discrimination, and State Obligations

The right to health is enshrined in Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which obliges states to take steps necessary for "the prevention, treatment and control of epidemic, endemic, occupational and other diseases"[12]. The UN Committee on Economic, Social and Cultural Rights (CESCR) has interpreted this right to encompass both access to health care and the underlying determinants of health, including safe water, food, housing, and information[13].

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[10] UN OHCHR (2020). *Emergency Measures and COVID-19: Guidance*.
[11] Milanovic, M. (2020). *Human Rights in Times of Crisis: COVID-19 and Derogations from the ICCPR*.

[12] **United Nations (1966)** *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, entered into force 3 January 1976, United Nations Treaty Series, vol. 993, p. 3, Article 12. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights Date of access
12/04/2025
[13] CESCR (2000) *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc. E/C.12/2000/4

During a pandemic, the right to health implies that states must ensure the availability, accessibility, acceptability, and quality of health services without discrimination. This includes ensuring equitable distribution of vaccines, access to testing and treatment, and inclusive public health messaging. Failure to uphold these obligations can exacerbate structural inequalities, disproportionately affecting women, racial and ethnic minorities, indigenous peoples, and other historically marginalized groups.

Non-discrimination, as a core principle of international human rights law, remains non-derogable even during emergencies[14]. States must avoid measures that have discriminatory intent or effect, whether in relation to lockdown enforcement, vaccine prioritization, or economic relief programs. The UN and civil society organizations have raised concerns over discriminatory enforcement of COVID-19 restrictions in various jurisdictions, often targeting migrant communities, informal workers, and racial minorities [15].

The pandemic has also brought to the fore the concept of global health justice. Wealthy nations' stockpiling of vaccines and reluctance to waive intellectual property rights under the TRIPS Agreement have drawn criticism from scholars and international organizations alike. As Gostin and Meier argue, international solidarity must move beyond rhetoric to ensure equitable access to life-saving interventions[16].

Public health emergencies such as the COVID-19 pandemic place exceptional stress on legal systems, governance structures, and the international order. However, even during such crises, human rights law remains not only relevant but essential. Derogations under Article 4 of

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[14] **United Nations (1966)** *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force 23 March 1976, United Nations Treaty Series, vol. 999, p. 171, Article 4(1). Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (Accessed:09/04/2025)

[15] **Amnesty International (2021)** *COVID-19 Crackdowns: Police Abuse and the Global Pandemic*. London: Amnesty International. Available at: https://www.amnesty.org/en/documents/pol30/3443/2021/en/ Date of access 13/04/2025

[16] **Gostin, L.O. and Meier, B.M. (2021)** 'Global health justice and the COVID-19 pandemic: Ensuring vaccine equity, human rights, and solidarity', *The Milbank Quarterly*, 99(2), pp. 450–468. Available at: https://doi.org/10.1111/1468-0009.12505 Date of access 15/04/2025

the ICCPR must remain exceptional, proportionate, and subject to judicial oversight. The IHR framework underscores the need for international cooperation as a legal and ethical imperative. UN bodies have reinforced that pandemic responses must be rights-respecting, inclusive, and grounded in the principles of equality and non-discrimination.
Ultimately, protecting human rights in times of public health crisis is not a luxury, but a necessity for effective, equitable, and sustainable responses. States must recognize that public health and human rights are not mutually exclusive goals, but rather mutually reinforcing obligations.

EU EXTERNAL HUMAN RIGHTS POLICY IN PRACTICE DURING COVID-19

This chapter critically analyses how the European Union (EU) operationalised its human rights commitments during the COVID-19 pandemic through external action instruments, development assistance, and diplomatic initiatives. It assesses the EU's ability to uphold normative coherence between its foundational values and its external engagements, focusing particularly on the "Team Europe" approach, the deployment of the European Instrument for Democracy and Human Rights (EIDHR), the integration of rights safeguards in foreign aid, and the role of the European External Action Service (EEAS).

The "Team Europe" Approach: Solidarity and Strategic Coordination

The EU's initial response to COVID-19 on the international stage was encapsulated in the launch of the *Team Europe* initiative, which aimed to combine resources from EU institutions, Member States, and financial institutions to support partner countries in addressing the health, social, and economic impacts of the pandemic. Officially launched in April 2020, the initiative pledged over €20 billion in support to countries in Africa, the Western Balkans, the Middle East, Asia, and Latin America[17].
The *Team Europe* approach signified a paradigmatic shift towards a more unified and strategic deployment of development and humanitarian assistance. While framed around principles of solidarity and

[17] European Commission (2020) *Team Europe: Global EU Response to COVID-19*. Brussels. Available at: https://international-partnerships.ec.europa.eu/policies/team-europe_en Date of access 15/04/2025

multilateralism, it also reinforced the EU's normative agenda, embedding human rights, democratic governance, and rule of law within its pandemic-related assistance packages. According to the European Commission[18] .the strategy sought not only to address immediate health emergencies but also to strengthen institutional resilience and social inclusion, aligning closely with the EU's values-based external action model under Article 21 of the Treaty on European Union .

Yet, questions remain regarding the efficacy and transparency of conditionality and rights integration in this framework. While *Team Europe* succeeded in mobilising substantial resources, critics have pointed to the risk of securitising aid and subordinating rights-based concerns to geopolitical and migration management priorities, particularly in the EU's southern neighborhood[19].

The European Instrument for Democracy and Human Rights (EIDHR)

The European Instrument for Democracy and Human Rights (EIDHR) played a crucial role in the EU's pandemic response, particularly in supporting civil society organisations , human rights defenders, and democratic institutions under stress due to emergency measures. EIDHR funding mechanisms were adapted to ensure the continuity of grassroots human rights work in regions where civic space was shrinking under the pretext of public health control.

The EIDHR's flexibility and direct-access nature enabled the EU to channel support to non-state actors without requiring governmental endorsement, which proved essential in contexts where governments were using the pandemic to consolidate authoritarian power. According to the European Parliament [20], EIDHR interventions during COVID-19 prioritised digital security, access to information, and protection of human rights defenders, especially in countries where lockdowns and states of emergency were accompanied by repression and censorship.

Del Biondo argues that the EU has historically used aid conditionality as a mechanism to promote democratic governance and human rights

[18] Ibid.

[19] Bargués, P. (2021) 'The EU's approach to resilience in external action: Between technicality and politics', *Global Affairs*, 7(2), pp. 225–241.

[20] European Parliament (2021) *Human Rights and Democracy in the World: Annual Report 2020*. Brussels: European Union. Available at: https://www.europarl.europa.eu Date of access13/04/2025

abroad. While this approach has been criticised for inconsistency and selective application, the COVID-19 context underscored the importance of maintaining such conditionalities to prevent the erosion of democratic norms during global crises[21].

Integrating Human Rights Safeguards into EU Foreign Aid

A central element of the EU's external human rights policy is the mainstreaming of rights safeguards into its development cooperation. During the pandemic, this principle was tested in terms of ensuring that EU-funded health interventions, social protection programmes, and economic recovery efforts in partner countries were compliant with international human rights standards.

In line with the EU Action Plan on Human Rights and Democracy (2020–2024), the EU sought to implement a rights-based approach to development cooperation, integrating principles of participation, accountability, non-discrimination, transparency, and empowerment [22].For instance, EU aid conditionality included requirements for non-discriminatory vaccine distribution, protections for marginalised communities, and accountability mechanisms in recipient countries.

Nevertheless, critiques persist regarding the real leverage of EU conditionality in authoritarian or semi-authoritarian contexts, where the political will to implement human rights reforms is weak. As Portela [23] notes, sanctions and conditional aid are often more effective when used in tandem with diplomatic engagement and support for local civil society actors, rather than as standalone punitive tools. The COVID-19 emergency brought this tension into sharp relief, with some partner governments exploiting the crisis to shrink civic space while continuing to benefit from EU aid flows.

The Role of the European External Action Service (EEAS)

The European External Action Service (EEAS), as the EU's diplomatic arm, was instrumental in coordinating external human rights actions

[21] Del Biondo, K. (2015) 'EU Aid Conditionality in Action: Human Rights, Democracy and Good Governance', *Journal of International Development*, 27(8), pp. 1351–1365.

[22] Ibid, European Parliament (2021)

[23] Portela, C. (2010) *European Union Sanctions and Foreign Policy: When and Why Do They Work?* London: Routledge.

during the pandemic. The EEAS facilitated high-level dialogues with third countries, promoted multilateral cooperation in forums such as the United Nations and the G20, and monitored developments in partner countries where emergency powers risked violating fundamental rights.
The EEAS also issued statements condemning the misuse of emergency legislation to curtail freedom of expression, restrict civil liberties, or target opposition actors under the guise of pandemic control. In doing so, it acted as a normative actor in international relations, reinforcing the EU's identity as a promoter of human rights globally[24].
At the same time, the EEAS faced significant constraints, particularly in contexts where the EU's geopolitical or migration interests conflicted with its human rights objectives. In the Sahel, for example, the EEAS navigated a complex landscape of counter-terrorism cooperation, development assistance, and human rights promotion, often struggling to strike a coherent and principled balance[25]. The pandemic further complicated these efforts by limiting diplomatic engagement and monitoring capabilities on the ground.
The COVID-19 pandemic presented a litmus test for the EU's external human rights policy. Through the *Team Europe* initiative, the deployment of EIDHR funds, and the integration of rights safeguards in foreign aid, the EU sought to project a values-based response to a global crisis. The EEAS played a vital role in maintaining diplomatic pressure on human rights issues, while also facilitating coordination among member states and EU institutions.
However, the pandemic also revealed the limitations of the EU's external action framework, particularly in navigating the tensions between normative commitments and strategic interests. The experience of COVID-19 underscores the need for more robust, consistent, and transparent mechanisms to uphold human rights in EU external relations, especially during times of crisis. As the EU reflects on its pandemic response, strengthening the coherence and credibility of its human rights agenda must remain a central objective.

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[24] Sjursen, H. (2006) 'The European Union as a "normative" power: How can this be?', *Journal of European Public Policy*, 13(2), pp. 235–251.
[25] Youngs, R. and Panchulidze, E. (2020) *EU Support for Civil Society and Human Rights Defenders in the Sahel*. Carnegie Europe. Available at: https://carnegieeurope.eu Date of access 15/04/2025

Comparative Case Studies: The EU's Human Rights Engagement during the COVID-19 Pandemic

This research adopts a comparative case study approach to examine the European Union's external engagement in promoting human rights during the COVID-19 pandemic across four strategically selected third-party states: Serbia, Ukraine, Tunisia, and Mozambique. This method allows for a nuanced and context-specific analysis of how the EU's normative power[26] and external governance frameworks were operationalized under conditions of global health emergency. Each case represents a unique regional, political, and socio-economic configuration, permitting the study to explore the adaptability, consistency, and effectiveness of EU human rights policy amidst the pressures of an unprecedented global crisis[27].

COVID-19 significantly disrupted not only domestic governance structures but also challenged the ability of external actors such as the EU to project values and norms beyond their borders. The EU, as both a political actor and a normative power, was forced to recalibrate its engagement strategies in real time, balancing immediate humanitarian aid with longer-term objectives related to democratic governance, human rights, and institutional resilience[28]. In this context, the pandemic can be understood not only as a public health crisis but also as a litmus test for the EU's commitment to human rights-based foreign policy. Through this multi-regional comparison, the analysis seeks to uncover how the EU adapted its strategies to complex local realities, and to what extent these efforts aligned with its broader normative commitments enshrined in the EU Charter of Fundamental Rights and external action principles under Article 21 TEU.

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[26] Manners, I. (2002). *Normative power Europe: A contradiction in terms?* Journal of Common Market Studies, 40(2), 235–258. https://doi.org/10.1111/1468-5965.00353 Date of access 16/04/2025

[27] Lavenex, S., & Schimmelfennig, F. (2009). *EU rules beyond EU borders: Theorizing external governance in European politics*. Journal of European Public Policy, 16(6), 791–812.

[28] Keukeleire, S., & Delreux, T. (2022). *The foreign policy of the European Union* (3rd ed.). Red Globe Press.

Case Study 1: Serbia (Western Balkans)

Serbia constitutes a critical case in the Western Balkans, situated at the intersection of the EU's enlargement agenda and its broader neighborhood policy. The COVID-19 pandemic unfolded against a backdrop of contested democratic practices, fragile rule of law, and persistent concerns regarding freedom of the press and the shrinking civic space[29]. During the early months of the crisis, the EU mobilized significant financial and technical assistance for Serbia, channeling funds through the Instrument for Pre-accession Assistance (IPA II) to support health infrastructure, supply chains for personal protective equipment, and broader socio-economic recovery.

However, the pandemic also accentuated governance deficiencies. Emergency decrees and strict lockdown measures introduced by the Serbian government were accompanied by intensified restrictions on media and civil liberties, raising alarm among domestic watchdogs and international observers. Civil society organizations documented cases of censorship, intimidation of journalists, and the instrumentalization of public health measures for political gain (Freedom House, 2021). While the EU publicly reaffirmed its commitment to democratic standards and media freedom, critics argued that Brussels' response remained diplomatically cautious, reflecting the complex interplay between normative aspirations and strategic geopolitical interests in the region[30]. Thus, Serbia serves as a revealing case of normative ambivalence in the EU's external human rights discourse during crisis conditions.

Case Study 2: Ukraine (Eastern Partnership)

Ukraine offers a case of exceptional complexity due to the convergence of multiple systemic crises: the COVID-19 pandemic, ongoing Russian aggression following the 2014 annexation of Crimea, and the escalation of full-scale war in February 2022. Despite these overlapping emergencies, the EU maintained a strong commitment to supporting

[29] European Parliament. (2021). *Rule of law and media freedom in the Western Balkans: A focus on Serbia*. Directorate-General for External Policies. https://www.europarl.europa.eu/ Date of access 15/04/2025

[30] Bieber, F. (2019). *The Rise of Authoritarianism in the Western Balkans*. Palgrave Macmillan. https://www.isbn.de/buch/9783030221485/the-rise-of-authoritarianism-in-the-western-balkans?utm_source=chatgpt.com Date of access 16/04/2025

Ukraine's sovereignty, governance reforms, and human rights infrastructure. During the pandemic phase, EU assistance included over €190 million in immediate aid and long-term support under the Eastern Partnership framework to strengthen the healthcare system, improve access to vaccines, and bolster civil society resilience[31].

What distinguishes Ukraine is the way in which the EU's COVID-19 response became interlinked with broader geopolitical and security dynamics. While aid was directed toward health governance, it also served to reinforce institutional legitimacy and societal resilience in the face of Russian hybrid warfare and domestic fragility[32]. The EU's approach emphasized multi-level engagement—collaborating with national authorities, municipalities, and grassroots actors—to ensure that pandemic-related support contributed not only to immediate recovery but also to long-term democratization and human rights reinforcement. Nevertheless, challenges persisted in ensuring equitable vaccine access, particularly in conflict-affected regions such as Donbas, where humanitarian corridors and delivery infrastructure were limited.

Case Study 3: Tunisia (Southern Neighborhood)

Tunisia, often portrayed as the lone success story of the Arab Spring, occupies a pivotal place in the EU's Southern Neighborhood policy. The COVID-19 crisis struck Tunisia at a moment of democratic uncertainty and economic fragility, further exposing deep-rooted inequalities and governance shortcomings. In response, the EU implemented a range of support measures, including direct budgetary aid, health-sector assistance, and partnerships with international organizations and local NGOs to mitigate the pandemic's socio-economic fallout [33].

The EU's engagement in Tunisia was explicitly framed through a human rights lens, focusing on socio-economic rights such as healthcare access, labor protections, and the welfare of marginalized groups. Special

[31] EEAS. (2021). *European Union external action – Mozambique: EU response to COVID-19*. European External Action Service. https://www.eeas.europa.eu/ Date of access 16/04/2025

[32] Delcour, L., & Wolczuk, K. (2020). *Beyond geopolitical competition: Reassessing EU engagement with the Eastern Partnership countries*. Geopolitics, 25(3), 601–619. https://doi.org/10.1080/14650045.2018.1477757 Date of access 16/04/2025

[33] ENI CBC MED. (2021). *EU response to COVID-19 in the Mediterranean: Solidarity, support, and resilience*. https://www.enicbcmed.eu/

attention was paid to refugees, asylum seekers, and undocumented migrants—populations at heightened risk due to both the pandemic and discriminatory policies[34]. EU support included technical and financial assistance to strengthen the public health system and expand access to testing and treatment in underserved regions. Additionally, human rights conditionality mechanisms were activated to promote transparency in the use of emergency powers and to preserve space for civil society during lockdown periods. Nevertheless, the EU faced criticism for not taking a firmer stance during moments of executive overreach, particularly following President Saied's suspension of parliament in 2021, which many perceived as a democratic backslide.

Case Study 4: Mozambique (Global South)

Mozambique represents a case outside the EU's immediate geopolitical sphere but is central to the EU's broader development and human rights agenda in the Global South. Characterized by post-conflict reconstruction efforts, entrenched poverty, and recurrent natural disasters, Mozambique was already facing significant humanitarian and governance challenges when COVID-19 emerged. The pandemic intensified pre-existing vulnerabilities, especially among women and girls[35], internally displaced persons, and rural populations with limited access to healthcare .EU support in Mozambique was multifaceted, integrating human rights promotion with development cooperation[36]. Key areas of intervention included funding for rural health clinics, gender-based violence prevention programs, and education campaigns on public health measures. The EU also coordinated with other donors and multilateral institutions to address the intersecting crises of conflict in Cabo Delgado, climate shocks, and pandemic-related economic disruptions. Gender equality was a prominent theme, with targeted funding allocated to women's shelters, reproductive health services, and

[34] Fargues, P., Issa, A., & Yafi, E. S. (2021). *Migration in North Africa in the times of COVID-19*. International Centre for Migration Policy Development (ICMPD). https://www.icmpd.org/ Date of access 16/04/2025

[35] UN Women. (2020). *The impact of COVID-19 on women and girls in Mozambique*. https://mozambique.unwomen.org/ Date of access 16/04/2025.

[36] Human Rights Watch. (2021). *World Report 2021: Mozambique*. https://www.hrw.org/world-report/2021/country-chapters/mozambique Date of access 16/04/2025.

legal aid for survivors of domestic violence—a phenomenon that saw a global surge during lockdowns [37].

This case illustrates the EU's attempt to apply a rights-based approach in complex humanitarian settings, aligning with its stated commitment to the Human Rights and Democracy Action Plan 2020–2024. However, operationalizing such commitments in fragile contexts remains fraught with implementation challenges, including limited state capacity, donor coordination gaps, and the potential securitization of aid delivery.

Through the comparative analysis of Serbia, Ukraine, Tunisia, and Mozambique, this study demonstrates the variability and complexity of the EU's external human rights engagement during the COVID-19 pandemic. While the EU consistently framed its interventions within a normative vocabulary of solidarity, democracy, and human rights, the degree of coherence between discourse and practice varied significantly across contexts. Structural factors—including regional geopolitics, domestic governance, and civil society capacity—shaped both the scope and the effectiveness of EU action. This analysis underscores the importance of context-sensitive strategies and the need for continuous reflection on the normative dimensions of EU foreign policy, particularly in times of global crisis.

Conclusion and Recommendations

This study set out to critically examine the European Union's external engagement in the promotion and protection of human rights during the COVID-19 pandemic, with a focus on four comparative case studies—Serbia, Ukraine, Tunisia, and Mozambique. Through this analysis, the research aimed to address the central question of how the EU operationalized its normative commitments under crisis conditions, and what this reveals about the nature and limits of its role as a global human rights actor.

The findings reveal a complex and differentiated picture of the EU's external governance. Across all cases, the EU demonstrated a willingness to uphold its human rights agenda, albeit in varied forms, conditioned by local political dynamics, strategic interests, and institutional constraints. In Serbia and Tunisia, for example, the EU's response reflected a tension between geopolitical pragmatism and normative aspirations, as concerns

[37] Ibid, EEAS. (2021).

over democratic backsliding and civil liberties were met with relatively restrained diplomatic engagement. In contrast, the EU's involvement in Ukraine and Mozambique illustrated a more comprehensive integration of humanitarian, developmental, and rights-based approaches, shaped by overlapping crises and compounded vulnerabilities.

This research contributes to the literature on EU external governance by providing an empirical analysis of how crisis contexts, such as a global pandemic, recalibrate the instruments and priorities of EU foreign policy. It supports the argument advanced by scholars such as Manners and Keukeleire and Delreux that the EU's identity as a normative power is neither static nor uniformly applied, but contingent upon situational factors and relational dynamics. Furthermore, this study expands the conceptual understanding of human rights promotion beyond legalistic or institutional framings, emphasizing the importance of socio-economic rights, civil society engagement, and intersectional vulnerabilities in crisis settings.

In conclusion, while the EU has positioned itself as a defender of human rights globally, the COVID-19 pandemic has exposed both the potential and the fragility of this claim. By learning from the differentiated impacts of its interventions, the EU has an opportunity to recalibrate its external action in a manner that is not only responsive but transformative—aligning its normative ambitions with practices that are both principled and pragmatic in future crises.

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Milestones of Law in Central Europe 2025
European and International Courts as Focal Points of Judicial Dialogue and Cross-Border Inspiration
Comenius University in Bratislava
Faculty of Law
1st edition
2025

ISBN (e-version) 978-80-7160-776-2

FACULTY OF LAW
Comenius University
Bratislava

ISBN: 978-80-7160-776-2